

Case Name:

**R. v. Riley**

**Between  
Her Majesty the Queen, and  
Tyshan Riley, Phillip Atkins and Jason Wisdom**

**[2008] O.J. No. 2887**

Court File No.: P299-07

Ontario Superior Court of Justice

**M.R. Dambrot J.**

Heard: March 10-June 5, 2008.<sup>1</sup>

Judgment: July 21, 2008.

(121 paras.)

*Constitutional law -- Constitutional validity of legislation -- Determination of the constitutional validity of s. 184.4 of the Criminal Code -- Section 184.4 of the Criminal Code was inconsistent with the Charter -- However, the deficiencies could be remedied by severance and by reading down -- Therefore, the overall scheme in section 184.4 of the Criminal Code was reasonable and its constitutional validity was upheld -- Criminal Code, s. 184.4 -- Canadian Charter Rights and Freedoms, 1982, s. 8.*

*Criminal law -- Constitutional issues -- Canadian Charter Rights and Freedoms -- Legal rights -- Protection against unreasonable search and seizure -- Determination of the constitutional validity of s. 184.4 of the Criminal Code -- Section 184.4 of the Criminal Code was inconsistent with the Charter -- However, the deficiencies could be remedied by severance and by reading down -- Therefore, the overall scheme in section 184.4 of the Criminal Code was reasonable and its constitutional validity was upheld -- Criminal Code, s. 184.4 -- Canadian Charter Rights and Freedoms, 1982, s. 8.*

Determination of the constitutional validity of section 184.4 of the Criminal Code. Riley, Atkins and a third accused were being tried on charges of first degree murder, attempted murder, and committing murder and attempting murder for the benefit of a criminal organization. It was believed that Riley led a group of people from one gang who went out and shot at people believed to be members of a rival gang. The police did not initially have grounds to arrest Riley for the shooting but they had a duty to continue to investigate and to prevent Riley from causing serious harm to other persons. As a result, the police intercepted private communications of Riley without judicial authorization under section 184.4 of the Criminal Code. Riley and Atkins took the position that the interception of the private communications violated their Charter right to be secure from unreasonable search and seizure. Riley and Atkins submitted that section 184.4 of the Criminal Code was inconsistent with section 8 of the Charter and therefore of no force or effect. Further, Riley and Atkins submitted that section 184.4 of the Criminal Code was used in a manner which violated section 8 of the Charter.

HELD: Constitutional validity upheld. Section 184.4 of the Criminal Code was inconsistent with the Charter in two ways. First of all, the availability of the power to intercept communications without prior judicial approval exceeded what was reasonable within the meaning of section 8 of the Charter because of the over breadth of the definition of peace officer. Secondly, the absence of an obligation to give notice to the objects of interception was inconsistent with section 8 of the Charter. However, the first deficiency could be remedied by severance and the second by reading down. Therefore, the overall scheme in section 184.4 of the Criminal Code was reasonable.

**Statutes, Regulations and Rules Cited:**

Canadian Charter Rights and Freedoms, 1982, s. 1, s. 7, s. 8, s. 24(1), s. 24(2), s. 52

Criminal Code, s. 2, s. 183, s. 184.1, s. 184.1(1), s. 184.1(2), s. 184.1(3), s. 184.2, s. 184.4, s. 184.4(a), s. 184.4(c), s. 184(2)(a), s. 186, s. 186(1), s. 186(1)(b), s. 188, s. 189, s. 193, s. 195, s. 196, s. 196(1), s. 489.1, s. 722(3), s. 722(4)

Ontario Police Services Act, s. 3(2), s. 17(2), s. 22(1)(c), s. 26.2, s. 41(1)(b), s. 64

Protection of Privacy Act, 1974,

**Counsel:**

*Suhail Akhtar, Maureen Pecknold, Scott Childs, Michael Passeri and Lesley Pasquino, for the Crown.*

*David Midanik, for Tyshan Riley.*

*David Berg and Jody Matthew, for Philip Atkins.*

*Maurice Mirosolin and Emma Rhodes, for Jason Wisdom.*

**1** M.R. DAMBROT J.:-- Tyshan Riley, Phillip Atkins and Jason Wisdom are being tried by me, with a jury, on charges of first degree murder, attempt murder, and committing murder and attempt murder for the benefit of a criminal organization. The charges relate to the shooting of Brenton Charlton and Leonard Bell on March 3, 2004, resulting in the death of Mr. Charlton and the wounding of Mr. Bell.

**2** Riley, supported by Atkins, seeks the exclusion of evidence at their trial pursuant to s. 24(2) of the *Charter*. They allege that the interception of their private communications pursuant to s. 184.4 of the *Criminal Code*, which permits interceptions to be made by peace officers without judicial approval to prevent serious harm to persons or property in narrowly defined exigent circumstances, violated their right to be secure against unreasonable search and seizure guaranteed by s. 8 of the *Charter*. Their rights were violated, they argue, both because s. 184.4 is inconsistent with s. 8, and so of no force or effect, in accordance with s. 52 of the *Charter*, and because it was used, in this case, in a manner that violated s. 8. They also argue that a warrant authorizing the installation and monitoring of a number recorder on telephone lines associated with Riley, the fruits of which were used in deciding to make use of s. 184.4, and later in an affidavit in support of an authorization to intercept private communications, was obtained in a manner that violated s. 8 of the *Charter*.

**3** In these reasons, I will consider only the constitutional validity of s. 184.4. The remaining issues will be dealt with in separate reasons.

**4** As will be seen, I have concluded that s. 184.4 of the *Criminal Code* is inconsistent with the *Charter* in two respects: (1) the availability of the extraordinary power to intercept without prior judicial approval exceeds what is reasonable within the meaning of s. 8 of the *Charter* because of the overbreadth of the definition of peace officer insofar as it governs who may make use of s. 184.4; and (2) the absence of an obligation to give notice to objects of interception is inconsistent with s. 8 of the *Charter*. I have further concluded that the first of these deficiencies can be remedied by severance, and the second by reading down. With these deficiencies remedied, I conclude that the overall scheme in s. 184.4 is reasonable.

**BACKGROUND**

5 On March 3, 2004, at 5:20 p.m., Brenton Charlton was driving a blue Chrysler Neon southbound on Neilson Road in Toronto. Leonard Bell was in the front passenger seat. Mr. Charlton came to a stop in the passing lane at a red light at Finch Ave. A black Nissan Pathfinder pulled up behind the Neon, and the occupants of the Pathfinder began shooting at the Neon. Mr. Charlton got out of the vehicle and attempted to run, but was shot in the back and killed. Mr. Bell, who remained in the car, was shot several times, but survived.

6 At the time of the shooting, the police believed that Riley, Atkins and Wisdom were members of a criminal organization operating in the Galloway area of Scarborough known as the Galloway Boyz. One of the gang's fiercest rivals was a gang operating in the Malvern area of Scarborough known as the Malvern Crew. In October 2002, one of the leaders of the Galloway Boyz was murdered. Members of the Galloway Boyz believed that the murder was committed by a member of the Malvern Crew. As a result, the police believed that the Galloway Boyz, led by Mr. Riley, formed "Ride Squads" that drove into the Malvern area and shot at people they believed to be Malvern Crew members.

7 Following the shooting, Det. Comeau, the Toronto Police Service ("TPS") homicide detective in charge of the investigation, and his partner, Det. Banks, came to suspect that Riley had participated in the shooting of Charlton and Bell. The motive for the killing, they believed, was to avenge the death of the murdered member of the Galloway Boyz, and to enhance the reputation of their gang. They believed that Riley had mistaken Charlton and Bell for members of the Malvern Crew. They also had reason to believe that Riley intended to shoot other members of the Malvern Crew for the same reason.

8 The police did not have grounds to arrest Riley for the shooting of Charlton and Bell at that time. They had a duty to continue to investigate the shooting. They also had a duty to try to prevent Riley from causing serious harm to other persons. As a result, from April 15, 2004, to April 19, 2004, the police intercepted the private communications of Riley without judicial authorization, relying on s. 184.4 of the *Criminal Code*. The purpose of listening to Riley pursuant to s. 184.4 was to keep track of Riley's whereabouts, in order to prevent him from shooting anyone else.

9 The decision to intercept, in purported compliance with TPS policy, was made by Staff Inspector Ramer, who was then the Unit Commander of Intelligence Services in the TPS. One of Ramer's many duties was oversight of all investigations conducted by the TPS that involved the interception of private communications under Part VI of the *Criminal Code*.

10 When he made the decision, Ramer had only a general understanding or overview of the investigation, but did not know the details. He had received briefings about the investigation at his management meetings, including one such meeting the day before he gave his direction to proceed. He made no record of the information he received, and upon which he based his decision to commence wiretapping. The only record that does exist is his personal log, as Unit Commander, for all authorizations conducted in the unit, and a TPS form 649 prepared by Banks, who was the lead homicide investigator on this case in the absence of Comeau at the time that the decision to intercept was made. In the 649, Banks asked Ramer for permission to use s. 184.4 in this investigation, and provided a brief summary of the reasons that he thought that the use of s. 184.4 was justified.

#### **THE GROUNDS OF CHALLENGE TO SECTION 184.4**

11 In *R. v. Six Accused Persons*, [2008] B.C.J. No. 293 (S.C.), Davies J. declared that s. 184.4 of the *Criminal Code* is constitutionally invalid legislation. More specifically, he concluded that s. 184.4 breaches s. 52 of the *Constitution Act* by reason of its contravention of the right to be free from unreasonable search and seizure guaranteed by s. 8 of the *Charter*. In this case, in their factum, the applicants adopt some of the reasons of Davies J., and argue that s. 184.4 is unconstitutional because:

1. it is void for vagueness in violation of s. 7 of the *Charter* because it does not specify what procedure if any is to be followed with regard to:
  - i. record keeping
  - ii. duration
  - iii. consultation with superiors
  - iv. following protocols in place in the particular law enforcement agency
  - v. time limits
  - vi. returns
  - vii. disposition of the fruits of intercepting if no prosecution follows
  - viii. a prerequisite of investigative necessity

2. it is void for overbreadth in violation of s. 7 of the *Charter* because:
  - i. it permits a peace officer to make the decision to intercept private communications
  - ii. it defines peace officer too broadly
3. it is inconsistent with s. 8 of the *Charter* because:
  - i. it places the decision in the hands of a peace officer who is not impartial, and so cannot be considered to be capable of acting judicially
  - ii. intercepting in exigent circumstances can be judicially authorized by the use of s. 188 of the *Criminal Code*, and so a warrantless power to intercept in exigent circumstances is not justified
  - iii. there is no requirement for the peace officer to record the reasons for using s. 184.4 under oath even after the fact
  - iv. again, the definition of peace officer is too broad
  - v. again, it places the decision to intercept in the hands of a police officer

**12** In *Six Accused Persons*, the constitutional challenge was similarly made on the basis of vagueness and overbreadth under s. 7 of the *Charter*, as well as inconsistency with s. 8. In his reasons, Davies J. stated, correctly in my view, that the overbreadth concerns raised by the applicants before him under s. 7 were better considered as part of his s. 8 analysis. In this case, the same also applies to the vagueness arguments made under s. 7, which are not the same as the more familiar vagueness arguments that were made in *Six Accused Persons*. Mr. Midanik came to the same conclusion as I did on this issue, and, in the course of his submissions asked me to treat his s. 7 arguments as subsumed under s. 8. I will do so, and will deal with the arguments under the following headings:

- A. The Meaning of Section 184.4
- B. Is an Urgent Circumstance Warrantless Interception Power Constitutional?
- C. The Effect of Specific Section 8 Concerns:
  1. Placing the Decision in the Hands of a Peace Officer
  2. The Breadth of the Definition of "Peace Officer"
  3. Record Keeping/Affidavit under Oath
  4. Absence of an Investigative Necessity Prerequisite
  5. Duration and Time Limits
  6. Notice
  7. Use and Disposition of Interceptions
  8. Report to Parliament
- D. Is the Urgent Circumstance Warrantless Interception Power in Section 184.4 of the *Criminal Code* Constitutional?

## ANALYSIS

### A. THE MEANING OF SECTION 184.4

**13** Section 184.4 of the *Criminal Code* provides:

Interception in exceptional circumstances

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

- (a) the peace officer believes on reasonable grounds that the urgency of the situation is such that an authorization could not, with reasonable diligence, be obtained under any other provision of this Part;

- (b) the peace officer believes on reasonable grounds that such an interception is immediately necessary to prevent an unlawful act that would cause serious harm to any person or to property; and
- (c) either the originator of the private communication or the person intended by the originator to receive it is the person who would perform the act that is likely to cause the harm or is the victim, or intended victim, of the harm.

1993, c. 40, s. 4.

**14** There is disagreement between the parties as to what the prerequisites to the use of s. 184.4 provided for in the legislation actually are. Davies J. has provided an interpretation of some of them. I do not find myself in complete agreement with the views of Davies J., the Crown or the defence. It will help inform my resolution of the issues raised on this application to begin by setting out my view of those prerequisites.

**15** As I read s. 184.4, before using the warrantless interception power, the peace officer must have reasonable grounds to believe that:

- i. interception is immediately necessary to prevent an unlawful act that would cause serious harm to any person or to property
- ii. the urgency of the situation is such that a judicial authorization could not be obtained with reasonable diligence
- iii. the target of interception is the person who will commit the unlawful act

**16** I have changed the order of the prerequisites from the order in which they appear in the *Code* because I think their meaning is clearer when examined in this order. I will now proceed to explain what I believe each of these prerequisites means.

**Interception is immediately necessary to prevent an unlawful act that would cause serious harm to any person or to property**

**17** In my view, the fundamental prerequisite to unauthorized interception is the requirement that it be immediately necessary. The words "immediately necessary" have both a temporal and an analytical component. The temporal component derives from the word immediate. It imposes a requirement that interception must be necessary, *at present*, that is, *at the very time that the decision to intercept is taken*. The analytical component derives from the word necessary. It imposes a requirement that intercepting must be effective, or at least *it must be likely that intercepting will be effective, and there must not be an equally effective alternative*. If there is an equally effective alternative, then intercepting can hardly be necessary.

**18** It might be said that this is a narrow interpretation of the words "immediately necessary", and not one that provides much flexibility to those responsible for law enforcement. I do not disagree. But in view of the invasiveness of electronic interception of private communications, and as a consequence the very high preference for prior judicial approval flowing from s. 8 of the *Charter*, a narrow interpretation is entirely appropriate.

**19** In addition, the immediate necessity must relate to the prevention of an unlawful act that would cause serious harm to any person or property. This limitation ensures that this power is used only in circumstances where there is a likelihood that an unlawful act will be committed, and a likelihood that that unlawful act will cause serious harm to a person or to property. Again, this is entirely appropriate. Dispensing with the requirement of prior judicial approval for so invasive an intrusion into privacy can only be justified, if at all, in circumstances where there is a likelihood of serious harm.

**20** I note that in argument, Mr. Midanik challenged the breadth of this prerequisite, suggesting that it could be used to justify wiretapping where there was a likelihood of serious harm to some trivial piece of property. He used the example of a garbage can. I do not think that this is a proper understanding of the meaning of the concept of serious harm to property. Serious, as it applies to property, implies not only a significant degree of harm, but also harm to property of significance, such as a bridge, a building, or a home. In each of these cases, if there is a significant degree of harm, then the harm would inevitably have serious consequences. Neither the phrase "serious harm to any person or to property", nor the context, leave it open to wiretap without a warrant to prevent an act that will likely have trivial consequences.

**21** Finally, I note that in *R. v. Six Accused Persons*, Davies J. thought it necessary, to avoid an overbreadth argument, to limit the reference to an unlawful act in s. 184.4 to unlawful acts mentioned in the definition of the word "offence" in

s. 183. That list serves to limit the offences in relation to which an authorization to intercept private communications can be granted. With respect, I do not agree with Davies J. on this point, for several reasons. First, I think that the scope of the unlawful act requirement is sufficiently circumscribed for constitutional purposes by the requirement that the unlawful act would cause serious harm to persons or property. No meaningful additional protection of privacy would be gained by listing the unlawful acts that could give rise to such serious harm. Second, I note that the list of offences in s. 183 has become a very broad list indeed. I suspect that one would be very hard pressed to conjure up an unlawful act that could likely result in serious harm to a person or property that is not in the list. But if, by oversight, there is one, I see no constitutional value that is enhanced by precluding warrantless interception in such a case. Third, referencing this exceptional police power to a broad list of offences, most of which could never trigger the use of s. 184.4, seems to me to send the entirely wrong signal. It invites creativity in the use of s. 184.4 that is entirely uncalled for.

**The urgency of the situation is such that a judicial authorization could not be obtained with reasonable diligence**

**22** This prerequisite underscores the strong preference for judicial authorization. I choose to consider it second because its meaning is informed by the meaning of the prerequisite that I have just considered. This subsection provides that s. 184.4 is unavailable if some other wiretap order under Part VI of the *Criminal Code* could be obtained with reasonable diligence, having regard to the urgency of the situation. And the urgency of the situation can mean only the immediate necessity to wiretap in order to prevent the unlawful act that will likely result in serious harm.

**23** Of course, a judicial authorization can never be obtained immediately. If, in the first instance, it is immediately necessary to intercept private communications, then an authorization can never be obtained as quickly as it is needed, even with reasonable diligence, and this prerequisite is readily overcome. But that does not mean that the reasonable diligence requirement is meaningless. It increases in significance as time goes on. I agree with Davies J. that in order to continue intercepting under s. 184.4 once intercepting is begun, the police are compelled to immediately put in motion an effort to obtain judicial authorization with dispatch, if that is possible, or risk being out of compliance with s. 184.4.

**24** But I note that there is an impediment to seeking an authorization in some cases that Davies J. did not mention. In my view, in some cases, no judicial authorization will be available. This flows from the significant difference in purpose between s. 184.4 on the one hand and judicial authorization on the other.

**25** Section 184.4 is a preventative tool. It is not available to the police for the purpose of investigation. It is only available to prevent serious harm from occurring. It is strictly future oriented. It is concerned with offences that have not yet been committed.

**26** On the other hand a judicial authorization issued pursuant to s. 186, and an emergency authorization issued pursuant s. 188, are clearly investigative tools. Even when granted on the basis of urgency, the goal remains investigation. Section 186(1)(b) permits an authorization to be granted where "the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures." It is concerned with offences that have been or are being committed, not with future offences. This is clear from the language of Martin J.A. in *R. v. Finlay and Grellette* (1985), 23 C.C.C. (3d) 48 (Ont. C.A.) (leave to appeal to S.C.C. ref'd (1986), 54 O.R. (2d) 509), adopted by LaForest J. in *R. v. Duarte*, [1990] 1 S.C.R. 30 at 45, where he stated:

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 and Grellette*, *supra*, at pp. 70 *et seq.*, 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.

**27** No doubt in many cases where s. 184.4 is used, it would be possible for the police to find a present offence to justify an authorization and so comply with what is compelled by s. 184.4(a), although it does seem anomalous to force the police to apply for an investigative tool when what they want is a preventive tool. But where there really is no offence that has been or is being committed that can be used to justify an authorization, the police will not be able to immediately seek one. I would not view this as an obstacle to the use of s. 184.4.

**The target of interception is the person who would commit the unlawful act or the victim**

**28** This prerequisite further limits the scope of urgent wiretapping by permitting the interception of a private communication only if the person the police believe will commit the offence, or the intended victim, is either the originator or the recipient of the interception. The belief, of course, must be based on reasonable grounds. It may well be that in certain circumstances, interception outside of this narrow paradigm would prevent serious harm. But Parliament narrowed wiretapping in this way in an obvious recognition that making it any broader would introduce far more scope for the exercise of subjective judgment by the police, and open the door to abuse, however unintended.

**29** For that reason, I agree with Davies J. that the word victim must be read narrowly. It does not, for example, include those, such as family members, who might be psychologically harmed by physical harm done to the direct victim, although in another context such a broad reading might be appropriate. (See for example s. 722(3) and (4) of the *Code*, concerning victim impact statements.) But I do not agree with him that the intercepted communications must be between the perpetrator and the victim. That is not what the section says, nor would it make much sense for it to do so. It would unduly limit the effectiveness of s. 184.4, without appreciably enhancing privacy. If one of the prime goals of s. 184.4 is to locate the perpetrator, then intercepting his or her calls with persons other than the victim would be highly useful. Requiring that one of the parties to a communication be either the perpetrator or the victim places a sufficient control on intercepting to avoid abuse.<sup>2</sup>

## **B. IS AN URGENT CIRCUMSTANCE WARRANTLESS INTERCEPTION POWER CONSTITUTIONAL?**

**30** Before embarking on a detailed consideration of the claim that s. 184.4 contains a host of constitutional flaws, it is worth asking whether there is a need to do so at all. In other words, leaving aside these possible shortcomings, is it constitutional for Parliament to legislate a properly crafted warrantless scheme for the interception of private communications in exigent circumstances? Only if it is constitutional for Parliament to do so is there a need to examine the alleged flaws.

**31** In my view, the decisions of the Supreme Court make it clear that it is not constitutionally impermissible for Parliament to craft a narrow emergency wiretap power. In reaching this conclusion, I begin with the Court's approval of a warrantless power to search a dwelling house in exigent circumstances in *R. v. Grant*, [1993] 3 S.C.R. 223. The Court stated, in *Grant*, in reference to the warrantless power to search places found in s. 10 of the former *Narcotic Control Act*, at paras. 29-30:

29 ... Protection against unreasonable search and seizure is maximized by the requirement that entries by state authorities be pre-authorized by a judicial arbiter. On the other hand, this Court must also consider the societal interest in law enforcement, especially with regard to the illicit drug trade. This pernicious scourge in our society permits sophisticated criminals to profit by inflicting suffering on others. In attempting to strike a balance between these two sets of interests, I have concluded that warrantless searches pursuant to s. 10 *NCA* must be limited to situations in which exigent circumstances render obtaining a warrant impracticable. Warrantless searches conducted under any other circumstances will be considered unreasonable and will necessarily violate s. 8 of the *Charter*. To the extent that s. 10 *NCA* authorizes a search in the absence of the limiting circumstances, it is invalid. In these circumstances, it is unnecessary to consider s. 1. See *Baron, supra*, at p. 452.

30 This exception to the general rule which proscribes warrantless searches must be narrowly construed. In general, the test will only be satisfied where there exists an imminent danger of the loss, removal, destruction or disappearance of the evidence sought in a narcotics investigation if the search or seizure is delayed in order to obtain a warrant. See *R. v. D.(I.D.)* (1987), 38 C.C.C. (3d) 289, per Sherstobitoff J.A.

**32** Similarly, in *R. v. Godoy*, [1999] 1 S.C.R. 311, in considering whether the *Charter* precludes entry into private premises in response to 911 calls, the Court stated, at para. 22:

22 Thus in my view, the importance of the police duty to protect life warrants and justifies a forced entry into a dwelling in order to ascertain the health and safety of a 911 caller.

**33** It seems to me that a limited power to intercept the private communications of a person believed to be about to commit an offence involving serious harm to a person or property where it is immediately necessary to do so to prevent the unlawful act, and where a judicial authorization cannot be obtained with reasonable diligence, is consistent with

these judgments, and is not inconsistent with the *Charter*. In reaching this decision, I bear in mind that the context of s. 184.4 is the prevention of harm, and not the investigation of offences.

**34** In *R. v. Six Accused Persons*, on this issue, Davies J. stated, at paras. 198-199:

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:

*R. v. Feeney*, [1997] 2 S.C.R. 13, 115 C.C.C. (3d) 129: permitting entry by the police without warrant into a dwelling house to arrest a fleeing accused in cases of hot pursuit;

*R. v. Godoy*, [1999] 1 S.C.R. 311, (1998) 21 C.R. (5th) 205: 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

*R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52: 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.

**35** I agree. The real issue in this case is not whether it is constitutionally permissible for Parliament to enact a warrantless interception power in narrowly defined exigent circumstances, but rather whether the particular power created in s. 184.4 of the *Criminal Code* strikes the appropriate constitutional balance between the right of individuals to be left alone and the responsibility of the state to protect persons and property. Has Parliament defined the state interest justifying the use of a warrantless power narrowly enough, and sufficiently circumscribed the use of the power so that s. 184.4 can, on the one hand, be effectively used to prevent serious harm to persons and property without, on the other hand, unduly risking the interception of private communications that is not necessary for accomplishing this purpose?

**36** I note that in his able argument, Mr. Midanik attempted to measure the provisions of s. 184.4 against the list of safeguards in respect of wiretapping under what was then Part IV.1 of the *Criminal Code* found in the judgment of LaForest J. in *R. v. Duarte*, [1990] 1 S.C.R. 30 at para. 45. Viewed in this way, he argued, it is apparent that s. 184.4 falls short of the mark. In making this comparison, it is well to examine what LaForest J. actually said in *Duarte*. He stated, at paras. 45-48:

45 It is worth noting, in this regard, the basis for the conclusion of Martin J.A. in *R. v. Finlay and Grellette*, *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.

46 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: "... 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)).

47 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 by-passes any judicial consideration of the entire police procedures and thereby makes irrelevant the entire scheme in Part IV.1 of the *Code*.

48 As was put by Martin J.A. in *R. v. Finlay and Grellette*, *supra*, at p. 70:

Authorizing such a serious intrusion on the individual's reasonable expectation of privacy as the interception of his private communications on the basis of mere suspicion would not further the interests of the administration of justice, but would bring it into disrepute.

37 The underlying point made by LaForest J. is that for a wiretap power to be reasonable within the meaning of s. 8 of the *Charter*, there must be safeguards in place that preclude the police from embarking on fishing expeditions in the hope of uncovering evidence of crime. The list of safeguards in paragraph 46 of his judgment are simply the safeguards in place that accomplished that purpose in relation to authorizations to intercept private communications. There is nothing in the judgment to suggest that this is the only set of safeguards that will withstand *Charter* scrutiny, or that if any one of them were removed, the constitutional validity of what is now Part VI would evaporate.

38 In my view, Parliament is free to craft whatever safeguards it chooses when enacting a wiretap provision, subject to the overriding dictates of *Hunter v. Southam*. The task of the Court when scrutinizing such an enactment for constitutional validity is not to determine if it includes all of the measures in the list in *Duarte*, but rather to ascertain if the enacted safeguards, as LaForest J. put it, "prevent the possibility that the police view recourse to electronic surveillance as a humdrum and routine administrative matter."

### **C. THE EFFECT OF SPECIFIC SECTION 8 CONCERNS:**

#### **1. PLACING THE DECISION IN THE HANDS OF A PEACE OFFICER**

39 Undoubtedly, s. 184.4 falls short of the insistence in *Southam v. Hunter*, [1984] 2 S.C.R. 145 upon prior authorization of state intrusions upon privacy by a person capable of acting judicially. But in *Southam v. Hunter* itself, and many other cases, the Courts have recognized that this preference is not absolute. Dickson J., as he then was, stated:

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

40 I have already concluded that a warrantless emergency interception power may be constitutionally valid if it properly balances the public interest in preventing harm with the public interest against the invasion of privacy by the state through indiscriminate wiretapping. A warrantless power is, by definition, a power placed in the hands of a police investigator or other state actor. It follows that simply placing the decision in the hands of a peace officer, in this exceptional and limited context, does not, of itself, violate s. 8.

## 2. THE BREADTH OF THE DEFINITION OF "PEACE OFFICER"

41 Section 184.4 authorizes a "peace officer" to intercept private communications without judicial authorization in narrowly defined emergency circumstances. "Peace officer" is defined in s. 2 of the *Criminal Code* as follows:

"peace officer" 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.

42 The applicants here, as did the applicants in *Six Accused Persons*, argue that this list is overbroad, and, as a result, s. 184.4 is inconsistent with s. 7 and s. 8 of the *Charter*. Davies J. agreed. He stated, at paras. 234-237:

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.

**43** In the end, he concluded, at paras. 241-2:

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.

**44** I approach this issue somewhat differently. I agree wholeheartedly with Davies J. that the list of persons that Parliament has authorized to invoke s. 184.4 is too broad. Parliament took a short cut in defining who could use the section by simply relying on the definition of peace officer in s. 2. As a consequence, Parliament ran the risk of distorting the narrow circumstances in which the provision may be used -- a core aspect of what otherwise may be used to justify this extraordinary power. For example, while there are historical reasons for the definition of peace officer to include mayors and reeves, and practical reasons for it to include pilots and bailiffs, there can be no reason to authorize any of them to use s. 184.4. On the other hand, I am inclined to believe that there is justification for some of the other categories of peace officers, such as corrections officers and the specified Canadian Forces national defence personnel, to employ s. 184.4. There may be justification for some of the other categories of peace officers as well, but I have not heard the evidence that would assist me in making that determination.

**45** In considering the effect of this overbreadth, I must bear in mind that s. 52 of the *Constitution Act*, 1982 provides that any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect. Nothing could be simpler, and less controversial, than to conclude that any overbreadth in the application of the definition of peace officer in s. 2 of the *Code* as it applies to s. 184.4 of the *Code* is of no force or effect. It is beyond doubt that if Parliament was aware that the application of s. 2 was too broad, it would have narrowed it to what was constitutional. If s. 184.4 is otherwise consistent with the constitution, it should remain in full force and effect. The fact is, however, that I am hearing this challenge as a trial judge presiding over a criminal case. I am not hearing an application for a declaration of constitutional invalidity. In the case before me, no one other than a police officer used s. 184.4. I have no hesitation in saying that permitting a police officer to invoke s. 184.4 involves no overbreadth. Since the overbreadth in s. 2 has no implications whatever for the case before me, it does not fall to me to determine the extent to which s. 2 is overbroad. I leave that to be decided by a judge who has the issue properly raised before him or her, and a proper evidentiary record upon which to decide it. I note that is for the applicant to show that the inclusion of certain

categories is inconsistent with s. 8. I content myself with saying that to the extent that the combined effect of s. 184.4 and s. 2 permits categories of persons to use s. 184.4 for whom there is no justification, the inclusion of those categories must be severed.

**46** I cannot leave this issue without giving consideration to Davies J.'s second concern about who may use s. 184.4. He said that he was surprised by 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. Of course, no one would find it acceptable for an inexperienced constable assigned to traffic duty to take it upon himself or herself to make use of s. 184.4, and do so without supervision. But that is an impossible scenario. Police forces are hierarchical organizations. Police officers have ranks, and answer to superior officers. They are inevitably subject to supervision. Moreover, as I have already noted, intercepting private communications is costly and resource intensive. Even a homicide investigator could not, realistically, engage in wiretapping without some form of approval by a superior officer, regardless of the existence of an approval policy. In my view, supervision and control by superior officers when s. 184.4 is engaged is inevitable. Indeed, Davies J. noted that the many police forces who filed evidence on the application before him, as a matter of policy, require very senior officers to approve the use of s. 184.4. The same is true in the TPS. But the nature of the control and supervision of the use of s. 184.4 no doubt differs, and must differ, from police force to police force.

**47** It would be difficult in the extreme, and in my view unnecessary, for Parliament to legislate the nature of the control and supervision required for the use of s. 184.4 by the myriad of law enforcement agencies in Canada, with their differing sizes, structures and mandates. Parliament has not chosen to mandate internal supervision of individual peace officers who make use of other broad invasive powers in the *Criminal Code*, and the Courts have not been critical of this. I do not see the need for such legislative detail in relation to the power in s. 184.4, and I do not view it as a prerequisite for compliance with s. 8.

### **3. RECORD KEEPING/AFFIDAVIT UNDER OATH**

**48** This issue was raised variously in relation to s. 7 and s. 8 of the *Charter*. In essence, Mr. Midanik argues that s. 184.4 is constitutionally infirm because it neither requires the peace officer who asks a superior officer to be permitted to use s. 184.4 to prepare a written document, under oath, setting out the grounds for the use of s. 184.4, nor does it require the superior officer who permits the use of s. 184.4 to record his or her reasons.

**49** The failure to require the creation of such a record, the argument runs, makes the decision inaccessible to a person whose private communications have been intercepted, and makes it difficult to review at a criminal trial if the Crown attempts to use the interceptions as evidence against the target.

**50** In considering this argument, I note first of all that it presumes the bifurcated decision-making process that existed in this case as a matter of TPS policy, but was neither required, nor perhaps even contemplated by Parliament. Section 184.4 puts the decision to use s. 184.4 in the hands of a peace officer. In this case, if the grounds for the use of s. 184.4 existed, insofar as the provisions of the *Criminal Code* are concerned, Det. Banks was free to use it without consulting his superiors. I say immediately that I fully endorse the TPS policy. It is entirely appropriate that a decision to use this invasive technique should be approved by a high-ranking officer. Indeed, as I have already stated, it is probably inevitable, since wiretapping is resource intensive and a decision to use it could hardly be put into effect without approval at a high rank for administrative reasons alone. But even where approval of a senior officer is required by a particular police force, that does not necessarily mean that the senior officer is the decision maker. The senior officer may simply be required to approve of a decision already made by a responsible, lower ranking officer. That is a question of fact to be decided on the evidence in each case, and in fact, is a matter of debate in this case. Despite a requirement for senior officer approval, as a matter of fact the decision to use s. 184.4 may in some cases be the decision of the line officer.

**51** I mention that a bifurcated procedure is not contemplated by the legislation simply because it undermines part of Mr. Midanik's argument. Mr. Midanik's position is logical only if the procedure is a bifurcated one. Requiring an investigating officer to prepare a sworn document setting out his or her grounds for using s. 184.4 would make little sense if that officer was the actual decision maker. The purpose of an oath is to give the decision maker some confidence that the person providing the grounds is being truthful. Obviously, the decision maker would not need that assurance if he or she was the officer who had the primary knowledge of the grounds.

**52** But what about a requirement that the decision maker create a record of the grounds known or presented to him or her for the use of s. 184.4, without requiring that it be made under oath? Undoubtedly this would be helpful to a person, like Mr. Riley, who is challenging the decision. It is far more difficult for the target of interception to know the basis for the decision in the absence of a written record. At the same time, requiring the creation of a written record would intro-

duce time consuming formality into the emergency interception process. Once an officer embarks on an effort to reduce the information he or she relies on to writing, considerations of fullness and frankness will arise. Officers will be torn between the obligation to produce a full and frank record, coupled with the fear the omission of any marginally relevant piece of information will provide fodder for a challenge to the decision to use s. 184.4 at a possible trial, and the fear that the time lost in fulfilling this obligation responsibly rather than commencing wiretapping that is immediately necessary to prevent serious harm will have dire consequences.

**53** No doubt there are policy arguments for and against requiring an officer to make a record of the grounds for the use of s. 184.4. But in the end, my simple answer to Mr. Midanik's argument is that there is no constitutional mandate for it known to me. No doubt the failure to create a record can have constitutional implications. The failure to keep an adequate record will present problems of proof for the Crown on an application to exclude the fruits of the use of s. 184.4 pursuant to s. 24(2) of the *Charter*, at least where the decision is made by a senior officer. Where the lead investigator makes the decision, his or her notes of the investigation will amply inform the trial judge of the basis for the decision. But where the decision is made by a senior officer, it will be more difficult to know exactly what information was made known to the senior officer, and what was not. It will be harder to know, for example, that information tending to undermine the grounds for the use of s. 184.4 known to the investigators was brought to the attention of the decision maker. If the onus of establishing that a particular use of s. 184.4 violated s. 8 were on the accused, this would be a serious obstacle to the vindicating of the accused's constitutional rights. But this obstacle is significantly offset by the fact that s. 184.4 is a warrantless search power, and so, on an application to exclude evidence pursuant to s. 24(2) of the *Charter*, the onus is on the Crown to establish that there was no breach of s. 8.

**54** In the end, a failure to adequately record what information was brought to the attention of the decision maker, even if it is done after the fact, will create a serious proof problem for the Crown. But I do not think that there is a constitutional requirement to create such a record. There are many other warrantless search powers known to the law where the same problem arises. In no case has an appellate court said that any of these powers are inconsistent with s. 8 because there is no requirement to create a record of the grounds.

**55** As I have noted, Mr. Midanik also points to the fact that s. 184.4 not only fails to require that the grounds for using s. 184.4 be recorded, it also fails to require that the reasons of the decision maker to permit the use of s. 184.4 be recorded. Section 184.4 shares this infirmity, if infirmity it is, with the ordinary wiretap authorization provision in s. 186, and every other warrant provision that I can think of. The courts have had little difficulty in reviewing the issuance of warrants and orders authorizing invasions of privacy without requiring recorded reasons. I see no constitutional requirement that the reasons of the decision maker to permit the use of s. 184.4 be recorded either.

**56** I would not give effect to this argument.

#### **4. THE ABSENCE OF AN INVESTIGATIVE NECESSITY PREREQUISITE**

**57** Section 186(1) provides that an authorization under that section may be given if a judge is satisfied:

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

**58** Section 186(1)(b) is referred to compendiously as the requirement of investigative necessity. There has been some debate in the cases whether or not the requirement of investigative necessity is a constitutional requirement. In *R. v. Garofoli*, [1990] 2 S.C.R. 1421, in upholding the constitutional validity of s. 178.13, the predecessor of s. 186, Sopinka J. stated:

The result is that the statutory requirements of s. 178.13(1)(a) are identical to the constitutional requirements.

**59** The implication that is often drawn from this is the investigative necessity, then found in s. 178.13(b), is not a constitutional prerequisite.

**60** On the other hand, proponents of the opposite view point to the decision in *R. v. Araujo*, [2000] 2 S.C.R. 992, where LeBel J., albeit in *obiter*, stated:

In particular, the investigative necessity requirement embodied in s. 186(1) is one of the safeguards that made it possible for this Court to uphold those parts of the *Criminal Code* on constitutional grounds.

61 Similarly, in *R. v. S.A.B.*, [2003] 2 S.C.R. 678, Arbour J. stated, at paras. 53-54:

I turn now to the specific grounds of attack against the DNA warrant provisions advanced by the appellant. The appellant argued that DNA warrants should only be available when it is necessary for the state to obtain a sample because it cannot investigate effectively by using less intrusive techniques. In other words, DNA warrants should be a "last resort" investigative tool. This approach is analogous to the constitutional requirement applicable to wiretap authorizations (see *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 37). Judicial authorization to intercept private communications by recording devices cannot be issued unless the court is satisfied that other investigative techniques have been tried and have failed or are unlikely to succeed (*Criminal Code*, s. 186(1)(b)). I see no reason to import, as a constitutional imperative, a similar requirement in the case of DNA warrants. There are obvious differences between the use of wiretaps as an investigative tool, and recourse to a DNA warrant.

62 The Courts that have considered the argument, however, have tended to side with the view that investigative necessity is not a constitutional requirement for wiretap authorizations. (See, for example, *R. v. Doiron* (2007), 221 C.C.C. (3d) 97 (N.B.C.A.) (leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 413), *R. v. Bordage* (2000), 146 C.C.C. (3d) 549 (Que. C.A.) And *R. v. G.L.*, [2004] O.J. No. 5675 (S.C.J.).)

63 I need not reach a conclusion on this precise issue. I do conclude, however, that when it comes to a highly intrusive state action such as wiretapping, the requirements of *Southam v. Hunter* may not exhaust the prerequisites for a constitutional scheme of authorization. As Martin J.A. noted in *Regina v. Finlay and Grellette*, *supra*, at p. 68:

In determining the constitutionality of Part IV.1 of the *Code* the proper approach, in my view, is to consider its provisions and the safeguards contained therein in their entirety. It is not proper, in my opinion, to seize upon individual sections of Part IV.1 and to see if those sections, viewed in isolation, contravene the provisions of the *Charter*.

64 Later, in reaching his conclusion that Part IV.1 was constitutional, he stated, at p. 78:

The provisions of Part IV.1 with respect to the granting of an authorization to intercept private communications, considered as a whole, are more stringent (and rightly so) than the requirements for a conventional search warrant. As Mr. Justice Estey said in *Lyons v. The Queen*, *supra*, [1987] 2 S.C.R. 309, it is apparent *from the entire scheme of the legislation* that the judges play a vital role in safeguarding the public interest. They are vested with wide powers to protect the public interest and the legislative scheme contemplates that these powers will be exercised when appropriate.

65 Similarly, in *R. v. Duarte*, [1990] 1 S.C.R. 30, La Forest J. stated, at para. 47:

... 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 ...

66 It seems to me that while investigative necessity is probably not a prerequisite for a valid wiretap scheme, it is one of the considerations that permitted Martin J.A. in *Finlay and Grellette* and LaForest J. in *Duarte* to conclude that there were sufficient safeguards in place in Part IV.1 to ensure that wiretapping is not carried out indiscriminately, but only subject to stringent safeguards. As a result, they each concluded that Part IV.1 does not violate s. 8. To pass constitutional muster, Parliament may not have to include an investigative necessity prerequisite, but it must design a scheme that adequately protects privacy. There is no single, pre-ordained scheme that must be enacted.

67 In the end, however, whatever may be the case in respect of conventional wiretap authorizations, it is obvious that investigative necessity is not a prerequisite for wiretapping when the purpose of the wiretapping is not to investigate offences, but rather is to prevent harm, as is the case with s. 184.4. It would be absurd to consider whether other investigative procedures have been tried and failed, are unlikely to succeed or are impractical on account of urgency when

what is contemplated is wiretapping that is immediately necessary to prevent an unlawful act that will cause serious harm. The contours of what may be constitutionally required beyond or in substitution for the *Southam v. Hunter* prerequisites must depend on the context.

**68** In the case of emergency wiretapping, investigative necessity cannot and should not be the litmus test for constitutional validity. Instead, the inquiry should focus on whether or not the prerequisites are sufficiently defined and sufficiently narrow to ensure that only intercepting that truly justifies omitting the requirement of judicial authorization is permitted, and whether or not the potential for invasions of privacy that are not necessary for the prevention of harm is sufficiently minimized. In my view, this scheme accomplishes that purpose.

**69** I say this having regard to the manner in which I have interpreted the provisions of s. 184.4 above. In particular, I note that:

- \* Intercepting must be *necessary* to prevent harm -- if another investigative technique is equal to the task, then this prerequisite is not met.
- \* The necessity to wiretap to prevent harm must be *immediate* -- in particular, if an authorization could be obtained with reasonable diligence, this prerequisite is not met.
- \* The harm being prevented must result from an unlawful act, and must be *serious*.
- \* Only private communications to which the perpetrator of the unlawful act or the intended victim is a party may be intercepted.

**70** In reality, although it is tailored to an emergency situation, as it should be, the test for intercepting under s. 184.4 is narrower than the test of investigative necessity. The requirement that wiretapping be immediately necessary to prevent serious harm, in my view, imposes a very stringent standard, and meets the constitutional requirements, however they are articulated.

## 5. DURATION AND TIME LIMITS

**71** Mr. Midanik argues that s. 184.4 is also inconsistent with the Charter because it places no time limit on intercepting. He notes that an authorization by a judge in urgent circumstances pursuant to s. 188 is limited to 36 hours, and questions how warrantless wiretapping can be permitted to continue for a longer period. I note, however, that the urgent circumstances scheme contemplates that successive authorizations may be given under s. 188. In other words, wiretapping under this provision may continue longer than 36 hours if a judge gives further permission. As a result, it is not correct to say that wiretapping pursuant to s. 188 is limited to 36 hours.

**72** In my view, the short answer to Mr. Midanik's argument is that on its face, the power to wiretap is more circumscribed than the 36 hour limit on s. 188 authorizations. When a judge grants an authorization under s. 188, intercepting can continue for 36 hours, even if the urgency evaporates during that period. The power to intercept under s. 184.4, however, is quite unlike an authorization. The conclusion that the prerequisites are met gives no power to intercept for any period of time at all. The narrow prerequisites to intercepting pursuant to s. 184.4 must persist on each occasion that a further interception is made. On its face, s. 184.4 requires that the peace officer must believe, on reasonable grounds, that each interception that is made is immediately necessary to prevent harm. If he or she does not have that reasonable belief, then the interception is not lawful.

**73** The response to this, of course is that in some cases, it is a distinction without a difference. If interception continues to be immediately necessary for a week, then the use of the warrantless interception power can continue for a week, even though it would be entirely possible for the police to obtain an authorization of some sort in the interim with reasonable diligence. The answer to this, in my view, is Davies J.'s reading of s. 184.4(a), which I have adopted, that when the police begin to make use of s. 184.4, they are compelled to immediately put in motion an effort to obtain judicial authorization with dispatch, if that is possible, or risk being out of compliance with s. 184.4.

## 6. NOTICE

**74** The applicants argue that the failure of the legislation to provide for a report to the court of wiretapping done pursuant to s. 184.4, notice to the targets of interception, and a scheme for the disposition of what has been intercepted are also constitutional infirmities. I will deal with the disposition issue separately. In examining the issue of reports and notice, it may be helpful to begin with a historical perspective.

**75** The search warrant finds its origins in sixteenth century England. At that time, the search warrant was most commonly a delegation of the authority of the Justice of the Peace to search for stolen goods. The warrant took the form of

an order requiring the informant to enter a named place, search for and seize the property and return it to the Justice, who would decide how it was to be disposed of. This was the origin of the return.

**76** Over time, the warrant ceased to be a delegation of authority, and instead became an authorization to conduct a search and seizure. In Canada, by the time of our first *Criminal Code* in 1892, a justice could issue a search warrant to search for and seize evidence of any *Criminal Code* offence. Whatever was seized still had to be returned to the justice, who could detain and preserve it until the conclusion of the investigation or trial, order it restored to the person from whom it was taken or, in some cases, order it disposed of or destroyed. As is apparent, the purpose of the return was to enable a justice to ensure the proper maintenance or disposal of property seized under the justice's authority.

**77** With the rise of modern police forces and other investigative agencies, it became commonplace for justices to permit the returned property to be maintained by the seizing police force or agency, which was usually much better equipped to do so than were justices. Ultimately, the *Code* caught up with this practice, and permitted a police officer or other person executing a warrant to make a report instead of a return. (See s. 489.1 of the *Code*.) The report includes a written inventory of what was seized, to enable the justice to fulfill the obligation of ensuring that the property seized is properly maintained or disposed of.

**78** There remained, however, one important flaw in the search and seizure scheme. Since in its origin the justice was only concerned with the disposition of property seized by his delegate, or later under his authority, there were no provisions in the *Code* regulating the many instances in which property was seized by police officers or other persons without a warrant, but in the execution of their duties under an act of Parliament. This includes everything from seizures of abandoned property to searches incident to arrest, consent searches, exigent circumstance searches and many others. To fill the gap, s. 489.1 was amended to require returns or reports in those circumstances as well.

**79** I have undertaken this excursion into legal history to show that the purpose of a return or report has been to ensure the proper care and disposal of seized property. There is no reason for a return or report to be made in the case of electronic surveillance. Certainly no supervision is needed to ensure the proper care of an intercepted communication. The prohibition against disclosure of intercepted private communications in s. 193 of the *Code* is surely sufficient. No requirement exists to make a return or report in relation to s. 186 authorizations, and no suggestion has been made in any decision, to my knowledge, that this violates the *Charter*. In my view, it does not.

**80** It could be argued, of course, that despite the history of returns and reports, they are constitutionally required in wiretap legislation to permit judicial oversight of this highly intrusive investigative technique. But that argument was rejected by Martin J.A. in *Regina v. Finlay and Grellette*. In his reasons for judgment, Martin J.A. made reference to two decisions of the Supreme Court of the United States which, he said, would assist in delineating the issues that arose on the branch of that appeal dealing with the constitutional validity of Part IV.1 (now Part VI) of the *Criminal Code*, namely *Berger v. State of New York* (1967), 87 S. Ct. 1873 and *Katz v. United States* (1967), 88 S. Ct. 507. He noted that in *Berger*, in the course of striking down a New York statute that authorized wiretapping, the court identified a number of requirements essential to the constitutional validity of legislation providing for the granting of a judicial authorization to intercept private conversations. Martin J.A. noted five of these at p. 62 of his judgment, including this: "There must be a return on the warrant so that the Court may supervise the use of the seized conversations."

**81** In respect of this American requirement, Martin J.A. stated, at p. 78:

Part IV.1 of the *Code* does not contain a provision similar to Section 2518(6) of Title III which provides that the judge issuing the order may require periodic progress reports to be made to him. The authorizing judge under para. (2)(d) of s. 178.13 might, however, if he considered it necessary in the public interest, require a similar report. In any event, as I have previously stated, the issue here is whether Part IV.1 contravenes s. 8 of the *Charter*, not whether it is identical in all respects with Title III, although a comparison with Title III is useful and, in my view, tends to support the constitutionality of Part IV.1.

**82** He concluded that Part IV.1 did not contravene s. 8 of the *Charter*. I consider this decision to be decisive on the question of any constitutional requirement of a report or a return.

**83** That, however, does not entirely dispose of the issue. Section 196(1) of the *Criminal Code* does require the Attorney General or Minister of Public Safety and Emergency Preparedness on whose behalf an authorization under s. 186 was obtained (which, as I read the provisions, would include an authorization under s. 188) within ninety days after the period during which interception was authorized, subject to extensions under that section, to notify in writing the per-

sons who were the objects of interception, and to certify to the court in a prescribed manner that the persons were notified. This provision is in addition to the notice of intention that must be served on an accused pursuant to s. 189 of the *Code* before intercepted private communications can be admitted into evidence.

**84** Absent this requirement, and absent notice under s. 189, targets of interception would not likely know that their privacy had been invaded, and would have no opportunity to attempt to vindicate their rights if the wiretapping was not lawful. In the case of an accused, this might mean that he or she was unaware that there was exculpatory evidence in existence, although the Crown's disclosure obligations should preclude this from happening. In the case of a person who is not charged with an offence, it may be that an action for damages for unlawful interception of private communications, or an application for a remedy pursuant to s. 24(1) of the *Charter* is available to them. Alternatively, they may wish to seek the destruction of any recording of their intercepted private communications. There are obstacles to advancing such claims, and even to obtaining access to the interceptions. In this regard, the discussion in *Michaud v. Quebec*, [1996] 3 S.C.R. 3 is informative. But without notice, uncharged former surveillance targets would not even have an opportunity to consider their options.

**85** In the case of s. 184.4, as in the case of one-party consent authorizations pursuant to s. 184.2 and interceptions without authorization to prevent bodily harm to an agent of the state pursuant to s. 184.1, no notice is required to be given. I leave to others whether this matters in the case of s. 184.1, where the target of interception is the agent of the state. But at least in the case, of s. 184.4, there is no apparent basis for not requiring the same notice as in the case of s. 186. The only difference that I can see is that in the case of s. 186, it is the Attorney General or Minister of Public Safety and Emergency Preparedness who obtains the authorization, and the same person who is obliged to give notice. Those Ministers are no doubt better organized to ensure that proper notice is given than are many police agencies. But if notice is a constitutional requirement, then this argument based on expedience can be of no moment.

**86** In *R. v. Six Accused Persons*, Davies J. concluded that the absence of a notice provision in respect of s. 184.4 violates s. 8 of the Charter. He stated, at paras. 214-215 and 217-218:

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.

...

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.

**87** I agree.

**88** Crown counsel argued that the absence of a notice provision cannot violate s. 8 of the *Charter*, since a failure to give notice in the case of a s. 186 authorization has been held not to preclude the admissibility of intercepted private communications. Here the Crown has reference to *Regina v. Welsh and Iannuzzi* (No. 6) (1977), 15 O.R. (2d) 1, where the Court of Appeal considered the effect of the Crown's failure to give notice to the accused pursuant to s. 178.23(1), the predecessor of s. 196. Zuber J.A. stated, at p. 8:

It is said on behalf of Welsh and Iannuzzi that total compliance with Part IV.1 of the Code is necessary to make an interception lawful, and as a result of the failure of the Attorney-General for Ontario to notify them within 90 days following the period for which the authorization was given, the interception is rendered unlawful and therefore inadmissible.

Section 178.23(1) is directory and its purpose is to ensure that there be disclosure that private communications have been intercepted and thereby provide a basis for political accountability. However, it cannot be said that a failure to comply with this section can retrospectively characterize an otherwise lawful interception as unlawful. Inadmissibility of intercepted communication is dealt with in detail in s. 178.16. The absence of the type of notice contemplated in s. 178.23 from s. 178.16 is fatal to this argument. It is perhaps unnecessary to observe that in this case, before the 90-day period mentioned in s. 178.23 had expired, Welsh and Iannuzzi had already received a notice and transcript pursuant to s. 178.16(4). Of what value to them was a redundant notice pursuant to s. 178.23(1)? This argument commends itself neither on the law, nor on the facts.

**89** I note that *Welsh and Iannuzzi* is a pre-*Charter* case, and concerns the former absolute exclusionary rule rather than s. 24(2) of the *Charter*. I am inclined to the view, however, that the result would be the same today, whether on the basis that the failure to give notice to an accused under s. 196 who has nonetheless been given notice under s. 189 does not violate s. 8, or if it does, that it does justify exclusion under s. 24(2). But that is neither here nor there when the constitutionality of the scheme in s. 184.4 is considered. While the failure to notify Mr. Riley in the manner required by s. 196 may not have violated his rights, the failure to require notification generally that individuals were the object of interception under s. 184.4 may fall short of constitutional minimum standards. In my opinion, it does.

**90** No defence of this specific shortcoming in s. 184.4 was made under s. 1 of the *Charter*, and so I turn my attention to the question of remedy. I note that Davies J. stated in paras. 263-4 of his judgment that were it not for the number of constitutional breaches he identified in s. 184.4, he would have been prepared to read in an appropriate notice provision. He also said, however, at para. 268, that he would not be prepared to read in a notice provision because it would constitute an unacceptable intrusion into Parliament's domain. Because I do not share his view that the constitutional breaches are too numerous to permit reading in, and because Parliament has already enacted the sort of notice provision that it finds to be appropriate in the wiretap context, I would not hesitate to read in a notice provision.

**91** In *Schachter v. Canada*, [1992] 2 S.C.R. 679, Lamer C.J.O. described the limited circumstances in which it is appropriate to apply the constitutional remedy of "reading in". He stated, at p. 682:

The purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the legislature. In some cases, of course, it will not be a safe assumption that the legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. There reading in would not be appropriate. Just as reading in is sometimes required in order to respect the purposes of the legislature, it is also sometimes required in order to respect the purposes of the *Charter*. Reading in therefore is a legitimate remedy akin to severance and should be available under s. 52 in cases where it is an appropriate technique to fulfill the purposes of the *Charter* and at the same time minimize the interference of the court with the parts of legislation that do not themselves violate the *Charter*.

**92** The Chief Justice later summarized the circumstances in which reading in is appropriate. He stated, at p. 718:

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.

**93** With respect to s. 184.4, it is a safe assumption that if Parliament had been aware that it was necessary to enact a notice provision in order for the present s. 184.4 to be constitutional, it would have done so. It is also a fair inference that if Parliament had enacted a notice provision for s. 184.4, that provision would have resembled s. 196.

**94** I am of the view that in this case:

- \* reading in a notice provision would constitute a lesser interference with the objective of the legislation, namely that peace officers be permitted to intercept private communications without authorization where immediately necessary to prevent serious harm to persons or property, than would striking s. 184.4 down. It would also further an important component of the objective of s. 184.4, namely that the use of s. 184.4 interfere with privacy no more than is necessary.
- \* Given the example of s. 196, reading in a notice provision would not constitute an unacceptable intrusion into the legislative domain.
- \* Reading in would have no more than a trivial effect on any budgetary decision.

**95** Accordingly, although I find that the absence of a notice provision renders s. 184.4 inconsistent with s. 8 of the *Charter*, rather than striking down the enactment on that basis, I would renumber the present s. 184.4 as s. 184.4(1), and read into s. 184.4 the following:

- s. 184.4(2) A peace officer who has intercepted one or more private communications under subsection (1) in relation to a particular situation of urgency shall, within 90 days after the last interception is made, notify in writing the person who was the object of interception in accordance with subsection 196(1), with such modifications as the circumstances require.
- s. 184.4(2) The provisions of subsections 196(2) to (5) apply to the giving of notice pursuant to subsection 184.4(2) with such modifications as the circumstances require.

## 7. USE AND DISPOSITION OF INTERCEPTIONS

**96** The applicants argue that the failure of the legislation to provide a scheme for the disposition of what has been intercepted is also a constitutional infirmity. They argue that the Crown should be precluded from tendering interceptions made pursuant to s. 184.4 in evidence at a criminal trial, and that the provision should provide for the destruction of the interceptions or the return of the interceptions to the target.

**97** While no case supports these arguments, Mr. Midanik is able to point to s. 184.1 of the *Code* as a precedent. Section 184.1(1) permits an agent of the state to intercept private communications if: one party to the communications consents, the agent of the state believes on reasonable grounds that there is a risk of bodily harm to the person who consents, and the purpose of the interception is to prevent the bodily harm. Section 184.1(2) makes the contents of interception under s. 184.1(1) inadmissible as evidence except in proceedings in which bodily harm is alleged. Section 184.1(3) requires the agent of the state to destroy any recording, transcript or notes of such private communication if nothing in the private communication suggests that bodily harm has occurred or is likely to occur.

**98** It is necessary to know the history of s. 184.1 in order to understand the rationale for the unusual use and destruction provisions in it.

**99** Until the decision of the Supreme Court in *Duarte*, by virtue of s. 178.11(2)(a), now s. 184(2)(a) of the *Code*, it was not unlawful for any person, including an agent of the state, to surreptitiously intercept private communications on the basis that one of the parties to the communication had consented. It was also generally believed that such interception did not infringe s. 8 of the *Charter*. In *Duarte*, however, the Court concluded that s. 8 is infringed when an agent of

the state intercepts a private communication with the consent of the originator or intended recipient without prior judicial authorization.

**100** Prior to *Duarte*, one-party consent interception had carried out for two purposes: to protect an agent of the state from bodily harm where the agent was surreptitiously assisting in the investigation of an offence; and to obtain evidence of an offence by surreptitiously recording communications of an alleged participant in the offence with an agent of the state who was assisting in the investigation of the offence, usually in an "undercover" capacity. As a result, in 1993, Parliament gave two responses to the decision in *Duarte*, namely, s. 184.1 and s. 184.2.

**101** When the purpose of intercepting with consent is solely the prevention of bodily harm, s. 184.1 is now available to permit interception without prior judicial authorization. But where the purpose of intercepting with consent is the gathering of evidence, s. 184.2 has to be resorted to. That section permits one-party consent interception with the authorization of a provincial court judge or a judge of a superior court of criminal jurisdiction. It is fair to say that because one party is consenting, the prerequisites of this provision are not as onerous as the prerequisites of an authorization under s. 186.

**102** It is immediately apparent that without a restriction on the use of interceptions made under s. 184.1, abuse of the scheme would be inevitable. In virtually every undercover investigation there is a risk of bodily harm to the person who is consenting to the interception of private communications. As a result, the police would be entitled to intercept without prior judicial approval in virtually every undercover case, and then obtain the evidentiary benefit of the intercepting without the need to obtain an authorization under s. 184.2. I emphasize that such abuse could, and no doubt would take place without any impropriety on the part of the police. Their use of s. 184.1 would usually be quite lawful, and the evidentiary windfall inevitable.

**103** As a result, in order to ensure respect for the policy underlying s. 184.2, which in turn is intended to comport with the judgment in *Duarte*, and still have the warrantless interception power in s. 184.1 solely for the narrow purpose of preventing bodily harm to undercover agents, it was necessary to preclude the evidentiary use of interceptions under s. 184.1 except in cases involving bodily harm.

**104** There is no similar need for a limitation on the use of evidence obtained under s. 184.4. Of course, like any law, s. 184.4 can be abused. But unlike s. 184.1, because the circumstance in which s. 184.4 may be used are so limited, there is no risk that the legitimate use of s. 184.4 will undermine the scheme of authorization elsewhere in Part VI, notably the scheme for authorizations in s. 186. As a result, where interceptions lawfully made under s. 184.4 for the purpose of preventing harm turn out to have evidentiary value in a prosecution, I see no reason for them to be inadmissible in the absence of any violation of the *Charter*.

**105** Nor do I see any reason to conclude that s. 8 of the *Charter* imposes any obligation to destroy or "return" recordings, transcripts or notes of intercepted private communications. It is noteworthy that the destruction requirement in s. 184.1 has been criticized on the basis that the agent of the state might, quite inadvertently, be destroying what turns out to be exculpatory evidence. No destruction requirement exists in the case of authorized interceptions, although the privacy interest of innocent persons who have been intercepted pursuant to an authorization is no different than the privacy interests of persons intercepted pursuant to s. 184.4. It is always open to the object of interception to apply to the Court for the destruction or return of his or her private communications, again subject to the comments of the Supreme Court in *Michaud v. Quebec*. I do not think the *Charter* requires more.

## **8. REPORT TO PARLIAMENT**

**106** Section 195 of the *Code* requires the federal Minister of Public Safety and Preparedness and the Attorneys General of each province to prepare and lay before Parliament an annual report relating to applications for authorizations under s. 186 made on their behalf, and for authorizations given under s. 188 upon application made by peace officers designated by them. The report is to contain largely numerical information about the numbers of authorizations sought and obtained or refused, the number of persons ultimately prosecuted, the average duration of authorizations, the number of notices given, the offences, places and manner of interception, and the like. The report does not include information about intercepting pursuant to s. 184.1, s. 184.2 or 184.4.

**107** The applicants argue that the absence of a reporting requirement in reference to s. 184.4 interceptions is inconsistent with s. 8 of the *Charter*. They find support for their position in the judgment of Davies J. in *Six Accused Persons*. In enumerating his reasons for concluding that s. 184.4 contravenes s. 8 of the *Charter*, he stated, at para. 241, that of particular concern to him was the absence of two constitutional safeguards under s. 184.4, namely a notice provision and:

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.

**108** The only explanation I can find in the judgment for a concern about the absence of a requirement to report to the executive branch of government is found in para. 223, where Davies J. stated:

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.

**109** His explanation for a concern about the absence of a requirement to report to Parliament is found in paras. 220-222, where he stated:

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.

**110** For myself, with great respect, I find the rationale for each of these concerns unconvincing.

**111** A requirement of after the fact reporting to "the executive branch of government charged with the responsibility for law enforcement and civilian oversight of police actions", or to "senior, independent law enforcement officials" seems entirely anomalous to me. I do not understand what the purpose of such reporting would be. If it is meant to involve the executive in oversight of the day to day operations of the police, then it runs counter to our traditional view of the independence of the police constable subject to supervision through the chain of command of the police force, and the insulation of the policing function from political interference. In any event, I am aware of no precedent for such reporting to be mandated by s. 8 of the *Charter*.

**112** A reading of the *Ontario Police Services Act* provides some comfort for my view of the independence of the police officer from oversight by the executive branch of government, at least in this province. The *Act* gives responsibility for oversight of law enforcement activity by the police to the Commissioner of the Ontario Provincial Police (s. 17(2) and s. 64), to the Chief of Police of a municipal police force (s. 41(1)(b) and s. 64), to the Ontario Civilian Police Commission (s. 22(1)(c)), and to the Independent Police Review Director (s. 26.2, upon proclamation). The Solicitor General, and his or her officials, whom I presume Davies J. had in mind when he spoke of independent law enforcement officials, on the other hand, have no direct oversight responsibilities. The powers and duties of the Solicitor General in respect of policing are established by s. 3(2) of the *Act*, as follows:

(2) The Solicitor General shall,

- (a) monitor police forces to ensure that adequate and effective police services are provided at the municipal and provincial levels;
- (b) monitor boards and police forces to ensure that they comply with prescribed standards of service;
- (c) Repealed: 1995, c. 4, s. 4(1).
- (d) develop and promote programs to enhance professional police practices, standards and training;
- (e) conduct a system of inspection and review of police forces across Ontario;
- (f) assist in the co-ordination of police services;
- (g) consult with and advise boards, community policing advisory committees, municipal chiefs of police, employers of special constables and associations on matters relating to police and police services;
- (h) develop, maintain and manage programs and statistical records and conduct research studies in respect of police services and related matters;
- (i) provide to boards, community policing advisory committees and municipal chiefs of police information and advice respecting the management and operation of police forces, techniques in handling special problems and other information calculated to assist;
- (j) issue directives and guidelines respecting policy matters;
- (k) develop and promote programs for community-oriented police services;
- (l) operate the Ontario Police College.

**113** The *Act* is consistent with my view that the executive branch of government has no direct responsibility for oversight of operational decisions of the police. The Solicitor General's powers with respect to policing enumerated in the *Ontario Police Services Act* relate to the performance of police forces, not to the performance of individual police officers. Accordingly, I do not see how a requirement of a report of the use of s. 184.4 to the Solicitor General or his or her officials would help to ensure that the provision is used only in accordance with the law, and that the intrusions into privacy under the section are as minimal as possible. While the Solicitor General might choose to collect data concerning the use of s. 184.4 in order to develop programs to enhance professional police practices in the use of s. 184.4, this is very remote from the oversight function that I presume was intended by Davies J. Accordingly, I see no basis to say that the absence of such a reporting requirement can be inconsistent with s. 8 of the *Charter*.

**114** I find the notion that reporting to Parliament is a constitutional requirement equally unsupportable. Indeed, again with great respect, I think that Davies J. has misconceived the purpose of the report to Parliament in s. 195. He posits that its purpose is to give to Parliament an oversight function in respect of intercepting private communications by the police akin to judicial oversight, and concludes that a lack of a reporting requirement undermines police accountability.

**115** I note first of all that s. 195 assigns no oversight function to Parliament upon receipt of a report, nor any guidance as to what Parliament is intended to do with it. Furthermore, I am convinced that any notion that Parliament is intended to provide oversight for the law enforcement responsibilities of the police akin to judicial oversight is constitutionally unsound. Leaving entirely aside the problem with a federal legislature providing an oversight function for provincial police forces, it is quite alien to the function of Parliament to oversee the law enforcement activities of the police.

**116** Moreover, even if Parliament could provide an oversight function akin to judicial oversight, receiving the cumulative interception information required by s. 195, undifferentiated even as to police force, would not provide a means for Parliament to provide oversight that is meaningful. If for example, one police force in Ontario was making disproportionate use of s. 184.4, thereby raising the possibility that that force was misusing the provision, the Parliamentary report would give no hint of even that. Perhaps the clearest indication that the purpose of the Parliamentary report is not oversight arises from a comment made by Davies J. He stated, "[i]t is surprising that Parliament should require reports in judicially authorized circumstances but not when there is no requirement for judicial oversight." The obvious answer is that the Parliamentary report is not intended to provide a substitute for judicial oversight.

**117** What then is the purpose of the Parliamentary report? It should be recalled that the entire wiretapping regime was first enacted in 1974 under the title, the "Protection of Privacy Act." Parliament was no doubt concerned about the nature in which and extent to which this new regime would be used, and how it would impact on privacy. The reporting requirement can be described as a measure of accountability, and to that extent I agree with Davies J., but no more than that. The report, no doubt, was intended to provide Parliament with information to assist it with its natural function:

legislating. Parliament presumably hoped that the report would assist it in determining what revisions would be necessary to fine tune the balance between privacy and law enforcement. But surely a legislative reporting requirement such as s. 195 that does not provide for active oversight of wiretapping generally, far less any particular use of the wiretap provisions, cannot be a constitutional requirement of a reasonable wiretap power within the meaning of s. 8.

**D. IS THE URGENT CIRCUMSTANCE WARRANTLESS INTERCEPTION POWER IN SECTION 184.4 OF THE *CRIMINAL CODE* CONSTITUTIONAL?**

**118** I have concluded that s. 184.4 of the *Criminal Code* is inconsistent with the *Charter* in two respects: (1) the availability of the extraordinary power to intercept without prior judicial approval exceeds what is reasonable within the meaning of s. 8 of the *Charter* because of the overbreadth of the definition of peace officer insofar as it governs who may make use of s. 184.4; and (2) the absence of an obligation to give notice to objects of interception is inconsistent with s. 8 of the *Charter*.

**119** I have further concluded that the first of these deficiencies can be remedied by severance, and the second by reading down. With these deficiencies remedied, I conclude that the overall scheme in s. 184.4 is reasonable. It suffers, of course, from the absence of a requirement of prior judicial approval. But I have already indicated that, like Davies J., I recognize the legitimacy of Parliament's stated goal of attempting to prevent reasonably apprehended serious harm to persons or property, and also recognize that in truly exigent circumstances the privacy rights of individuals may be overridden by such concerns without prior judicial approval, provided that the scheme permitting it contains sufficient safeguards.

**120** In my view, s. 184.4 does have sufficient safeguards to make it reasonable. Of course, no scheme, even one that includes prior judicial approval, can prevent abuse by state actors who are determined to be abusive, who are reckless about the law or who are ignorant of it. But I believe that s. 184.4 is so narrowly tailored to be available only in situations of true exigency, (that is, to prevent an unlawful act that would cause serious harm to a person or to property), and so constrained as to when it can be used, (that is, only when intercepting is "immediately necessary" to accomplish its purpose, when no authorization could be obtained under Part VI with reasonable diligence, and when the perpetrator or victim is a party to the intercepted communication), that it can be said that there are safeguards in place that preclude the police from embarking on fishing expeditions in the hope of uncovering evidence of crime even without a requirement of prior authorization. As a result, there is no basis to strike down s. 184.4, and so I uphold its constitutional validity.

**DISPOSITION**

**121** This application is dismissed.

M.R. DAMBROT J.

cp/e/qljxk/qlprp/qltll/qlhcs/qlaxw

<sup>1</sup> Several pre-trial motions were heard together during this period of time.

<sup>2</sup> Subsequent to drafting these reasons, it came to my attention that on May 13, 2008, Davies J. released a Corrigendum to his judgment in which he acknowledged that s. 184.4(c) only requires that either the perpetrator of the anticipated crime or the victim or intended victim has to be a party to a private communication intercepted pursuant to s. 184.4.