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## COST OF ADMISSION: ONE RUBBER STAMP – EVALUATING THE SIGNIFICANCE OF INVESTIGATIVE NECESSITY IN WIRETAP AUTHORIZATIONS AFTER *R. V. ARAUJO*

Jim Cruess\*

### Introduction

Between 2000 and 2011, Canadian courts denied 4 of 1358 wiretap<sup>1</sup> requests.<sup>2</sup> Such near universal authorization of wiretap requests suggests something is wrong.

The application of sections 185 and 186 of the *Criminal Code*,<sup>3</sup> two provisions that govern the authorization and renewal of audio wiretaps,<sup>4</sup> should reflect both a practical and a policy-based purpose. From a practical perspective, the application of “investigative necessity”—a statutory requirement that the requesting government body demonstrate that other investigative procedures are unlikely to succeed in order to authorize most wiretaps<sup>5</sup>—should distinguish wiretap requests from much less privacy-invasive warranted searches of property. From a policy perspective, sections 185–186, in part through the application of investigative necessity, should properly balance the privacy interests of Canadian residents with the Crown’s interest in the effective investigation and prosecution of crime. As presently drafted and applied, sections 185–186 are failing to reflect both of these purposes.

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<sup>1</sup> For the purposes of this article, the term wiretap will be used to describe all forms of prospective interception of communications, including some which do not require proof of investigative necessity such as video surveillance authorized under a general warrant pursuant to s 487.01 of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

<sup>2</sup> *Annual Report on the Use of Electronic Surveillance 2005* (Ottawa: Public Safety Canada, 2006) [2005 Report]; *Annual Report on the Use of Electronic Surveillance 2010* (Ottawa: Public Safety Canada, 2011) at 7 [2010 Report]; *Annual Report on the Use of Electronic Surveillance 2011* (Ottawa: Public Safety Canada, 2012) at 5 [2011 Report].

<sup>3</sup> *Criminal Code*, *supra* note 1.

<sup>4</sup> Audio wiretaps are the most common means by which police forces are authorized to intercept private communications. The only other common form of intercept requested is video under a general warrant by operation of s 487.01 of the *Criminal Code*, *supra* note 1.

<sup>5</sup> This is not technically the only means by which a requesting State party can prove investigative necessity under s 186 of the *Criminal Code*, *supra* note 1. However, in practice, it is the determinative factor: see Part I.

For decades, wiretaps have been instrumental in the investigation and prosecution of all manner of criminals including murderers<sup>6</sup> and members of complex criminal networks such as drug trafficking rings.<sup>7</sup> Intercepted communications between alleged offenders provide highly reliable information that can, among other things, identify members of criminal organizations, implicate targets in criminal activity, and support the conviction of criminals.

While this technology can be an effective investigative tool, it can also facilitate unnecessary large-scale breaches of the privacy of targeted individuals and their associates, friends, and families. Wiretaps are indiscriminate in the communications they record. A wiretap will intercept and record an innocent conversation with a loved one just as it will record the discussion of a large-scale drug transfer. This indiscriminate privacy infringement is why the *Criminal Code* must carefully circumscribe government use of wiretaps. Without effectively enforced limits and preconditions for the use of wiretaps, privacy will be eroded into a meaningless value. Justice La Forest, for the majority in *R v Duarte*, aptly summarized this risk:

[T]he very efficacy of electronic surveillance is such that it has the potential, if left unregulated to annihilate any expectation that our communications will remain private. A society which exposed us, at the whim of the State to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning.<sup>8</sup>

The *Criminal Code* primarily protects privacy from unnecessary wiretap surveillance by requiring the requesting body to satisfy a member of the judiciary that the following criteria are met before receiving authorization for most wiretaps:<sup>9</sup> (i) there are reasonable and probable grounds to believe an offence<sup>10</sup> has been or is being committed;<sup>11</sup> (ii) the authorization sought will afford evidence of that offence;<sup>12</sup> and (iii) investigative necessity is established.<sup>13</sup> In essence, the establishment of investigative necessity is the mechanism that justifies a wiretap's increased infringement of a target's (and his or her associates') privacy interests relative to a search of property in favour of the Crown's interest in the effective investigation of crime.

Authorizing and reviewing judges are best positioned to maintain the right balance between privacy and investigative interests. It follows that in order to strike an appropriate balance, not only must a judge authorize proposed wiretaps, but he or

<sup>6</sup> See for example: *R v Ebanks*, 2009 ONCA 851.

<sup>7</sup> See for example: *R v Mahal*, 2012 ONCA 673 [*Mahal*].

<sup>8</sup> *R v Duarte*, [1990] 1 SCR 30 at para 22 [*Duarte*].

<sup>9</sup> Some types of wiretap such as consent wiretaps (*Criminal Code*, *supra* note 1, s 184.2), in which one party to the private communication consents to the interception, do not require proof of investigative necessity. The privacy implications of consent wiretaps are less problematic, as the consenting party essentially waives his or her privacy under those circumstances.

<sup>10</sup> The term 'offence' refers only to those offences listed in s 183 of the *Criminal Code*, *supra* note 1.

<sup>11</sup> *Duarte*, *supra* note 8 interpreting the *Criminal Code*, *supra* note 1, s 186(1)(a) which requires that the authorization "would be in the best interests of the administration of justice."

<sup>12</sup> *Ibid.*

<sup>13</sup> *Criminal Code*, *supra* note 1, s 186(1)(b).

she must be willing to reject authorization requests due to the failure to show investigative necessity in the name of privacy over investigative interests in some circumstances.

The additional investigative necessity requirement for authorization of wiretaps is both logical and necessary when the effects of wiretaps are considered against those of normal searches of property. First, as noted, unlike normal search warrants which seize evidence in one location at one point in time, wiretaps record all incoming and outgoing information “like a huge vacuum cleaner, indiscriminately sucking in the relevant with the irrelevant without distinction”<sup>14</sup> for between 60 and over 240 days.<sup>15</sup> To put the effect on privacy in perspective, in one recent case, police intercepted 14,000 communications, of which 83 were deemed relevant and 16 were sought to be admitted as evidence at trial.<sup>16</sup> This massive acquisition of information also violates the privacy of innocent third parties who associate with the target(s) of wiretaps. Second, unlike normal search warrants, wiretaps depend on the absence of notice of the information acquisition to the target in order to succeed. The intercept target is not informed of the wiretap until after its completion.<sup>17</sup>

Like search warrant authorizations, wiretap authorization hearings are performed *ex parte*. No party represents the interests of the target(s). The authorizing judge must make a decision based only on a police affidavit and questions put to the affiant. This creates a substantial risk of unfairness or abuse.<sup>18</sup> It follows that in order to mitigate that risk, the investigative necessity requirement must both be legislatively applicable to a given wiretap request and effectively applied by the judiciary in order to balance privacy and investigative interests.

Prior to 2000, investigative necessity was not applied robustly. Wiretap requests were nearly universally authorized.<sup>19</sup> In 2000, the Supreme Court of Canada in *R v Araujo* sought to revitalize investigative necessity and strike a fair balance between privacy and investigative interests. The Court found that investigative necessity is not met solely because a wiretap is most efficacious,<sup>20</sup> but a wiretap does not need to be a tactic of last resort.<sup>21</sup> Justice LeBel, speaking on behalf of a unanimous Court, held that “[t]he judge should not view himself or herself as a mere rubber stamp”; rather, he or she should take a close look at the material submitted by the applicant to determine if there is “practically speaking, no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry.”<sup>22</sup>

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<sup>14</sup> Law Reform Commission of Canada, *Electronic Surveillance* (Ottawa: Working Paper 47, 1986) at 34.

<sup>15</sup> 2010 Report, *supra* note 2 at 7.

<sup>16</sup> *R v Spackman* (2008), 234 CCC (3d) 24 (Ont SCJ) at para 2.

<sup>17</sup> In some cases, such as organized crime wiretap authorizations for investigations of offences under ss 467.11, 467.12, and 467.13 of the *Criminal Code*, notice may be delayed even further after the end of monitoring: see *Criminal Code*, *supra* note 1, s 196(5).

<sup>18</sup> *R v Bogiatzis* (2003), 108 CRR (2d) 294 at paras 10-15 (Ont SCJ).

<sup>19</sup> See for discussion: Francois Valerioté, “Judicial Authorization for Wiretap: An Illusory Protection” (1980) 12 Ottawa L Rev 215 at 216.

<sup>20</sup> *R v Araujo*, 2000 SCC 65 at para 39 [*Araujo*].

<sup>21</sup> *Ibid* at paras 34-35. Also affirmed by the Ontario Court of Appeal in *R v Schreinert* (2002), 165 CCC (3d) 295 at 305 (Ont CA) [*Schreinert*].

<sup>22</sup> *Araujo*, *supra* note 20 at para 29.

This article seeks to determine whether *Araujo*, as applied by the courts over the last thirteen years, did in fact strike a fair balance between Canada's investigative interests and the privacy interests of its residents in sections 185-186 wiretap authorizations and reviews.<sup>23</sup> Does it impose a sufficiently high standard to authorize privacy-invasive wiretaps relative to traditional searches? On my evaluation, it does neither. Thus, one must also ask: how can its role be reformed to better balance Canadian citizens' privacy with the State's interest in the effective investigation of crimes?

The article will proceed in four parts. In Part I, it will briefly define investigative necessity as it has been interpreted by Canadian case law, noting similarities to wiretap law in the United States and United Kingdom. In Part II, it will examine how investigative necessity has been legislated out of significance in the investigation of some crimes under the *Criminal Code*. Specifically, it looks at legislated exceptions in which investigative necessity need not be proven and the ramifications of those exceptions. In Part III, it will examine the application of *Araujo* based on wiretap authorization statistics and wiretap review jurisprudence since 2000. This analysis will show that investigative necessity as currently applied has little to no effect on the authorization or denial of wiretap requests and their admission as evidence at trial. I assert that courts are unnecessarily favouring the State's interest in criminal investigation and prosecution over the privacy of Canadian residents by failing to apply the investigative necessity requirement in the way the Supreme Court intended in *Araujo*. Finally, Part IV will conclude and propose some preliminary reforms. I suggest that in order to properly balance privacy and investigative interests, changes need only ensure that (i) investigative necessity is always applied for wiretap authorizations, and (ii) investigative necessity is applied in a manner that ensures authorization requests are rejected on the failure to demonstrate it. These proposed reforms seek to ensure that the application of investigative necessity protects the privacy of Canadians from unnecessary surveillance and serves as more than a "rubber stamp" requirement.

## I. The Meaning of Investigative Necessity

Investigative necessity can be met by any one of three disjunctive grounds listed in subsection 186(1)(b) of the *Code*, namely that:

- (i) Other investigative procedures have been tried and failed;
- (ii) Other investigative procedures are unlikely to succeed; or
- (iii) 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.<sup>24</sup>

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<sup>23</sup> One commentator argued that the Court did not go far enough in *Araujo*. He argues that despite its apparently strong language, *Araujo* represents only an aspirational statement of the law with no real effect on wiretap authorizations or admission of wiretaps into evidence at trial: Nathan Forester, "Electronic Surveillance, Criminal Investigations, and the Erosion of Constitutional Rights in Canada: Regressive U-Turn or a Mere Bump in the Road Towards *Charter* Justice" (2010) 73 Sask L Rev 23 at 66.

<sup>24</sup> *R v Smyk* (1993), 86 CCC (3d) 63 at 70 (Man CA).

In practice, only one ground is regularly contended: that other investigative procedures are unlikely to succeed. Police need not prove the first ground—that all other investigative procedures are unlikely to succeed—because the Supreme Court in *Araujo* held that investigative necessity is not a test of last resort.<sup>25</sup> The third ground, urgency, is rarely argued because historically police could obtain an emergency wiretap under section 188 without proving investigative necessity if the situation truly needed expeditious investigation.<sup>26</sup> Thus, the determination of whether no other reasonable alternative methods of investigation exist will usually hinge on whether methods that were not tried were unlikely to succeed.

In determining whether other reasonable methods of investigation exist, the authorizing judge must evaluate the request based on the objective of the investigation.<sup>27</sup> For example, while planting an undercover officer close to a suspected drug trafficker may gather evidence against that trafficker, it may not be a reasonable investigative tactic to identify the leaders of the trafficking ring and acquire evidence of their guilt.<sup>28</sup>

The authorizing judge must also consider the risks and realities associated with other means of investigation.<sup>29</sup> Thus, the investigation of some crimes, such as drug trafficking, may preclude otherwise reasonable practices, such as the use of an undercover officer or police agent, because trafficking groups can be expected to employ counter-intelligence and violence to avoid police detection.<sup>30</sup>

Finally, investigative necessity must be considered with regard to the investigation as a whole, rather than evaluated as it concerns each named person in the authorization request.<sup>31</sup> Thus, an accused cannot successfully argue that the police should have executed a search warrant on his or her house, rather than seek a wiretap, if the search would not lead to evidence against other members of the drug-trafficking ring.<sup>32</sup>

The Canadian investigative necessity requirement is similar in form to the requirement in force in the United Kingdom, which says that the Secretary of State<sup>33</sup> must consider “whether the information which is thought necessary to obtain under the warrant could reasonably be obtained by other means.”<sup>34</sup>

In the United States, the necessity required to authorize wiretaps is also similarly worded, requiring that normal investigative procedures have been tried and have

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<sup>25</sup> *Araujo*, *supra* note 20 at para 29.

<sup>26</sup> This provision was struck down in 2012 by the Supreme Court of Canada in *R v Tse*, 2012 SCC 16. The Court held that s 184.4 of the *Criminal Code* violated the s 8 *Charter* right against unreasonable search or seizure because it did not provide a mechanism for oversight or notice to the person whose communications were intercepted. The breach could not be saved by s 1. However, the Court made clear that an emergency wiretap provision could be valid under s 8 in exigent circumstances. Thus, in future, police will likely retain a similar power when a new emergency wiretap provision is legislated.

<sup>27</sup> *Araujo*, *supra* note 20 at para 43; *R v Paris* (2006), 208 OAC 385 at para 17 (CA) [*Paris*].

<sup>28</sup> See for example *R v Adam*, 2006 BCSC 382 at paras 137-140 [*Adam*].

<sup>29</sup> *R v Wasfi*, 2006 BCCA 55 at para 49 [*Wasfi*].

<sup>30</sup> *Ibid.*

<sup>31</sup> *R v Pham*, 2002 BCCA 247 at para 85 [*Pham*] citing *R v Tahirkheli* (1998), 130 CCC (3d) 19 at 22 (Ont CA); *Mahal*, *supra* note 7.

<sup>32</sup> *Pham*, *supra* note 32 at para 43.

<sup>33</sup> In the UK, the Secretary of State and his or her delegated agents are responsible for wiretap authorizations, rather than a judge.

<sup>34</sup> *Regulation of Investigatory Powers Act 2000* (UK), 2000, c 23, s 5(4).

failed, reasonably appear to be unlikely to succeed if tried or are too dangerous.<sup>35</sup> However, in the United States, the requesting body must establish necessity in order to satisfy the requirements of the Fourth Amendment protecting against unreasonable searches and seizures.<sup>36</sup>

Section 8 of the *Charter*,<sup>37</sup> unlike the United States' Fourth Amendment, does not mandate proof of investigative necessity in order to authorize wiretaps.<sup>38</sup> This fact is reflected in the diminished significance of investigative necessity in the Canadian *Criminal Code* since sections 185(1.1) and 186(1.1) entered into force.

## II. Diminished Significance of Investigate Necessity in the *Criminal Code*

Investigative necessity no longer must be proven to authorize all section 186 wiretaps. Sections 185(1.1) and 186(1.1) now state that investigative necessity need not be proven to authorize a wiretap for the investigation of (i) terrorism offences, (ii) offences committed for the benefit of, at the direction of or in association with a criminal organization, or (iii) offences under sections 467.11-467.13 of the *Code*. Trial and appellate courts across Canada have held these exceptions to be constitutionally valid.<sup>39</sup> The practical effect of these exceptions on wiretap authorizations is significant. In essence, they have relegated investigative necessity to insignificance in many of the cases in which wiretaps are traditionally sought.<sup>40</sup>

Parliament legislated that investigative necessity need not be proven for offences associated with criminal organizations in 1997.<sup>41</sup> The criminal organization provisions took their current form by amendment in 2001<sup>42</sup> due to a concern that the 1997 definition of 'criminal organization' was too narrow and thus easily avoided by criminals.<sup>43</sup> The result was a broader definition that allows police to more easily wiretap organized groups of suspected criminals. The terrorism exception was also added in 2001.<sup>44</sup> Both the first criminal organization and the anti-terrorism amending statutes note in their preambles that the challenges of combating and deterring these activities require an enhanced capacity to investigate them. Each also came on the heels of a significant criminal event that caused public out-

<sup>35</sup> Title III, 18 USC s 2518(3)(c).

<sup>36</sup> Confirmed by LeBel J. in *Araujo*, *supra* note 20 at para 32. Also see DF Cook, "Electronic Surveillance, Title III, and the Requirement of Necessity," (1973) 2 Hast CLQ 571.

<sup>37</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>38</sup> *R v Lergie*, 2010 ONCA 548 [*Lergie*]; *R v SAB*, [2003] 2 SCR 678.

<sup>39</sup> *R v Doiron*, 2007 NBCA 41 at paras 43-46, leave to appeal to SCC refused [2007] SCCA No 413; *R v Lucas*, 2009 CanLII 27835 (Ont SCJ); *R v NY*, 2008 CanLII 15908 (Ont SCJ); *R v Pangman*, [2000] 8 WWR 536 at 551-561 (Man QB).

<sup>40</sup> A substantial amount (from 2006-2010, approx. 20% conservatively) wiretap authorizations arise in terrorism or organized crime cases with multiple perpetrators. See below for discussion.

<sup>41</sup> *An Act to amend the Criminal Code (criminal organizations) and to amend other Acts in consequence*, SC 1997, c 23, s 6.

<sup>42</sup> *An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts*, SC 2001, c 32, s 6.

<sup>43</sup> *R v Terezakis*, 2007 BCCA 384 at para 9 [*Terezakis*].

<sup>44</sup> *Anti-terrorism Act*, SC 2001, c 41, s 6.1.

cry<sup>45</sup> and ‘moral panic’.<sup>46</sup> First was the fear of organized crime in the wake of a gang war; next was the fear of terrorism after 9/11. These moral panics resulted in a legislative ratcheting effect, such that the barriers to authorizing a wiretap were incrementally removed in response to a collective moment of fear. The moral panic eventually subsided, but the changes remained. As a result, wiretaps are authorized in the same way as a traditional search for anyone about whom there are reasonable and probable grounds to believe he or she is committing one of the types of offences listed in sections 185(1.1) and 186(1.1). When a wiretap can be authorized on the same grounds as a search of property, why would the police tip their hand to the target with a traditional search and its notice requirements? The same grounds can allow for greater information acquisition (with concomitant greater privacy infringement). Nowhere is this exception of more concern than in the investigation of offences committed in violation of sections 467.11, 467.12, and 467.13 of the *Criminal Code*.<sup>47</sup>

The provisions of sections 467.11-467.13 create a hierarchy of offences associated with criminal organizations.<sup>48</sup> Participating in or contributing to any activity of a criminal organization for the purpose of enhancing its ability to commit crimes (section 467.11) bears the lowest stigma; committing an indictable offence for the benefit of such an organization (section 467.12) is more serious; and instructing a person to commit an offence for the benefit of a criminal organization (section 467.13) is the most serious. The effect of the legislative immunity from proving investigative necessity with regard to these offences is strongest with regard to section 467.11.

Under section 467.1 of the *Criminal Code*, a criminal organization must (i) be composed of three or more people in or outside Canada, (ii) have as one of its main purposes or main activities, the facilitation or commission of one or more serious offences<sup>49</sup>, and (iii) likely gain a material benefit from the commission of such serious offence(s), or such a benefit is gained by at least one of its members.<sup>50</sup> The

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<sup>45</sup> The organized crime legislation was passed on the eve of a federal election around which time the Quebec Attorney General issued a plea for new measures to address a violent and protracted fight between the Hell’s Angels and Rock Machine in Quebec, which had recently resulted in the death of an innocent young boy on a public street from a bomb blast (D Stuart, “Politically Expedient But Potentially Unjust Criminal Legislation against Gants,” Alan D Gold Collection of Criminal Law Articles, ADGN/RP-056 (1997) (Law Society of Upper Canada Session on Criminal Law and the Charter, September 27, 1997), and Colloquium on Organized Crime, International Association of Penal Law in Egypt, November 1997 at paras 3-7). The other came months after September 11, 2001, a date on which al-Qaeda operatives launched four coordinated terror attacks against the United States.

<sup>46</sup> A moral panic is a time in which “[a] condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved (or more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible.” Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and the Rockers* (London: MacGibbon and Kee, 1972) at 9.

<sup>47</sup> *Criminal Code*, *supra* note 1.

<sup>48</sup> Terezakis, *supra* note 44 at para 11 citing *Criminal Code*, *supra* note 1, s 467.1.

<sup>49</sup> A serious offence is defined as an indictable offence with a maximum punishment of five or more years in prison.

<sup>50</sup> *Criminal Code*, *supra* note 1, s 467.1.

criminal organization cannot form randomly.<sup>51</sup> The Supreme Court of Canada in *R v Venneri* determined that a flexible approach to this definition is appropriate, but made clear that the term “organized,” connoting some degree of structure and coordination, limits the scope of groups to which the definition can be applied.<sup>52</sup>

The problem with this definition of criminal organization with regard to wiretap authorizations is its breadth. Practically, for police to dodge the obligation to prove investigative necessity, they need only show that the target is “associated” with a criminal organization. Some offences such as drug trafficking are regularly perpetrated by an organized group of at least three people in which at least one member stands to benefit. A close association with such a group may show reasonable and probable grounds that a person contributes to that organization for the purpose of enhancing its ability to commit crime. Thus, an innocent party’s mere association with this kind of group may open him or her up to the large-scale acquisition of personal information by the State based only on the elements of a normal search warrant.<sup>53</sup> The breadth of individuals to whom section 467.11 opens wiretap investigation seriously decreases the privacy protection provided by investigative necessity to criminally innocent parties from surveillance or to people who would otherwise only be subject to a less invasive search of property.

A Member of Parliament argued this erosion of privacy was necessary in order to “relieve police officers of a paper burden.”<sup>54</sup> That Member supported making the change “because when investigating organized crime, it is *almost* always obvious that [wiretapping] is a last resort.”<sup>55</sup> Thus, investigative necessity, which was intended to protect residents from the power of the State to surreptitiously intrude upon and record their lives, was eliminated for many residents in order to save the police the time and effort it takes to show wiretapping is really necessary.

The efficacy of this avenue to authorize wiretaps was not lost on the police. Between 2006 and 2010, from a total of 553 wiretap requests, the police made 97 requests to wiretap target(s) contributing to a criminal organization, 90 for commission of an offence in relation to a criminal organization and 44 for instructing the commission of an offence for the benefit of a criminal organization.<sup>56</sup> In combination with the (at least) 22 authorizations granted for terrorism-related offences,<sup>57</sup> it is clear that the privacy protection provided by investigative necessity has been significantly diminished, thus exposing residents to an increased risk of large-scale privacy violations in the name of State criminal investigation. This finding represents the first indicator that investigative necessity does not play a significant role in Canadian wiretap law. The application of investigative necessity (in cases where it still applies) is the second, and much more concerning, indicator

<sup>51</sup> *Ibid.*

<sup>52</sup> *R v Venneri*, 2012 SCC 33 at paras 28-31, 35.

<sup>53</sup> Even s 467.12 of the *Criminal Code*, *supra* note 1, which bears a higher stigma than s 467.11, does not require membership in the criminal organization to meet the *actus reus* of the offence: *Venneri*, *supra* note 53 at para 51.

<sup>54</sup> *House of Commons Debates*, 35th Parl, 2nd Sess, (21 April 1997) at 9976 [House Debates].

<sup>55</sup> *Ibid* [emphasis added].

<sup>56</sup> 2010 Report, *supra* note 2 at 11. It should be cautioned that most surveillance authorizations are granted in relation to more than one offence, so there was likely overlap in the number of individual wiretaps authorized under this statutory exception.

<sup>57</sup> *Ibid* at 8-9.

that investigative necessity no longer has a significant role and thus is not effectively balancing investigative and privacy interests.

### III. The Legacy of *Araujo*: Investigative Necessity as Applied by the Courts

Investigative necessity is applied by the courts in two different contexts. First, it is applied during the initial *ex parte* hearing to determine if a wiretap will be authorized or renewed. Second, it can be applied by a reviewing judge in a *voir dire* to determine the admissibility of wiretap evidence. At both of these levels, statistics and jurisprudence show that investigative necessity plays a very small role in limiting the authorization of wiretaps or the use of wiretap evidence at trial.

#### A. Initial Wiretap Authorizations

Statistics from the ten years following *Araujo* are so stark that they suggest judicial rubber-stamping of wiretap requests remains the norm. From 2001 to 2005, two of 689 wiretap authorization or renewal requests were denied.<sup>58</sup> Between 2006 and 2010, two of 553 requests were denied.<sup>59</sup> In 2011, zero of 116 were denied.<sup>60</sup>

Skeptics would argue that these chilling statistics are justifiable because wiretaps improve the ability of the State to both investigate and prosecute crime. However, the figures show that prosecution of cases involving wiretaps is far from a successful endeavour despite courts' almost universal admission of wiretap evidence.<sup>61</sup> While the 551 successful wiretap requests between 2006 and 2010 resulted in the arrest of 2617 people whose identities became known as a result of the wiretap,<sup>62</sup> only 453 (17.3%) were convicted.<sup>63</sup> Proceedings were pursued against at least 2126 of those individuals.<sup>64</sup> From that conservative estimate of the total individuals against whom proceedings were commenced, only 21.3% were convicted. Of particular concern is the fact that in 2009 and 2010, only 22 of 502 people arrested (4.4%) were successfully convicted.<sup>65</sup> In 2011, 294 people whose identity became known from an interception were arrested.<sup>66</sup> Proceedings were pursued against at

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<sup>58</sup> 2005 Report, *supra* note 2. Of those 689, 70 were for s 467.11, 46 for 467.12, and 41 for 467.13, all of which do not require proof of investigative necessity. Another 91 were for either video or emergency audio wiretaps, neither of which requires the affiant to establish investigative necessity.

<sup>59</sup> 2010 Report, *supra* note 2 at 5-6. One hundred twenty-seven of the requests in this range were for either video or emergency audio wiretaps.

<sup>60</sup> 2011 Report, *supra* note 2. Thirty-five of this total were for video surveillance.

<sup>61</sup> See Part III.B for detailed discussion.

<sup>62</sup> 2010 Report, *supra* note 2 at 13.

<sup>63</sup> *Ibid* at 16.

<sup>64</sup> 2010 Report, *supra* note 2 at 14-15. The term 'at least' is used due to the nature of the data available. The reports divide the persons against whom proceedings were commenced between those persons who were identified and not identified in the authorization. Within each of those two categories, the reports divide between people charged with (i) an offence specified in the authorization; (ii) and offence for which an authorization may be given, but was not specified in the authorization; and (iii) an offence for which no authorization may be given. The total of 2126 individuals is the sum of only those people charged with an offence specified in the authorization. In other words, that number assumes that all people charged with an offence in category (ii) or (iii) were also charged with an offence specified in the authorization. It is the most conservative figure at which one could arrive.

<sup>65</sup> *Ibid*.

<sup>66</sup> 2011 Report, *supra* note 2 at 13.

least 234.<sup>67</sup> Zero had been convicted by the time Public Safety Canada released its 2011 Annual Report.<sup>68</sup> These figures are nearly 50% below the Public Prosecution Service of Canada's 2008 conviction rate of 69.4%.<sup>69</sup>

While alarming, these numbers cannot simply be taken at face value. The discrepancy could at least in part be explained by the fact that wiretaps are often used on complex cases which are more difficult to prove in court. However, an over 50% gap certainly suggests that the benefit wiretaps provide through crime investigation, prevention and prosecution is at least more limited than one would assume, thus diminishing the utility of the large-scale invasion of privacy.

The statistics above suggest that the courts may not be applying investigative necessity robustly during first instance *ex parte* wiretap authorizations. In fact, the statistics suggest the possibility that the entire wiretap authorization process may be an illusory protection of privacy interests. In addition, the benefit police and prosecutors gain from the use of wiretaps is significantly smaller than one would assume.

This insignificance of investigative necessity is mirrored in the review of authorizations by trial judges. In fact, other rules concerning the review of wiretaps and admission of evidence obtained in breach of the *Charter* actually further diminish the significance of investigative necessity, even when courts suspect or explicitly find that it has not been proven. The result is that investigative necessity is a nearly meaningless protection after the initial wiretap authorization is granted.

### B. Review of Authorizations at Trial

On review, investigative necessity has proven to be at least as insignificant as it is in initial authorizations. Out of approximately 75 cases decided after *Araujo* that were reviewed, four final decisions found a failure to meet investigative necessity.<sup>70</sup> Of those four, illegally obtained wiretap evidence was admitted in two because of the subsequent *Charter* subsection 24(2) analysis under *Grant*<sup>71</sup> and *Collins*.<sup>72</sup> Only one reported case resulted in the exclusion of evidence.<sup>73</sup> These statistics alone suggest that investigative necessity is not serving its role protecting Canadians' privacy from unnecessary wiretap surveillance.

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<sup>67</sup> *Ibid* at 14-15.

<sup>68</sup> *Ibid* at 16-17. 2011 figures should be viewed cautiously as many trials may not have concluded by the time of writing.

<sup>69</sup> Hong Kong, Legislative Council Secretariat, *Conviction Rates in Selected Places* at 2, online: <<http://www.legco.gov.hk/yr09-10/english/sec/library/0910in19-e.pdf>>. The PPSC's conviction rate is not a perfect comparison to the wiretap conviction rate since crimes under the jurisdiction of provincial Attorneys General may involve wiretaps. It is, however, an acceptable approximation due to the use of wiretaps predominantly in drug trafficking, terrorism, and organized crime cases, all of which are under federal jurisdiction.

<sup>70</sup> *Spackman*, *supra* note 17; *R v Eatmon (Charter Application)*, 2007 NBQB 204 [*Eatmon*]; *R v Fraser*, 2010 BCSC 344 [*Fraser IN*]; *R v Terezakis*, 2005 BCSC 821 [*Terezakis Application*].

<sup>71</sup> *R v Grant*, 2009 SCC 32 [*Grant*]; wiretap admitted in *R v Fraser*, 2010 BCSC 1238 [*Fraser Charter*].

<sup>72</sup> *R v Collins*, [1987] 1 SCR 265; wiretap admitted in *Eatmon*, *supra* note 71.

<sup>73</sup> *Spackman*, *supra* note 17. In that case, the *Charter* admissibility was determined under the *Collins* test, which was subsequently overruled by the Supreme Court of Canada in *Grant*, *supra* note 72. The *Charter* analysis from the fourth case was unreported.

### B1. Legal Barriers

The parameters under which a trial judge must operate when reviewing a wiretap authorization all but ensure wiretap evidence will be admitted. First, the trial judge has the discretion to allow the Crown to amplify the police affidavit by presenting evidence in order to buttress a defective warrant.<sup>74</sup> This practice was expressly maintained, though limited, by *Araujo*. The Court in *Araujo* cautioned that “amplification cannot go so far as to remove the requirement that the police make their case to the issuing judge, thereby turning the authorization procedure into a sham.”<sup>75</sup> Though *Araujo* greatly restricted the Crown’s ability to amplify the basis for a search warrant and cautioned the courts to be careful not to allow amplification to subvert the requirement for prior authorization,<sup>76</sup> the sheer maintenance of amplification to some extent lets the Crown, in those circumstances where it applies, “attempt to explain away the illegality of the actions of the police by way of amplification.”<sup>77</sup> It is another mechanism which diminishes the significance of a failure to show investigative necessity in an initial request hearing.

Second, the trial judge is prohibited from conducting a *de novo* review of the authorizing judge’s decision. *R v Garofoli* established that the reviewing judge may only find that a statutory requirement was not met if the authorizing judge “could not have granted the authorization” based on the record before them *as amplified*.<sup>78</sup> Thus, in addition to modifying the initial record through amplification, the trial judge must give deference to the authorizing judge’s decision from a hearing in which only one side was represented.<sup>79</sup> This standard of review only further decreases the likelihood that a reviewing court will determine investigative necessity was not met, much less exclude evidence.

Finally, as noted, if the trial judge finds that investigative necessity was not met, he or she still must undergo a subsection 24(2) *Charter* analysis to determine if the evidence should actually be excluded. It is by no means guaranteed that the evidence will be excluded either, as only one case of those surveyed actually resulted in the exclusion of wiretap evidence.<sup>80</sup>

Each of the above successive barriers makes it increasingly less likely that improperly obtained wiretap evidence will be excluded at trial. These barriers ensure that investigative necessity carries very little practical significance to exclude wiretap evidence at the review stage of analysis even if it was not established at the initial wiretap request hearing. However, the jurisprudence also shows a deeper

<sup>74</sup> Glen Luther, “Of Excision, Amplification and Standing: Making Sense of the Law of Evidence in the Context of Challenges to Warranted Searches” (2006) 11 Can Crim L Rev 1 at 2. Defence may also amplify the affidavit before the trial judge, but this is a normal practice, as the trial is usually the first time at which the defence can argue against the sufficiency of information to authorize a wiretap authorization. In addition, unconstitutionally or erroneously obtained information may be excised from the record based on the accused’s amplification of the record. These errors, too, do not vitiate the authorization. *Paris*, *supra* note 27 at para 8.

<sup>75</sup> *Araujo*, *supra* note 20 at para 59.

<sup>76</sup> Luther, *supra* note 74 at 3.

<sup>77</sup> *Ibid* at 4-5.

<sup>78</sup> *R v Garofoli*, [1990] 2 SCR 1421 at 1452 [emphasis added].

<sup>79</sup> See for example *R v Blizzard*, 2003 NBQB 420 at para 13; *R v Valentine*, 2009 CarswellOnt 8868 at paras 28-29 (SCJ); *R v Chan*, 2001 BCSC 831 at para 43.

<sup>80</sup> *Spackman*, *supra* note 17.

concern. A practice of deference to the police has developed which results in findings that investigative necessity is met essentially on the word of the requesting officer(s) or their agent both at *ex parte* hearings and on review.

### B2. Application of Investigative Necessity in Reasons

Deference to the police has primarily manifested itself in wiretap case law in two ways.<sup>81</sup> Both have the capability to mislead judges to believe that there are no reasonable alternative methods of investigation remaining when other reasonable methods exist.

First, in most cases, broad investigative objectives allowed the police to successfully argue wiretaps were the only reasonable method of investigation available. Generally, so long as there were reasonable and probable grounds the targeted individual(s) were involved in the alleged offence(s) with other people, investigative necessity was found to be met.<sup>82</sup> For example, a defence argument that police should have inserted an undercover officer before seeking a wiretap was rejected in multiple cases because the undercover officer could not discover the full range of associates in a drug trafficking ring that would be found with a wiretap.<sup>83</sup> Even when a police officer had been highly successful in infiltrating a drug ring as an undercover agent, the breadth of the objective to uncover other parties involved in the ring was sufficient to meet investigative necessity.<sup>84</sup>

This kind of deference has led to acceptance of requesting affidavits that on their face do not meet the plain meaning of investigative necessity. In *R v Ahmed*, the British Columbia Court of Appeal upheld a decision that investigative necessity was met in a case where an undercover operation was proceeding well.<sup>85</sup> The affidavit filed in support of the authorization request stated:

*Notwithstanding that the undercover operation component of this investigation is proceeding favourably at this time, I believe there is a requirement for a full Authorization to intercept private communications because a crucial component of the undercover operation is the relationship the undercover operator has with the targets of the investigation. I believe the targets will usually speak to associates about their relationship with the undercover operators, often times making comments which clearly demonstrate how the targets view the undercover operators. This information is extremely valuable to personnel planning and directing the undercover operation as it allows them to accurately*

<sup>81</sup> In order to determine trends in the case law, approximately 75 cases from across Canada were surveyed.

<sup>82</sup> In fact, one of the only cases in which a broad objective was rejected is *Spackman*. That case concerned a single murder involving two accused. The Crown theory that the investigation concerning conspiracy to commit the murder would require a more complex understanding of the roles played by each of the two parties (by listening to their communications with third parties) was rejected: *Spackman*, *supra* note 17 at para 39. As there were only two people suspected to be involved in the offence, the broad investigative objective argument failed.

<sup>83</sup> *Adam*, *supra* note 29 at paras 137-140. Also see *Wasfi*, *supra* note 30 at para 34; *R v Courtoreille*, 2004 BCSC 834; *R v Ciancio and Lees*, 2006 BCSC 1717; *R v Pham*, 2009 CanLII 60792 (Ont SCJ) [*Pham Ontario*]; *R v Alcantara*, 2011 ABQB 719; *R v Sanghera*, 2012 BCSC 1197.

<sup>84</sup> *R v Williams*, 2003 CanLII 18484 at paras 7-9 (Ont CA).

<sup>85</sup> *R v Ahmed*, 2011 BCCA 254.

assess the state of mind of the target, to plan future scenarios to address the credibility concerns and also to get advance warning if there are concerns for the safety of the undercover operator. Furthermore, it provides the best evidence at trial should the accused put forth a defence he was aware the undercover operators were police officers.<sup>86</sup>

The affidavit essentially argues that a wiretap is requested to support an already successful, ongoing undercover operation. Rather than demonstrate there is no other reasonable alternative tactic, the RCMP showed exactly how another tactic was succeeding, and requested a wiretap in support of it. The Court of Appeal held that investigative necessity was met because other procedures alone were unlikely to provide the full extent of activities of the target and his associates.<sup>87</sup>

The case law shows that a broad investigative objective can effectively eliminate the viability of any investigative tactic other than a wiretap in the eyes of the courts. By pleading that such an objective is the purpose of a wiretap, the requesting organization will likely not have to meaningfully justify the need for a wiretap when other aspects of an investigation are proceeding well.

Second, even if a broad objective does not eliminate all other alternative methods of investigation, judges have demonstrated a willingness to defer to the opinion of the requesting police officer if it is at all supported by a reason. The Ontario Court of Appeal in *R v Paris* endorsed this statement from an Ontario High Court judgment:

I think that on such an application the judge would be entitled, if he or she saw fit to do so, to place considerable weight on the police officer's opinions as to the probable success of various types of possible investigative procedures in different types of cases. *I hazard the view that police officers probably know more about such matters than most judges.*<sup>88</sup>

Acceptance of a police officer's opinion is certainly not always improper. The problem is not with a properly weighed decision to rely on a police officer's evaluation of whether an investigative tactic would be effective, but rather how often the courts have seen fit to place significant weight on an officer's stated opinion. The risk that judges will have their role as the trier of fact usurped to some degree is no different from the risk associated with expert evidence.<sup>89</sup> A trier of fact is more likely to accept an expert's opinion than inquire into a technical area about which they know little. That is why the admission of expert evidence is limited in other areas of law. The police are experts in the investigation of crime. The risk of the expert usurping the trier's role is equally real in wiretap law as it is in any other areas in which an expert testifies. Reliance on police opinion risks shifting the analysis from the reasonableness of alternative methods of investigation to the believability of police reasons, a standard that is much easier for the requesting body to meet.

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<sup>86</sup> *Ibid* at para 18 [emphasis added].

<sup>87</sup> *Ibid* at para 32.

<sup>88</sup> *Paris*, *supra* note 27 at para 22 citing *R v Ho*, [1987] OJ No 925 at 8 (HC) [emphasis added]; also see *R v Dixon*, 2012 ONSC 181 at para 68.

<sup>89</sup> See *R v Mohan*, [1994] 2 SCR 9 for discussion of policy concerns and the current test governing the admission of expert evidence.

This concern is brought to life by the case law. In *R v Pham*,<sup>90</sup> the trial judge accepted a police officer's assertion that surveillance of non-public parts of an airport was not a reasonable alternative because all airport workers, including those involved in a drug trafficking ring, knew exactly who was supposed to be on shift at any given time.<sup>91</sup> The judge also accepted the assertion that search warrants of known parties to the offence against whom the police had reasonable and probable grounds to search would not have yielded information about the leaders of the organization even though one of those leaders' property could be searched.<sup>92</sup>

In *R v Schreinert*, similar faith was placed in police opinion. In *Schreinert*, the Ontario Court of Appeal upheld a wiretap authorization despite the fact that police (i) did not attempt to infiltrate a drug ring, (ii) did not attempt to obtain a search warrant for a suspected drug dealer with whom the accused had dealings, (iii) undertook minimal surveillance of relevant locations, (iv) declined to plant an undercover agent in the organization because it would take too much time, and (v) declined to seek cooperation from another police service that could have assisted in the investigation "for political reasons."<sup>93</sup>

The only end to this deference to police opinion came when police either (i) gave the Court no reason to believe an investigative method would be unlikely to succeed, (ii) inexplicably chose not to undertake common sense elements of police investigation or (iii) acted in bad faith. In *R v Fraser*, the police simply made conclusory statements that there were no police agents in the targeted organization nor was it likely that either of two informants within the group would be able to introduce an undercover operator.<sup>94</sup> Thus, there was nothing the Court could believe to explain why these were not reasonable alternative methods. In *R v Spackman*, the police inexplicably decided not to undertake a search of the accused's vehicle to which he consented, and chose not to interview relevant witnesses providing no reason for the conduct.<sup>95</sup> In *R v Eatmon* and *R v Terezakis*, a police officer went even further and actually hid information from either the wiretap requesting officer or the authorizing judge,<sup>96</sup> thus clearly demonstrating bad faith. In all of these cases, there was no factually viable explanation for the reviewing judge to believe. These were the only four of approximately 75 wiretap review cases surveyed in which a court did not uphold an initial finding that investigative necessity was met.

In many other cases surveyed, unnecessary deference to police investigative experience effectively lowered the investigative necessity requirement from "no reasonable alternative forms of investigation" to "no believable reasons provided"<sup>97</sup>

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<sup>90</sup> *Pham Ontario*, *supra* note 85.

<sup>91</sup> *Ibid* at paras 68-69.

<sup>92</sup> *Ibid* at paras 72-75.

<sup>93</sup> *Schreinert*, *supra* note 22.

<sup>94</sup> *Fraser IN*, *supra* note 71 at paras 61-63.

<sup>95</sup> *Spackman*, *supra* note 17 at paras 42-49, 85.

<sup>96</sup> In *Eatmon*, an officer effectively hid the fact that the accused offered to provide a statement with regard to the manslaughter charge with which he was associated (*Eatmon*, *supra* note 71 at paras 82-83, 87); in *Terezakis*, a police officer unsuccessfully claimed he believe a concurrent investigation into the drug ring they were investigating was only a possibility to be directed at low-level activity (*Terezakis Application*, *supra* note 71 at para 43).

<sup>97</sup> In this case, a broad investigative objective is another form of reason justifying the choice not to use an investigative method.

for choosing not to undertake an investigation. The application of investigative necessity in this manner both fails to properly apply the Supreme Court of Canada's reasoning in *Araujo* and unfairly favours the investigation of crimes over privacy.

#### IV. Conclusions and Recommendations to Reform Investigative Necessity

The above analysis shows that investigative necessity gives no more protection of privacy now than it did before *Araujo*. As it was applied, the Supreme Court's call to make investigative necessity more than a "rubber stamp" requirement has failed to have a significant effect.

Investigative necessity need not be proven in a significant percentage of wiretap cases ( $\approx 20\%$  conservatively) due to subsections 185(1.1) and 186(1.1) of the *Criminal Code*. Even when it is applied, almost no authorization requests are rejected for failure to meet investigative necessity at first instance. Upon review, there are significant legal barriers to overcome, such as the *Garofoli*<sup>98</sup> standard of review and the court's decision whether to exclude evidence under subsection 24(2) of the *Charter*, before a court will exclude improperly obtained wiretap evidence. Finally, the courts have shown a tendency to defer to police opinions when finding that no reasonable alternative methods of investigation exist.

This series of hurdles has relegated investigative necessity to a position of near insignificance with regard to the outcome of wiretap authorization requests and cases. At present, investigative necessity barely distinguishes wiretaps from traditional search authorizations. However, that need not be the case. The issues causing the weakness of investigative necessity are primarily in the application (or lack thereof) of the standard rather than the formulation of *Criminal Code* subsection 186(1)(b) or the test to establish it. *Araujo* and subsection 186(1)(b) provide an effective base upon which to determine whether investigative necessity is established. Investigative necessity, if properly applied, can distinguish wiretaps from traditional searches and better balance privacy and criminal investigative interests. The following proposals would serve to breathe some life back into investigative necessity in order that it may serve those two purposes.

##### A. Guidelines and Judicial Education

The creation of internal memoranda or bulletins to educate judges on current police investigative methods would allow the bench to better inquire into the existence of other reasonable alternative methods of investigation. These memoranda would ideally be created by the courts of each province to maintain independence, but could alternatively be provided and updated by credible experts whose materials are reviewed or overseen by senior judges with experience in the area. Such documents should be confidential, so as to ensure they are not used by criminal organizations to structure operations in ways that evade necessary authorizations of wiretaps. Information about investigative techniques could also be disseminated in forums such as judicial education conferences or less formal judicial education

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<sup>98</sup> *Garofoli*, *supra* note 80.

seminars which are commonplace in Canadian courts. Such education materials could provide substance to the Supreme Court's reasoning in *Araujo* by giving courts more tools to determine if there are no other reasonable alternative methods of investigation.

As stated in *R v Paris*, the police know more about investigative methods than judges.<sup>99</sup> However, judges need a sufficient familiarity with police investigative procedure and tactics to properly balance Canadians' privacy interests with State investigative interests.<sup>100</sup> The proposed memoranda, bulletins and education programs could provide explanations of current police investigative methodologies through academic work and vetted materials from police or former police experts if available. As the documents would be kept confidential within the courts, such information could be disseminated to the bench without concern about compromising investigative efficacy. Confidentiality would thus ensure that the courts are better equipped to determine the issue, and ensure that such information is not used to obstruct the police's investigative duties and objectives.

The creation of internal memoranda, bulletins and education programs is fundamentally important to aid judges hearing initial authorization requests. Given the *ex parte* nature of these hearings, triers of fact must be able to inquire into the investigation at a deeper level than would be necessary in an adversarial hearing.

This kind of administrative solution is superior to other possible solutions like calls for the Supreme Court of Canada to review the *Garofoli* standard of review or the admission of evidence under subsection 24(2) of the *Charter*.<sup>101</sup> Updated written materials and education programs can be crafted and organized immediately. There is no need for the right facts to arise for the Supreme Court to reconsider one of its decisions. Issues like the *Garofoli* standard of review may need to be addressed down the road, but they are issues that will require further consideration to craft a better solution.

By drafting guidelines and creating education programs, the courts can begin to re-establish balance between privacy and state investigation today. Such a reform would help to ensure investigative necessity is effectively applied at first instance in wiretap request hearings and in reviews at trial or on appeal.

#### *B. Repeal of subsections 185(1.1) and 186(1.1) of the Criminal Code*

My second proposal lacks the ease and immediate effect of the first, but it is equally important. Investigative necessity is the only thing that distinguishes section 186 wiretap authorizations from traditional searches. Proof of it justifies the increased infringement of privacy that is inherent to wiretaps relative to traditional searches of property, which are limited in temporal and geographic scope. It follows that investigative necessity must be proven in all section 186 wiretap

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<sup>99</sup> *Paris*, *supra* note 27 at para 22 citing *R v Ho*, [1987] OJ No 925 at 8 (HC).

<sup>100</sup> *R v Wong* (1976), 33 CCC (2d) 506 (BCSC) at 18.

<sup>101</sup> It is also worth noting that the *legal community has generally supported the Grant test*. See for example Don Stuart, "Welcome Flexibility and Better Criteria for Section 24(2)" (2009) 66 CR (6th) 82.

authorization hearings.<sup>102</sup> In order for that to occur, subsections 185(1.1) and 186(1.1) of the *Criminal Code*<sup>103</sup> must be repealed.

There is no doubt that terrorism and organized crime must be investigated thoroughly and effectively by Canadian police. However, proving investigative necessity for wiretaps does not meaningfully inhibit that ability. A Member of Parliament argued to remove the requirement because wiretaps are “almost always” the last resort in this type of crime.<sup>104</sup> It is exactly that fact which is why proof of investigative necessity never should have been removed for wiretap requests related to those offences. Organized crime and terrorism investigations are the types *most likely* to meet investigative necessity. Organized criminal and terrorist organizations are often tight-knit groups in which it is hard to plant an undercover police officer or recruit a police agent; they may employ countersurveillance to overcome more traditional forms of investigation; in short, they are difficult to investigate.<sup>105</sup> Removal of the requirement does not significantly benefit the State interest in investigation and prosecution of crime beyond easing the time commitment of preparing part of the wiretap authorization or renewal request affidavit. Therefore, subsections 185(1.1) and 186(1.1) should be repealed in order to recreate a legal distinction between authorizations for wiretaps and traditional searches, two investigative tactics which are markedly different in practice.

### C. Summary

These two reforms represent modest changes that would allow investigative necessity to better protect citizens from unnecessary authorization of large-scale privacy infringement by the State without significantly interfering with the investigation and prosecution of crimes. Each reform targets the evaluation of investigative necessity at the initial hearing by ensuring that the authorizing judge has the knowledge, resources and legislative framework available to properly apply the investigative necessity test established in *Araujo*. They also avoid the need to make massive jurisprudential changes to legal principles like the *Garofoli* standard of review and exclusion of wiretap evidence under section 24(2) of the *Charter*. Without these initial changes, investigative necessity will be relegated to the realm of procedural niceties that lack substantive force. With these changes, the application of investigative necessity will make the judge in a wiretap hearing more than a “rubber stamp.”

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<sup>102</sup> The issue of whether investigative necessity should be proved for other forms of wiretap (i.e. consent wiretaps) is beyond the scope of this paper.

<sup>103</sup> *Supra* note 1.

<sup>104</sup> House Debates, *supra* note 55.

<sup>105</sup> See for example *R v Violette*, 2009 BCSC 1557 at paras 6-78 for discussion of the complex organizational structure of the Hells Angels Motorcycle Club.