

R. v. Tse, [2012] S.C.R. 16 - Emergency Wiretaps

Facts:

Peter Li was on bail, under house arrest and electronic monitoring as a result of charges for importing and possession of drugs. His daughter, Mary Li, contacted police to report Peter and his wife, Jennifer Pan, missing. Police used section 184.4 of the Criminal Code for an unauthorized warrantless wiretap when Mary Li began receiving calls from her father saying he was being held for ransom. The police obtained a warrant for continued wiretapping under section 186 of the Criminal Code about 24 hours later.

The trial judge, Mr. Justice Davies, of the Supreme Court of British Columbia found that section 184.4 contravened the Charter of Rights and Freedoms. The Crown appealed directly to the Supreme Court of Canada.

The Decision:

The Supreme Court of Canada agreed with the trial judge and gave Parliament 12 months to redraft the section.

The court reviewed the various wiretap provisions in the Criminal Code.

For section 186, a written application and an affidavit are required. The affidavit must include the following: facts relied on to justify the wiretap, particulars of the offence, types of private communications to be intercepted, names, addresses and occupations of persons to be wiretapped, background and history of any prior application. This is potentially a long, labour-intensive process.

Section 188 can be used when the wiretap is needed on an urgent basis. A specially designated peace officer can ask for a 36-hour wiretap authorization from a specially designated judge. The application can be oral, but should be given on oath or solemn affirmation. There should be a verbatim recording or other record. The process though simpler than under section 186, still takes time.

Section 195 provides for an annual statistical report to Parliament about the use of sections 186 and 188 and the prosecutions as a result. Section 196 provides notice to a person who was the object of a wiretap under section 186.

There is no reporting requirement for section 184.4, no consent or pre-authorization, but it is only available in emergency situations to prevent serious imminent harm, for example in hostage takings, bomb threats, armed standoffs, kidnappings.

The police must have reasonable grounds to believe that the threat of harm is immediate and necessary to prevent serious harm. Serious harm as far as property is concerned means a significant degree of harm, for example to a building, bridge or home. The police must obtain a warrant with the least possible delay under the circumstances.

Discussion Questions:

1) This case dealt with the former version of section 184.4, which the SCC found to be unconstitutional. Take a look at the new section 184.4. Did Parliament succeed in redrafting the section to make it constitutional? Why or why not?

2) Do you think the current section 184.4 strikes the appropriate balance between the privacy rights of the individual and society's right to prevent serious harm?

3) What happens when a section of the Criminal Code or another law is found to be unconstitutional?

Relevant Law:

Charter of Rights and Freedoms:

Section 8

Criminal Code of Canada:

Sections 184.4 (present and previous sections)

You may also want to take a look at sections 185, 186, and 188.

Resources:

You can read the entire case at:

<https://www.canlii.org/en/ca/scc/doc/2012/2012scc16/2012scc16html>

You can find the Charter of Rights and Freedoms and The Criminal Code at:

<http://laws.justice.gc.ca/en/>

Section 184.4 is available only if the originator or intended recipient is the perpetrator or the victim or intended victim. It is to prevent an offence. When no offence has been committed, section 188 is not available.

The Supreme Court of Canada found that Section 184.4 struck the appropriate balance between an individual's reasonable expectation of privacy and society's interest in preventing serious harm. However, there was no after the fact notice requirement. Unless there is a prosecution, the targets of the wiretap may never know about it and therefore never be able to challenge the use of the power. Because there was no provision for oversight this violated section 8 of the Charter of Rights and Freedoms.

Relevant Law:

Criminal Code of Canada

Interception in exceptional circumstances

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

- (a) the peace officer believes on reasonable grounds that the urgency of the situation is such that an authorization could not, with reasonable diligence, be obtained under any other provision of this Part;
- (b) the peace officer believes on reasonable grounds that such an interception is immediately necessary to prevent an unlawful act that would cause serious harm to any person or to property; and
- (c) either the originator of the private communication or the person intended by the originator to receive it is the person who would perform the act that is likely to cause the harm or is the victim, or intended victim, of the harm.

Present Section

Immediate interception — imminent harm

184.4 A police officer may intercept, by means of any electro-magnetic, acoustic, mechanical or other device, a private communication if the police officer has reasonable grounds to believe that

- (a) 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 interception is immediately necessary to prevent an offence 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 commit the offence that is likely to cause the harm or is the victim, or intended victim, of the harm.

Charter of Rights and Freedoms

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.