Terrorism, Criminal Organizations, and Investigavtive Necessity for Wire-Taps

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Introduction

The police suspect criminal activity. As part of their investigation, they use a "wire-tap". The concept is simple enough. It is the stuff of police dramas, detective sitcoms, and spy novels. "Wire" an informer. "Tap" a target's phones. "Rig" a suspect vehicle with a recording device. The end goal is a worthy one. Electronic surveillance allows the police to advance sophisticated criminal investigations, uncover otherwise unattainable evidence from high-level criminal organizations, and bring criminals to justice.

While the concept is simple enough, the use of a wire-tap gives rise to critical social issues. Unchecked electronic surveillance stands to be the "greatest leveller of privacy ever known".[1] It is an affront to individual privacy and autonomy. In a free and democratic society, we do not permit the police to employ such devices at their unfettered discretion. We require prior judicial authorization. And before a judge will grant such an authorization the police must convince her that there are, "practically speaking, no other reasonable alternative method[s] of investigation".[2] This requirement is called "investigative necessity".

This article argues that ss. 185(1.1) and 186(1.1) run afoul of s. 8 of the *Canadian Charter of Rights and Freedoms*.[3] In removing the

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1. *R. v. Sanelli*, (*sub nom.* R. v. Duarte) [1990] 1 S.C.R. 30, 53 C.C.C. (3d) 1, 74 C.R. (3d) 281 (S.C.C.), at para. 11 (*Duarte*).
2. *Criminal Code*, R.S.C. 1985, c. C-46 (*Criminal Code* all references hereafter to the *Criminal Code* unless otherwise indicated), at s. 185(1)(h); *R. v. Araujo*, [2000] 2 S.C.R. 992, 149 C.C.C. (3d) 449, 38 C.R. (5th) 307 (S.C.C.), at para. 29 (*Araujo*).
3. *Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.)*, 1982, c. 11 s. 8 (*Charter*).

investigative necessity requirement for certain investigations Parliament has offended the right of all Canadian citizens to be free from "unreasonable search or seizure".[4] It has upset the delicate balance between public privacy and the exigencies of law enforcement. It also sends a dangerous message. Our precious freedoms can be readily sold in the interest of administrative efficiency.

Section 8 of the Canadian *Charter* demands police utilize other practical methods of investigation before they resort to electronic surveillance. This matter is of heightened importance given the recent Supreme Court of Canada ruling that electronic conversations, such as text messaging, fall under the wire-tap provisions of the *Criminal Code* and are thus subject to the investigative necessity requirement.[5]

This article addresses the matter in four parts.

(I) First, this article briefly introduces the wire-tap regime. It argues that "investigative necessity" is central to the regime, and demonstrates that the requirement does not present law-enforcement officers with an unduly onerous burden.

(II) Second, this article explores the contours of ss. 185(1.1) and 186(1.1) of the *Criminal Code*. It explains that these subsections remove the investigative necessity requirement for a broad spectrum of investigations related to criminal organizations and terrorism and contends that Parliament's rationale for eliminating the investigative necessity requirement is far from compelling.

(III) Third, this article considers relevant constitutional jurisprudence. It surveys pertinent decisions in which the Supreme Court of Canada strongly suggests that investigative necessity is a constitutional pre-requisite for a wire-tap authorization, but do not directly rule on the issue. It then analyzes a number of lower courts decisions which interpret these Supreme Court decisions in a different manner. However, most lower courts focus on obiter statements from the Supreme Court instead of undertaking independent analysis based on fundamental constitutional principles.

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4. *Ibid.*
5. *R. v. Telus Communications Co.*, (*sub nom.* R. v. TELUS Communications Co.) [2013] 2 S.C.R. 3, 294 C.C.C. (3d) 498, 100 C.R. (6th) 221 (S.C.C.) (*Telus*).

(IV) Fourth, and finally, this article undertakes independent constitutional analysis and argues that these sections are unconstitutional. This article returns to the roots of s. 8 protection. The constitutionally protected right to be free from unreasonable search and seizure requires a case-by-case and principled balancing of public privacy and the exigencies of law enforcement. Sections 185(1.1) and 186(1.1) upset this balance and offend s. 8 because they allow police to resort to electronic surveillance where other methods of investigation are readily available. These sections fail to protect against proliferation of unnecessary electronic surveillance. This erodes the privacy and autonomy not only of police targets, but also of innocent third parties who are inevitably caught in the vast web of electronic surveillance. Moreover, these sections fetter the discretion of an authorizing judge. Even if ss. 185(1.1) and 186(1.1) are upheld, then an authorizing judge maintains, as a guardian of critical constitutional values, a residual discretion and a constitutional duty to consider investigative necessity before authorizing electronic surveillance.

(I) Investigative Necessity in the Wire-Tap Authorization Framework

As a preliminary matter, it is useful to briefly introduce the Canadian wire-tap regime, and explain how "investigative necessity" fits into that regime. While investigative necessity does not present law enforcement with an onerous burden, it is a critical component of a constitutional regime that seeks to maintain a delicate balance between the interest of law enforcement and individual privacy.

The Canadian wire-tap regime is a tangle of legislative provisions, judicial rules, and constitutional imperatives that form somewhat of a "procedural quagmire".[6] There are, however, two unifying principles which animate and bring coherence to the entire endeavour. This body of law seeks to strike a balance between:

(1) The state's interest in detecting and prosecuting criminal activity; and
(2) The interest of all Canadian citizens in retaining privacy and autonomy.[7]

6. *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 60 C.C.C. (3d) 161, 80 C.R. (3d) 317 (S.C.C.), at para. 183 (*Garofoli*).
7. Parliament has made worthy efforts to balance these interests. They have adopted a workable regime. Yet, it is a court of law, as a defender of constitutional rights, which determines whether parliament's regime con-

Canada's wire-tap regime originates in Part VI of the *Criminal Code*. Part VI regulates the manner in which the police are allowed to intercept the private communications of Canadians. The general rule is that it is illegal for *any person* to intercept private communications by way of electronic equipment, as the *Criminal Code* describes it "electro-magnetic, acoustic, mechanical or other device"[8] and has been held to include intercepting "electronic conversations" such as text-based messaging.[9] There is an exception where a police officer is acting pursuant to a valid judicial authorization.[10]

To attain judicial authorization, a police officer must bring an *ex-parte* application, in writing, to a judge.[11] As part of that application, the police officer must tender specific and detailed information about their investigation. They must swear to its truth under oath.[12] Before a judge will grant an authorization, she must generally be satisfied of two things:

(1) there are reasonable and probable grounds to believe that the interception will provide evidence of an offence that is being committed;[13] and,
(2) there are, practically speaking, no other means of investigation available (*i.e.*, "investigative necessity").[14]

Armed with a valid authorization, the police are legally entitled to intercept private communications in accordance with the

forms with the essential constitutional imperative, that every person be free from unreasonable search or seizure.

8. Note "electro-magnetic, acoustic, mechanical or other device" (*Criminal Code, supra*, footnote 1, at s. 184(1)) is defined as "any device or apparatus that is used or is capable of being used to intercept a private communication" (*Supra*, footnote 1, s. 183).
9. See *Telus*, *supra*, footnote 5.
10. *Supra*, footnote 1, s. 184(1)(b). Note that there are various provisions related to various forms of electronic interceptions. The analysis for the purposes of this section will be focus on the constitutionality of the regime for third party *i.e.*, non-participant interceptions.
11. *Supra*, footnote 1, s. 185.
12. Specifically, the facts and particulars of the offence, (s. 185(1)(c)) the type of communication they seek to intercept, (s. 185(1)(d)) the names and addresses of the people they are seeking to intercept and the manner it will be intercepted (s. 185(1)(e)), information about prior authorizations sought (s. 185(1)(f)), how long the interception will last (s. 185(1)(g)), and whether there is *investigative necessity* (s. 185(1)(h)).
13. *Criminal Code* s, 186(1)(a); note, although this section states that the authorization to be in be "in the interest of the administration of justice" this section has been interpreted to mean that the police must demonstrate "reasonable and probable grounds (See generally *Duarte*, *supra*, footnote 1).
14. *Criminal Code*, s. 185(1)(h); *Araujo*, *supra*, footnote 1, at para. 29.

authorization. So long as the police comply with the terms of the authorization, the fruits of that interception are admissible in criminal proceedings subject always to the rules of evidence,[15] and after-the-fact skirmishes over the validity of authorization.[16]

As a general rule, then, "investigative necessity" is a pre-condition for a wire-tap authorization. That is to say, before the police are entitled to use a "wire-tap" they must convince a judge that there is "investigative necessity". What is investigative necessity?

Sections 185(1)(h) and 186(1)(b) of the *Criminal Code* set out the "investigative necessity" requirement. They explain that the Crown must convince the court that:

> [o]ther investigative procedures have been tried and have failed, [and explain] why it appears that they are unlikely to succeed or that the urgency of the matter is such that it would be impractical carry out the investigation of the offence using only other investigative procedures.[17]

Subsequent judicial interpretation has cast light on the meaning of this provision. "Investigative necessity" does not require that a "wire-tap" be a "last resort".[18] But neither does it permit the police to rely on a wire-tap authorization as a matter of "convenience". In *R. v. Araujo*, Justice LeBel explains that the appropriate test is whether there is, "practically speaking, no other reasonable alternative method of investigation in the circumstances of the particular criminal inquiry".[19]

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15. For instance, where the Crown tenders an intercepted conversation, the statements of the accused are admissions, but the statements of a non-accused conversant may well be excluded as hearsay, as they are out of court statements tendered for the truth of their contents. See for example *R. v. Mapara* (2001), 244 W.A.C. 316, 149 B.C.A.C. 316, 2001 CarswellBC 592 (B.C. C.A. [In Chambers]); *R. v. Fliss*, [2002] 1 S.C.R. 535, 161 C.C.C. (3d) 225, 49 C.R. (5th) 395 (S.C.C.).
16. See generally *R. v. Lising* (2005), [2005] 3 S.C.R. 343, (*sub nom.* Lising v. The Queen) 201 C.C.C. (3d) 449, 33 C.R. (6th) 241 (S.C.C.) (*Pires*), see also *R. v. Williams* (2003), 181 C.C.C. (3d) 414, 180 O.A.C. 171, 2003 CarswellOnt 5038 (Ont. C.A.) (*Williams*). For a cogent overview see 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.
17. Sections 185(1)(h) and 186(1)(b).
18. *R. v. Commisso* (1983), [1983] 2 S.C.R. 121, 7 C.C.C. (3d) 1, 36 C.R. (3d) 105 (S.C.C.), at p. 135 (in which the dissent of Dickson J. (as he then was) used a "last resort" standard at); *R. v. Thompson*, [1990] 2 S.C.R. 1111, 59 C.C.C. (3d) 225, 80 C.R. (3d) 129 (S.C.C.), at p. 1160 (in which La Forest J.'s dissent referred to a "last resort" standard).
19. *R. v. Araujo*, [2000] 2 S.C.R. 992, 149 C.C.C. (3d) 449, 38 C.R. (5th) 307 (S.C.C.) (*Araujo*). See also *R. v. Lachance (La Chance)*, [1990] 2 S.C.R. 1490,

Although "investigative necessity" has been described as a "strict" requirement,[20] in practice it does not present an unduly onerous burden to law enforcement.[21] To determine whether or not there are "practically speaking, no other reasonable alternative method[s] of investigation" it is necessary to look at the object of the investigation.[22] Investigative necessity applies to the investigation *as a whole*, not in relation to a particular accused.[23] Further, the police do not need to employ every possible manner of investigation before seeking a wire-tap authorization. A judge may authorize a wire-tap search where she is satisfied that, due to the nature of the investigation, other techniques are *likely to fail*.[24] As the British Columbia Supreme Court cautions in *R. v. Wasfi*,[25] an authorizing judge must not assess investigative necessity

> . . . without understanding the realities and risks associated with other means of investigation. Drug traffickers, particularly those at higher levels of the distribution ladder, can be expected to employ methods designed to counter police inquiry into their activities and to be willing to resort to violence to avoid detection.[26]

The police have successfully established investigative necessity in a number of circumstances where they had taken reasonable steps to further investigations: where conventional search methods had proven ineffective;[27] where police they have exhausted a number of other forms of investigation but face suspects who used counter-surveillance and resort to violence in order to continue their activities;[28] where a previously successful investigation has

60 C.C.C. (3d) 449, 80 C.R. (3d) 374 (S.C.C.), at p. 1502 (in which an obiter reference of Sopinka J.'s judgment implied that the standard was "the only practical investigative technique available").

20. See *Pires*, *supra*, footnote 15, at para. 14, where Rosenberg J.A. cautions that the investigative necessity requirement is a "stringent one".
21. See for example *R. v. Adam*, 2006 CarswellBC 859, [2006] B.C.J. No. 536, 2006 BCSC 382 (B.C. S.C.); *R. v. E. (T.K.)* (2006), 816 A.P.R. 234, 316 N.B.R. (2d) 234, 2006 CarswellNB 807 (N.B. Q.B.).
22. *Araujo*, *supra*, footnote 18, at p. 43; *R. v. Pham* (2002), 165 C.C.C. (3d) 97, 274 W.A.C. 66, 167 B.C.A.C. 66 (B.C. C.A.) (*Pham*), at paras. 85-6.
23. *R. v. Tahirkheli* (1998), 130 C.C.C. (3d) 19, 113 O.A.C. 322, 1998 CarswellOnt 3963 (Ont. C.A.), at p. 22; *Pham*, *supra*, footnote 21, at paras. 85-86.
24. *R. v. Beaulieu*, 2005 CarswellNB 836, 2005 NBQB 71 (N.B. Q.B.).
25. *R. v. Wasfi* (2006), 206 C.C.C. (3d) 203, 368 W.A.C. 130, 222 B.C.A.C. 130 (B.C. C.A.).
26. *Ibid.*, at para 49.
27. *R. v. Beaulieu*, 2005 CarswellNB 836, 2005 NBQB 71 (N.B. Q.B.); *United States v. London*, 66 F.3d 1227 (1st Cir., 1995), at p. 1237 and stc > *United States v. Torres*, 901 F.2d 205 (2nd Cir., 1990).

stalled;[29] where police are unable to determine the various roles of parties believed to be involved in a murder;[30] where an imminent meeting between an undercover agent and a suspect provided a unique opportunity to gather information;[31] where the police are dealing with a tightly knit crime-syndicate which made other methods of investigation dangerous and ineffective;[32] where an investigation involved upper echelon of a drug dealing operation that took place primarily over telephone lines;[33] where targets of investigation were wary to connect themselves with street level investigations involving undercover agents;[34] and even where an informant had agreed to testify, but where an authorization is necessary to bolster the credibility that informant.[35]

On the contrary, the police have *not* been able to demonstrate investigative necessity where they assert that other investigative methods would fail, but do not explain *why* they would fail,[36] or where they do not utilize other methods which were practical in the context of the particular investigation, such as applying for conventional search warrants,[37] performing routine surveillance,[38] or taking advantage of an approved undercover operation.[39]

It is also noteworthy that that the investigative necessity

28. *R. v. Della Penna* (2012), 286 C.C.C. (3d) 174, 534 W.A.C. 256, 96 C.B.R. (5th) 312 (B.C. C.A.), at paras. 32-33.
29. *R. v. Lee* (2007), [2008] 8 W.W.R. 317, 427 A.R. 76, 88 Alta. L.R. (4th) 231 (Alta. Q.B.).
30. *R. v. Courtoreille*, 2004 CarswellBC 1452, [2004] B.C.J. No. 1327, 2004 BCSC 834 (B.C. S.C.); see also *R. v. Courtoreille*, 2004 CarswellBC 1452, [2004] B.C.J. No. 1327, 2004 BCSC 834 (B.C. S.C.).
31. *R. v. Della Penna* (2012), 286 C.C.C. (3d) 174, 534 W.A.C. 256, 96 C.B.R. (5th) 312 (B.C. C.A.), at para. 32.
32. *R. v. Brown*, 2005 CarswellOnt 8958, [2005] O.J. No. 6051 (Ont. S.C.J.); *United States v. Guerra-Marez*, 928 F.2d 665 (5th Cir., 1991), at p. 670.
33. *R. v. MacNeil* (2013), 297 C.C.C. (3d) 360, 574 W.A.C. 233, 336 B.C.A.C. 233 (B.C. C.A.), at para. 76, leave to appeal refused 2013 CarswellBC 3055, 2013 CarswellBC 3056, [2013] S.C.C.A. No. 245 (S.C.C.).
34. *Ibid.*, at para. 63.
35. *R. v. Buckingham* (2007), 826 A.P.R. 226, 271 Nfld. & P.E.I.R. 226, 2007 CarswellNfld 143 (N.L. T.D.).
36. In *R. v. Grant* (1998), 130 C.C.C. (3d) 53, 187 W.A.C. 36, 131 Man. R. (2d) 36 (Man. C.A.), it was held that the affidavit must disclose specific information with respect to specific crimes. It is not enough to allege general ongoing criminal activity.
37. *R. v. Smyk* (1993), 86 C.C.C. (3d) 63, [1994] 1 W.W.R. 513, 51 W.A.C. 303 (Man. C.A.), additional reasons (1993), 51 W.A.C. 318, 88 Man. R. (2d) 318, 1993 CarswellMan 474 (Man. C.A.).
38. *R. v. Mack* (2007), 458 A.R. 52, 2007 CarswellAlta 1959, [2007] A.J. No. 1551 (Alta. Q.B.).
39. *Ibid.*, at para. 152.

requirement is not unique to the Canadian regime. As Nate Whitling observes, the United States "wire-tap regime", a regime upon which Canada's regime is based, incorporates an "investigative necessity" requirement.[40] Britain also requires "investigative necessity" as a condition for wire-tap interceptions.[41]

The "investigative necessity" requirement, therefore, might be boiled down to a very basic proposition. Law enforcement should not use wire-tap as a matter of first resort. They should first explore other, less intrusive techniques that are practical in the circumstances of the particular investigation.

This requirement constitutes a flexible but integral part of a constitutional scheme which seeks to strike a delicate balance between law enforcement, and individual privacy and autonomy. It is a crucial safeguard to protect not only targets of police investigation, but innocent third party Canadians and those with whom they communicate who inevitably have their private conversations monitored and recorded. The investigative necessity requirement, however, was recently abolished in the context of certain police investigations.

(II) Sections 185 (1.1) and 186 (1.1): The Elimination of Investigative Necessity

Sections 185 (1.1) and 186 (1.1) eliminate the investigative necessity requirement in the context of certain police investigations. By virtue of these subsections, the police do not need to demonstrate

40. "Wire-tapping, Investigative Necessity and the *Charter*" (2002), 46 Crim. L.Q. 89. Citing *Omnibus Control and Safe Streets Act* (1968), 18 U.S.C. §§ 2518 (1994 and Supp. IV 1998), which states:

> (1) Each application . . . shall include the following information
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> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous
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> . . . . .
>
> (3) Upon such application the judge may enter an *ex parte* order . . . if the judge determines on the basis of the facts submitted by the applicant that –
>
> (c) normal investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous

There are also strong indications that this the requirement enjoys constitutional protection under the American constitution (D.F. Cook, "Electronic Surveillance, Title III, and the Requirement of Investigative Necessity", [1973] 2 Hast C.L.Q. 571, at pp. 577-86).

41. *Interception of Private Communications Act 1985* (UK), 1985, c. 56, s. 2(3).

investigative necessity where they investigate a criminal organization, or a terrorist offence. It is useful to consider the scope of these provisions and scrutinize their political justification.

Sections 185(1.1) and 186(1.1) remove a broad spectrum of police investigations from the ambit of the "investigative necessity" requirement. As outlined above, before a judge will authorize a "wire-tap" interception, the police must satisfy her that there are "practically speaking, no other alternative methods of investigation available". Sections 185(1.1) and 186(1.1) contain a subtle but potent exception. They declare that the police do *not* need to prove "investigative necessity" where they satisfy the judge that the investigation relates to:

> (a) an offence under section 467.11, 467.12 or 467.13;
> (b) an offence committed for the benefit of, at the direction of or in association with a criminal organization; or
> (c) a terrorism offence.

Thus sections 185(1.1) and 186(1.1)(a) and (b) eliminate the investigative necessity requirement for investigations relating to *criminal organizations*. A criminal organization is broadly defined as a group "however organized" that

> has as one of its main purposes or main activities the facilitation or commission or one or more serious offences that, if committed would likely result in the direct or indirect receipt of material benefit, including a financial benefit, by the group or by any of the persons who constitute the group . . . but does not include a group of persons that forms randomly for the immediate commission of a single offence. [42]

As a result of subsections (a) and (b) when the police do not need to prove investigative necessity when they investigate a criminal organization,[43] the commission of an indictable offence for the benefit of, at the direction of, or in association with a criminal organization[44] and the instruction of offences on behalf of a criminal organization.[45]

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42. Section 2. Note that the definition of "criminal organization" was challenged on *Charter* grounds for over-breadth. It was upheld in *R. v. Terezakis* (2007), 223 C.C.C. (3d) 344, 51 C.R. (6th) 165, 405 W.A.C. 74 (B.C. C.A.), leave to appeal refused (2008), 226 C.C.C. (3d) vi (note), 385 N.R. 380 (note), 452 W.A.C. 320 (note) (S.C.C.).
43. Section 467.11 makes it an offence to contribute to the activities of a criminal organization. Parliament intended the "participation in a criminal organization" offences to be the cornerstone of the recent criminal organization amendments.
44. Sections 467.11 and 467.12 (Section 467.12 makes it an indictable offence to *commit* any other indictable offence, for the *benefit of*, at the *direction of*, or

Sections 185(1.1) and 186(1.1)(c) eliminates the investigative necessity requirement in relation to *terrorism offences*. As a result the police need not demonstrate "investigative necessity" when they investigate a wide array of suspected terrorist activities,[46] including participation in a terrorist group,[47] the commission of an indictable offence, whether an act or omission,[48] for the benefit, direction, or in association with a terrorist group,[49] the provision,[50] or possession[51] of property for the purpose of facilitating a terrorist activity or the harbouring or concealment of terrorists,[52] and also any attempt[53] or conspiracy[54] to commit such offences.

In their present form, ss. 185(1.1) and 186(1.1) are the products of two controversial pieces of legislation: Bill C-95 (1997) — commonly known as the "anti-gang bill"[55] and the *Anti-terrorism Act* (2001).[56] It is informative to explore the justification for these larger legislative initiatives, and then scrutinize the specific justification for the removal of investigative necessity.

Bill C-95 (1997) removes the investigative necessity requirement in investigations of criminal organizations.[57] It is part of an integrated, legislative effort to combat the growing occurrence of gang activity in Canadian communities. It stems from what Parliament perceives as "a need to provide law enforcement officials with effective measures to prevent and deter the commission of criminal activity by criminal organizations and their members".[58]

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in *association with* a criminal organization); Note that s. 185(1.1)(b) and s. 186(1.1)(b) are essentially a re-iteration of s. 467.12.

45. Section 467.13 (s. 467.13, punishable by a life sentence, prohibits members of a criminal organization from instructing others to commit offences on behalf of the organization).
46. Section 2 "Terrorism Offence".
47. Section 83.18.
48. Section 2 "Terrorism Offence" (c).
49. Section 2 "Terrorism Offence" (b).
50. Section 83.02.
51. Section 83.02.
52. Section 83.23.
53. Section 2 "Terrorism Offence" (d).
54. Section 2 "Terrorism Offence" (d).
55. *An Act to Amend the Criminal Code (criminal organizations) and to amend other Acts in consequence thereof,* S.C. 1997, c. 23 (Bill C-95).
56. S.C. 2001, c. 41 (*Anti-terrorism Act*).
57. Bill C-95, *supra*, footnote 55, at s. 5.
58. *Ibid.*, "preamble". Note that the pre-amble of an act is an interpretive aid insofar as it serves to inform the purpose of the legislation (Ruth Sullivan, *Sullivan on Construction of Statutes* 5th ed. (Markam: Lexis Nexus 2008), at p. 388). Note also, however, that the pre-amble also states that "the Parliament of Canada recognizes that the measures provided for must be consistent with

In addition to other initiatives, the *Anti-terrorism Act* (2001) eliminates the investigative necessity for investigations involving "terrorism offences".[59] The *Anti-terrorism Act* is Canada's first piece of anti-terrorism legislation. It defines what constitutes terrorism, and makes it a punishable offence within the *Criminal Code*. It is aimed at disabling and dismantling the activities of terrorists groups and those who support them. It seeks to "strengthen . . . Canada's capacity to suppress, investigate and incapacitate terrorist activity".[60]

Bill C-95 is therefore lauded as an essential weapon in the battle against organized crime and the *Anti-terrorism Act* is purported to be a critical tool in the struggle to ensure national safety and security, but what lacks rational justification, however, is how the elimination of the "investigation necessity" requirement, and the removal of discretion from an authorizing judge furthers either of these aims. While the larger initiatives seem to address compelling objectives, the justification for the particular amendments to the wire-tap regime are, respectfully, fairly thin.

In the debate leading up to the enactment of Bill C-95, the Honourable Justice Minister Rock explains that:

> [a]t the moment if police officers want to get a wiretap they have to prove a number of things to a judge first. Among those they have to prove [investigative necessity]. . .
>
> [Bill C-95] would remove that burden. It would simplify the process of getting a wiretap if the police officer is investigating criminal organization offences . . . *it would relieve the police officers of a paper burden*. We are not saying we should allow free access to intrusive methods because it is administratively difficult for police. We are saying we should make that change because when investigating crime it *is almost always* obvious that it is a last resort for the reasons I have already given. It is very difficult to investigate.
>
> We are taking a burden from the police which we think is undue in the circumstances of offences of this kind . . . If we have the courage to conclude on the facts that it is almost always the last resort, then let us say it in the criminal law and not have the police go though the empty process of establishing it. *It sends a message as well.*[61]

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the principles set out and the rights guaranteed in the *Canadian Charter of Rights and Freedoms*". However, as will be demonstrated, the legislation sacrifices this end in the interest of administrative efficiency.

59. *Anti-terrorism Act*, *supra* footnote 55, at ss. 6, 6.1.
60. *Ibid.*, preamble.
61. *House of Commons Debates* (April 21, 1997) (*Debates April 21,* 1997) , at p.

Further, in the debate which would ultimately lead to the passage of the *Anti-terrorism Act*, its proponents would lament the current wire-tap regime was "extremely onerous and is an impediment to the ability of police to monitor criminal activity".[62] They would applaud the removal of the investigative necessity requirement as an essential tool to "streamline" the wire-tap process.[63] Other proponents would add that

> . . . the increased abilities of our police and security agencies also need to be carefully considered. It is important to remember that our laws dealing with national security have not kept up with advances in technology in terms of proposed changes to laws governing wiretapping procedures. Criteria for obtaining warrants and electronic surveillance orders to monitor terrorist activity should have been streamlined and modernized years ago. Our frontline workers need to be able to respond to the virtually unlimited resources, funds and technology of terrorist organizations. The analogy can be made in the context of organized crime. It seems that terrorist organizations and organized crime have unlimited funds. Our police and other security agencies do not.[64]

The *Anti-Gang Bill* and the *Anti-Terrorism Act* are founded on a national concern about organized crime and terrorism. However, there is no rational justification why the investigative necessity requirement for certain offences would significantly affect the efficiency of the wire-tap regime. The goal to "streamline" the process is suspect. Any expected benefit would seem to pale in comparison to the interest of preserving the privacy and autonomy of Canadian citizens. Moreover, what about the circumstances where it is *not* a last resort. Are we, as Toews suggests, to have the "courage"[65] to simply ignore these circumstances? Such concerns are pertinent to s. 1 analysis, and will be considered further hereafter when the constitutional implications are considered below.

In summary, ss. 185(1.1) and 186(1.1) eliminate the investigative

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9976 [emphasis added]. This justification is disconcerting, and will be explored hereafter.

62. *House of Commons Debates* (Tuesday, October 16, 2001), at p. 1155, *per* Mr. Peter MacKay; But as Mr. Steve Mahoney argues "Should there be a wiretap that lasts one year instead of 90 days? Should there be intrusive abilities to monitor situations within this country, abilities that we would probably not have supported on September 10 of this year? Since September 11 we have had to look at life through a different prism. Canadians are frightened and justifiably so. However, what concerns me is some of the hysteria that has literally thrown gasoline on an open flame" (*Ibid.*, at p. 1530).

63. *Ibid.*

64. *Ibid.*, at p. 1150, *per* M.P. Mr. Vic Toews.

65. *Debates April 21,* 1997, *supra*, footnote 60, at p. 9976.

necessity requirement in relation to a broad spectrum of police investigations. Insofar as the police are investigating criminal organizations or terrorism offences, they do *not* need to demonstrate investigative necessity. However, an analysis of the rationale underlying these provisions calls the true purpose into question. Having considered how "investigative necessity" operates in the wiretap authorization framework, and its abolishment in the context of certain offences, it is necessary to consider the constitutional implications of such amendments.

(III) Judicial Consideration: The Charter and "Investigative Necessity"

This section will consider how Canadian courts have interpreted the "investigative necessity" requirement. Specifically, it will consider whether "investigative necessity" is a constitutional requirement. First, it will survey relevant Supreme Court of Canada decisions suggesting that investigative necessity is indeed a constitutional requirement, but not directly decide the issue. Second, it will consider lower court decisions which have interpreted these decisions and conclude that investigative necessity is *not* a constitutional requirement, generally without undertaking detailed, independent constitutional analysis.

1. Investigative Necessity in the Supreme Court of Canada

Before considering the constitutionality of ss. 185(1.1) and 186(1.1), it is necessary to consider statements by the Supreme Court of Canada addressing the investigative necessity requirement. While there are four Supreme Court decisions that strongly suggest that "investigative necessity" is in fact a constitutional requirement: *R. v. Duarte*,[66] *R. v. Garofoli* (1990),[67] *R. v. Araujo*, (2000)[68] and in passing, *R. v. B. (S.A.)* (2003),[69] none of these decisions directly rule on the issue.

In *Duarte* (1990), the Supreme Court of Canada concludes that the requirement of pre-authorization and credibly-based probability extends to so-called "participant" interceptions. Unlike "third-party" wire-tap interceptions, which surreptitiously capture the

66. *Supra* footnote 1.
67. *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 60 C.C.C. (3d) 161, 80 C.R. (3d) 317 (S.C.C.) (*Garofoli*).
68. *Supra*, footnote 1.
69. *R. v. B. (S.A.)* (2003), [2003] 2 S.C.R. 678, 178 C.C.C. (3d) 193, 14 C.R. (6th) 205 (S.C.C.) (*B. (S.A.)*).

conversations of an accused with third parties, a 'participant' interception involves an undercover police officer, or an informant, who 'wears a wire' and engages the suspect in a conversation. In *Duarte* Justice LaForest explores Part IV of the *Criminal Code*, and its constitutional implications:

> It thus becomes necessary to strike a reasonable balance between the right of individuals to be left alone and the right of the state to intrude on privacy in the furtherance of its responsibilities for law enforcement. Parliament has attempted to do this by enacting Pt. [IV][70] of the Code . . . [as part of this scheme] [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* . . . 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 Pt. [IV] of the Code have been designed to prevent the agencies of the state from intercepting private communications on the basis of mere suspicion.
>
> *In proceeding in this fashion, Parliament has, in my view, succeeded in striking an appropriate balance* . . .[71]

Justice LaForest, therefore finds Parliament has "struck the appropriate balance" between individual privacy and law enforcement based on these provisions. Justice LaForest seems to suggest that the regime *as a whole* is essential to defending constitutional rights, *including* the investigative necessity requirement. That said, his statement is not unambiguous. He does not specifically state that the absence of an investigative necessity requirement would render the section unconstitutional or that a different regime would offend the *Charter*.

Later that same year, the Supreme Court delivered its decision in *Garofoli* (1990).[72] *Garofoli* addressed various aspects of the wire-tap regime. Most notably, it affirms that there is a leave requirement for cross-examination of the affiant of a wire-tap application. In the course of his judgment, Justice Sopinka also reviews the wire-tap regime. Under the heading "*Minimum Statutory and Constitutional Requirements*" Justice Sopinka writes:

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70. Formerly part IV.1.
71. *Duarte*, *supra*, footnote 1, at paras. 26-27 [*emphasis added*, citations omitted].
72. *Garofoli*, *supra*, footnote 6.

> Section 178.13(1) sets out the statutory conditions of which a judge must be satisfied before an authorization is issued:
>
> > 178.13 (1) An authorization may be given if the judge to whom the application is made 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.[73]

Since Justice Sopinka discusses 178.13(1)(b), the "investigative necessity requirement" under the heading "minimum statutory requirements", one might suggest that subsection (b) forms part of the constitutional requirements.[74] This is not decisive, but it is certainly informative.

Nearly 10 years later, in *R. v. Araujo* (2000), a unanimous Supreme Court delivered what would come to be the leading decision on the scope of the "investigative necessity" requirement. This case provides what is arguably the most telling statement from the Supreme Court. In *Araujo* Justice LeBel clearly cautions that he did does not intend to discuss the constitutionality of the investigative necessity requirement.[75] However, as Nate Whitling observes, "[d]espite LeBel J.'s best efforts to distance his decision from the issue of the constitutionality of ss. 185(1.1) and 186(1.1), it cannot be doubted that the interpretation of s. 186(1)(b) articulated therein is informed by a perception on the part of the court that the investigative necessity requirement . . . is of profound constitutional . . . significance."[76] In *Araujo* Justice LeBel notes that:

> An appropriate balance must be found between the need to safeguard privacy interests and the realities and difficulties of law enforcement. *The investigative necessity requirement found in s. 186(1)(b) has proved to be a critical but delicate component of the legal framework set up to regulate wiretapping in order to strike this appropriate but often elusive balance between the interests of the State and th of its citizens . . . we must not forget that the text of s. 186(1) represents a type of constitutional compromise. In particular, the investigative*

73. *Ibid.*, at para. 42.
74. Granted, such a conclusion might be called into question based on Justice Sopinka's later declaration that after *Garofoli* "the statutory requirements the statutory requirements of s. 178.13(1)(a) are identical to the constitutional requirements" (*Ibid.*, at para. 46).
75. *Ibid.*, at para. 2.
76. Whitling, *supra*, footnote 39, at p. 115.

> *necessity requirement embodied in s. 186(1) is one of the safeguards that made it possible for this Court to uphold these parts of the Criminal Code on constitutional grounds* . . . As a result, s. 186(1) must be read with a simultaneous awareness of the competing values of enabling criminal investigations and protecting privacy rights.[77]

This is perhaps the most telling statement of the Supreme Court of Canada on the issue.

Finally, in *R. v. B. (S.A.)*, (2003)[78] the Supreme Court of Canada considered a constitutional challenge to the DNA warrant provisions of the Criminal Code. In the course of its judgment, the Supreme Court of Canada makes passing reference to the investigative necessity requirement that has constitutional implications:

> 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*). 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)).[79]

While this is an obiter statement, it is informative as to the position of the Supreme Court on the constitutionality of the investigative necessity requirement. Taken together, one could argue that the Supreme Court of Canada strongly suggests investigative necessity is a constitutional requirement. However, lower courts are all but unanimous in reaching an opposite conclusion.

2. Investigative Necessity: Lower Court and Appellate Court Decisions

In recent years the longstanding debate surrounding the constitutionality of the investigative necessity requirement has bubbled to the surface. The issue has not yet worked its way back to the Supreme Court of Canada. But in the current investigative climate, and where we have seen a proliferation of new forms of electronic interceptions, such as the interception of text-based communications from telecommunication databases which have recently been found to fall under Part VI, or the *Criminal Code*, as

77. *Araujo*, *supra*, footnote 19, at pp. 1006-1007 [emphasis added].
78. *B. (S.A.)*, *supra*, footnote 68.
79. *Ibid.*, at paras. 53 and 54.

opposed to the General Warrant provisions,[80] it is only a matter of time before the question comes before the Supreme Court.[81]

Several lower courts have considered whether "investigative necessity" is a constitutional requirement. However most lower courts are all but unanimous in holding that "investigative necessity" is a legislative concession, and not a constitutional requirement. With respect, many of these decisions make much of construing the statements of the Supreme Court, and spend less time balancing the actual constitutional interests at stake. None of these decisions undertake a compelling, independent constitutional analysis of whether or not these sections strike an appropriate constitutional balance between law enforcement and the right of all Canadians to privacy. This part will consider the relevant decisions chronologically.

R. v. Pangman (2000),[82] was the first decision in which a court considered the constitutionality of ss. 185(1.1) and 186(1.1) of the *Criminal Code*. Fifteen suspects were confined in a police holding cell. The police installed hidden recording devices in the cell, and intercepted the private communications of the suspects. At trial, the Crown successfully argued that they did not need to demonstrate investigative necessity in relation to the interceptions, since their investigation involved a criminal organization. The defence objected to the admission, and among other things, challenged the constitutionality of ss. 185(1.1) and 186(1.1).

For the Manitoba Court of Queen's Bench, Justice Krindle concluded that ss. 185(1.1) and 186(1.1) did *not* offend s. 8 of the *Charter* because the investigative necessity requirement is *not* a constitutional requirement. She considers the relevant passages from *Garofoli*, as re-produced above, and declares,

> Is there anything in the foregoing which "constitutionalizes" investigative necessity? I think not. The *scheme* provided for by Parliament did impose the requirement of investigative necessity. But it is the "best interests of administration of justice" provision which imports those minimum requirements that are constitutional in their nature, when viewed against the history of s. 8 case law.[83]

Further, she notes that,

80. The General warrant power in contained in s. 487.01 of the *Criminal Code*.
81. See for generally *Telus*, *supra*, footnote 4. This is noteworthy given that any warrant for such communications granted under the general warrant provisions would have been granted without proof of investigative necessity.
82. *R. v. Pangman*, [2000] 8 W.W.R. 536, 76 C.R.R. (2d) 77, 147 Man. R. (2d) 93 (Man. Q.B.) (*Pangman*).
83. *Ibid.*, at para. 63.

> . . . investigative necessity has not been held to be a constitutional requirement to searches of the human body, described as being "the ultimate invasion of the appellant's privacy" by Cory J. for the Supreme Court in *R. v. Stillman* . . . If body searches are the ultimate invasion of an individual's privacy and they can be effected, constitutionally, without the Crown being required to show that "other methods have tried and failed or other methods are unlikely to succeed", then why would that requirement be constitutionally imported into electronic surveillance? The Crown points also to the absence of the requirement of investigative necessity in cases dealing with fingerprints, blood sample demands, and DNA warrants. The Crown points to the cases which have come before the Supreme Court of Canada relating to search warrants for and searches of media premises . . . The Supreme Court was urged to find that before a justice could order a search warrant of the media, the justice must be satisfied that "no alternative sources of the information sought are available." That is clearly the equivalent of investigative necessity. The Supreme Court of Canada declined to impose the requirement that "no alternative source of the information sought are available" as a pre-condition to the granting of a search warrant. The court simply suggested that issuing justices must exercise their discretion carefully in this type of case and the absence or presence of alternative sources of information is a factor for the issuing justice to weigh.[84]

In support of her conclusion, the learned Justice also observes that,

> . . . the case law from the U.S. Supreme Court, leading up to Title III, did not recognize investigative necessity or anything roughly equivalent to it as being a constitutionally required minimum to the infringement of privacy. *Title III does not itself require investigative necessity*.[85]

Yet, with the greatest of respect, the learned Justice erred. Title III, upon which the present Canadian regime is based, does indeed include an investigative necessity requirement.[86] In any event, the learned Justice concluded that she could "find no basis in the decided cases for holding that "investigative necessity" is a constitutional prerequisite to the authorizing of electronic surveillance."[87] Notwithstanding this error, subsequent decisions have generally adopted the learned Judge's reasoning.

In the decision of *R. c. Bordage* (2000)[88] the Quebec Court of Appeal upheld the constitutionality of s. 184 and s. 184.3 of the *Criminal Code*. Like ss. 185(1.1) and 186(1.1), s. 184 and s. 184.3

84. *Ibid.*, at pp. 68-69 [Citations Omitted].
85. *Ibid.*, at para. 58.
86. See Whitling, *supra*, footnote 39, at pp. 97-99.
87. *Pangman*, *supra*, footnote 81, at para. 70.
88. .) *R. c. Bordage* (2000), (*sub nom.* R. v. Bordage) 146 C.C.C. (3d) 549, 2000 CarswellQue 1225, 2000 CarswellQue 3696 (C.A. Que.).

remove the investigative necessity requirement. However, s. 184 and s. 184.3 remove the requirement in relation to the '*consent*' or so-called *participant interception* provision.[89] Participant interceptions differ *fundamentally* from standard wiretaps. Given the participant nature of the interception, the potential effect of any interception on third parties is *extremely limited*. This is significant and discussed in detail later. Along the same lines as Madame Justice Krindle of the Quebec Court of Appeal concluded that there was nothing in the Supreme Court of Canada's language in *Duarte* that constitutionalized the investigative necessity requirement.[90]

Similarly, in *R. v. Largie* (2004)[91], and the Ontario Superior Court of Justice considered ss. 184 and ss. 184.3 and reached the same conclusion for *participant* interceptions. Justice Tafford refers to Justice LeBel's comments in *Araujo* and declares:

> In my view, this does not alter the constitutional requirements to be met under Part VI of the Code as determined in *R. v. Garofoli* . . . Rather, it is merely a statement that one of the requirements of a legislative scheme that is constitutionally valid is the requirement of investigative necessity. It is not a statement that the constitutional minimum for Part VI of the Code has been changed to exceed the requirements of *Hunter v. Southham Inc*. . . . by complementing them with the requirement of investigative necessity.[92]

This decision was revisited by the Ontario Court of Appeal almost 6 years later, and the reasoning therein will be considered below to maintain chronology.

In *R. c. Doucet* (2004)[93] Justice Lévesque of the Superior Court of Quebec considered ss. 185(1.1) and 186(1.1). The accused was charged with many offences, including criminal organization offences. The police had electronically intercepted certain communications. The Crown tendered these statements as evidence. The defence challenged the admissibility of the

89. There provisions were a reaction to the Court's decision in *Duarte, supra*, footnote 1, that participant interceptions require prior-authorization.
90. *Ibid*., at para. 36.
91. *R. v. Largie*, [2004] O.T.C. 1193, 2004 CarswellOnt 5961, [2004] O.J. No. 5675 (Ont. S.C.J.) (*Largie*), at paras. 86-90, affirmed in *R. v. Largie* (2010), 258 C.C.C. (3d) 297, 101 O.R. (3d) 561, 266 O.A.C. 103 (Ont. C.A.), leave to appeal refused (2011), 287 O.A.C. 399 (note), 424 N.R. 400 (note), 2011 CarswellOnt 4950 (S.C.C.), leave to appeal refused (2011), 425 N.R. 395 (note), 2011 CarswellOnt 4990, 2011 CarswellOnt 4991 (S.C.C.) (*R. v. Largie ONCA*).
92. *Largie, supra*, footnote 90, at para. 90 [citations omitted].
93. *R. c. Doucet* (2003), 18 C.R. (6th) 103, 2003 CarswellQue 2854, [2003] J.Q. No. 18497 (C.S. Que.) (*Doucet*).

statements, arguing, among other things, that ss. 185(1.1) and 186(1.1) were unconstitutional. Justice Lévesque considered Whittling's critique of the *Pangman* decision.[94] However he took a different view.[95] Following the ordinary lines of analysis they noted that the Supreme Court's statements, those explored above, were in fact *obiter* comments which had no bearing on the outcome the respective decisions.[96] He also observes, as Madame Justice Krindle did, that other intrusive searches do not impute an investigative necessity requirement.[97] Thus, he too concluded that investigative necessity is not a constitutional requirement.[98]

In *R. v. Doiron* (2007),[99] the New Brunswick Court of Appeal also held that investigative necessity is not a constitutional requirement. The police had intercepted certain private communications between an accused's lawyer, Eric Doiron, and a police informant. Based largely on these interceptions, the police brought various charges against the accused. The Crown alleged criminal organization offences, and as such, the Court considered ss. 185(1.1) and 186(1.1) of the *Criminal Code*. Justice Deschênes surveys previous decisions,[100] and notes that the putatively pertinent Supreme Court statements are obiter.[101] He states that

> [n]otwithstanding Justices Lebel's and Arbour's obiter pronouncements, and Mr. Whitling's opinion, I believe that the necessity requirement is not a constitutional requirement for court-ordered electronic surveillance in cases involving organized crime, and that its absence from the legislation does not violate the right guaranteed by s. 8 of the Charter.[102]

In *R. v. Pereira* (2008),[103] Justice Romilly of the British Columbia Supreme Court reviewed wiretaps authorizations the police used to investigate alleged members of the Hells Angels. Justice Romilly began by emphasizing the relative roles of the judiciary and Parliament,[104] reiterating cautions against excessive judicial

94. *Whitling*, *supra*, footnote 39.
95. *Doucet, supra*, footnote 93, at paras. 38-39.
96. *Ibid.*, at paras. 39-45.
97. *Ibid.*, at para. 46.
98. *Ibid.*, at paras. 49-50.
99. *R. v. Doiron* (2007), 221 C.C.C. (3d) 97, 815 A.P.R. 205, 315 N.B.R. (2d) 205 (N.B. C.A.), leave to appeal refused (2007), 855 A.P.R. 342 (note), 383 N.R. 393 (note), 333 N.B.R. (2d) 429 (note) (S.C.C.) (*Doiron*).
100. *Ibid.*, at para. 29.
101. *Ibid.*, at para. 32.
102. *Ibid.*, at para. 33.
103. *R. v. Pereira* (2008), 247 C.C.C. (3d) 311, 2008 CarswellBC 3233, [2008] B.C.J. No. 2779 (B.C. S.C.) (*Pereira*).
104. *Ibid.*, at paras. 47-58.

activism, and "constitutionally hyperactive judges".[105] He declared total agreement with *Doiron*.[106] Most importantly, he relied on the observation that so-called *participant* interceptions did *not* require investigative necessity.[107] However, with respect, this premise is suspect as participant interceptions are a different creature given the minimal impact on the privacy of third parties, as will be explored below.

Finally, *R. v. Largie* (2010) provides the most recent statement on investigative necessity related to the criminal organization and terrorist exceptions at the appellate level. In *Largie* (2010) the Ontario Court of Appeal concluded investigative necessity is *not* a constitutional prerequisite for *participant surveillance*. It is critical to state at the outset that this decision did *not* consider standard wiretap provisions. It considered the *participant surveillance* provisions of the *Criminal Code* which, as explored below, involve fundamentally different constitutional considerations.

Justice Watt delivered the judgement of the panel. Justice Watt notes that "no appellate court has held, either expressly or by necessary implication, that investigative necessity is a constitutional necessity"[108]. He also notes that "Section 186(1)(a) [the participant observation provision] of the Criminal Code coincides with the minimum constitutional requirement dictated by *Hunter* . . . [in other words] "reasonable and probable grounds".[109]

However, Justice Watt makes two insightful observations. First, he stresses that,

> Like s. 186(1), the language of s. 184.2(3) is permissive, not mandatory. In reaching his or her conclusion, a judge under s. 184.2 must consider whether the search proposed is reasonable in light of the myriad factors at work in the specific case. In this respect, the authorizing judge might have in mind that it is often necessary for investigators to accumulate evidence supportive of the account provided by a source whose credibility and reliability may be suspect.[110]

In other words, in a practical sense, an authorizing judge may need

105. *Ibid.*, at para. 47, citing *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595, [1996] 5 W.W.R. 617, 181 A.R. 16 (Alta. C.A.), at p. 607, additional reasons (1996), 141 D.L.R. (4th) 44, [1996] 8 W.W.R. 405, 184 A.R. 351 (Alta. C.A.), reversed (1998), [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385, [1999] 5 W.W.R. 451 (S.C.C.).

106. *Pereira*, *supra*, footnote 102, at para. 253.

107. *Ibid.*

108. *R. v. Largie ONCA*, *supra*, footnote 90, at para. 51.

109. *Ibid.*, at para. 49.

110. *Ibid.*, at para. 55.

to consider the extent to which police have pursued other investigative techniques.

Second, and most importantly, Justice Watt makes a critical observation about the nature of electronic surveillance and its impact on *third parties*. He states:

> It is also worthy of reminder that although it is subject to a requirement of prior judicial authorization, *participant surveillance differs in scope from third-party surveillance*. Participant surveillance is generally more focused than third-party surveillance, targeting specific conversations with specific individuals. Capture of third-party communicants is less likely. And the consenting party may also direct the conversations, thus reducing the risk of intrusion into the target's privacy.[111]

Justice Watt astutely notes the critical difference between *participant* surveillance, and third party surveillance. As will be explored below this is the most important constitutional consideration: the effect of third party surveillance on innocent third parties.

Thus, while Justice Watt upheld the participant electronic surveillance provisions, it is clear that constitutional analysis of third party surveillance, such as surveillance of phone conversations, would involve a much different constitutional dialogue. This decision is thereby distinguishable, and a constitutional analysis of third party electronic surveillance would take into account different constitutional considerations.

Therefore, the vast majority of lower court decisions seem to agree that investigative necessity is not a constitutional requirement. As such, any argument to the contrary might be seen to be swimming upstream against a strong current of judicial authority.

However, three decisions from the Ontario Superior Court of Justice, although ultimately reaching the same conclusion, provide key insight to the debate, which may be pertinent to future constitutional analysis. These decisions are *R. v. Riley* (2008),[112] *R. v. Y. (N.)* (2008),[113] and *R. v. Lucas* (2009).[114]

Riley did not deal with a standard wire-tap interception. It dealt instead with s. 184.4 of the *Criminal Code*. Section 184.4 allows an electronic interception without prior-authorization in exigent circumstances.[115] Naturally, this involves the removal of the

111. *Ibid.*, at para. 56.
112. *R. v. Riley*, 2008 CarswellOnt 6082 (Ont. S.C.J.) (*Riley*).
113. *R. v. Lucas* (April 17, 2009), Nordheimer J. (Ont. S.C.J.) (*Y. (N.)*).
114. *R. v. Y. (N.)*, 2008 CarswellOnt 2094 (Ont. S.C.J.) (*Lucas*).
115. For instance where such an interception is immediately necessary to prevent serious bodily harm.

investigative necessity requirement. Thus, the court considered whether the absence of an "investigative necessity requirement" offended s. 8 of the *Charter*.[116] For the Ontario Superior Court of Justice, Justice Dambrot concluded that the investigative necessity requirement was *not* a constitutional requirement for such interceptions. However, he astutely and rightly acknowledges that

> when it comes to a highly intrusive state action such as wiretapping, the requirements of . . . [*Hunter v. Southam*] *may not exhaust the prerequisites for a constitutional scheme of authorization* . . . 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 . . . *The contours of what may be constitutionally required beyond or in substitution for the* [*Hunter v. Southam*] *prerequisites must depend on the context*.[117]

In *R. v. Y. (N.)* the accused applied for a declaration that ss. 185(1.1) and 186(1.1) were of no force or affect. Justice Sproat keenly observes that:

> A judge who exercises the discretionary power to grant such an authorization must consider all of the constitutionally recognized values implicated by the circumstances of the case, that is, the importance of privacy in a free and democratic society and the danger inherent in electronic surveillance by state actors. Thus, in exercising the discretionary power under s. 184.2 of the Code to authorize participant electronic surveillance, "investigative necessity" is a factor to be considered in all the circumstances of the investigation. See *Baron v. Canada* . . .
>
> Taking these principles to this application, the discretionary power conferred by s. 184.2 of the Code requires the authorizing judge to consider all of the circumstances of the application in deciding whether the right to privacy should give way to the interests of the state in effective law enforcement through the interception of private communications. This requires the judge to consider "investigative necessity" as defined in *R. v. Araujo*, supra, as one factor to be weighed in the case. *Consequently, in some cases the availability of other investigative alternatives to the proposed participant surveillance may lead to a refusal to issue the authorization*.[118]

Therefore, Justice Sproat concludes that "investigative necessity

116. *Riley*, *supra*, footnote 111, at paras. 57-62.
117. *Y. (N.) supra*, footnote 112, at paras. 63, 66, 67 [Emphasis Added].
118. *Ibid.*, at paras. 21- 22 [Emphasis Added].

remains a factor to be considered even though it is not a constitutional prerequisite".[119]

Finally, the decision in *Lucas* followed a similar vein of analysis. In *Lucas* the police received authorizations to intercept private communications against a number of alleged gang members. As part of a pre-trial application, the defense challenged the validity of these interceptions, and the constitutionality validity of s. 186(1.1) of the *Criminal Code*. After surveying relevant Supreme Court jurisprudence set out above, Justice Nordheimer concluded that investigative necessity was *not* a constitutional requirement, and that s. 186(1.1) was constitutionally valid. His rationale was that the removal of the requirement does not open the doors to indiscriminate use of the authorization process because it applies in very limited circumstances, and the police still have a very high standard for the authorization even where there is no investigative necessity requirement.[120] However, despite his ultimate ruling, Justice Nordheimer makes the following salient observation:

> [I]n circumstances where investigative necessity is not required by the express language of the *Criminal Code*, it may be that the court would require *a higher degree of proof before granting the authorization or impose additional terms for its execution*. I note, by way of example, the concern expressed by Martin J.A. in *R. v. Finlay* and Grellette that *authorizations invariably permit of persons who are not involved in the criminal activity being investigated.*[121] . . . In other words, the overall case that needs to be made out to justify the granting of an authorization can be adjusted by the court to fit the particular circumstances of the case before it.

This is a welcome addition to the dialogue. It suggests that in the absence of an investigative necessity requirement a judge has a heightened responsibility. A judge may require a higher degree of proof, and should also be acutely *aware of the effect of the authorization on innocent third parties* whose conversations will be captured by the proposed wiretap.

The appreciation in *Riley* that there is no "one-size fits all" constitutional standard for a reasonable search, the acknowledgment in *R. v. Y. (N.)*, that an authorizing judge retains discretion to consider investigative necessity, and the caution in *Lucas* that a judge has a heightened responsibility to consider the effect of the authorization on innocent third parties are all salient points which will be considered in the constitutional debate herein.

119. *Ibid.*, at para. 23.
120. *Lucas*, *supra*, footnote 113, at paras. 20-21.
121. *Ibid.*, at para. 24 (Emphasis Added).

As a side-note, in order to avoid constitutional challenges, in some jurisdictions is appears to be the practice of police to attain "mirror" authorizations, one demonstrating investigative necessity *and* another relying on ss. 185(1.1) or 186(1.1).[122] This is largely a function of uncertainty in this area. Inevitably, however, in cases in which a court does not accept investigative necessity is present, the issue will again arise and eventually return to the Supreme Court of Canada for ultimate determination.

Thus, in summary, the Supreme Court has made several comments about the potential of investigative necessity to be a constitutional pre-requisite, particularity in its recent decision in *R. v. Araujo*. However, lower courts are unanimous in their conclusion that the "investigative necessity" is *not* a constitutional requirement and by extension that ss.185 (1.1) and 186 (1.1) are constitutional.

Yet the analysis in subsequent lower court decisions has centered predominantly around whether or not there is a clear statement from the Supreme Court. Most of these decisions consider obiter statements from the Supreme Court of Canada, but none undertake a comprehensive independent constitutional analysis which involves balancing constitutional rights.

Unfortunately, debate about the implications of a few stray words have distracted from the most important matter at hand. Is the wire-tap regime constitutional? Is a scheme that grants intrusive wire-tap authorizations where other methods of investigation are available consistent with the constitutional right of every person to be free from unreasonable search or seizure? Does the regime strike the appropriate balance between the rights of the individual to privacy, and the state's interest in law enforcement? For the reasons considered here, it is argued that it does *not*.

(IV) Section 8 and Investigative Necessity: Revisiting *Southam*

This final section will consider whether the inclusion of ss. 185(1.1) and 186(1.1) offend the *Charter*. *Southam* explains that in the context of *each search* a court must ask whether legislation strikes the appropriate balance between the interests of law enforcement, and the interests of the individual privacy. A "wire-tap" is different than a conventional search warrant. It requires a court to strike a different balance. In removing the investigative necessity requirement, the legislature has upset the balance. Sections 185(1.1) and 186(1.1) offend s. 8 of the *Charter*. Further, these infringements do not pass

122. See for example *R. v. Alcantara* (2012), [2013] 6 W.W.R. 1, 547 A.R. 1, 80 Alta. L.R. (5th) 1 (Alta. Q.B.), at para. 21.

muster under s. 1 of the *Charter*. Also, even if "investigative necessity" is not a constitutional requirement, the removal of the investigative necessity requirement fetters the discretion of an authorizing judge and either *a fortiori* the subsections are unconstitutional, or in the alternative a trial judge retains discretion to consider "investigative necessity" in any event.

1. Revisiting *Southam*

Section 8 of the *Charter* declares that

> Everyone has the right to be free from unreasonable search or seizure

The leading Supreme Court of Canada decision on s. 8 of the *Charter* is *Hunter v. Southam*. But what is often overlooked is that *Southam* does not establish a "one-size fits all" standard for search warrants. Instead, *Southam* establishes the "broad brush strokes" of s. 8 protection.[123] In *Southam* Justice Dickson (as he then was) establishes guiding principles which animate, and direct s. 8 protection. He explains that a determination of whether a search is unreasonable involves a case-by-case assessment of whether

> . . . in a particular situation the *public's* interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.[124]

Thus, s. 8 analysis involves a delicate balancing of the interest of the *public* in privacy, which is "a crucial element of individual freedom which requires the state to respect the dignity, autonomy and integrity of the individual",[125] with the exigencies of law enforcement, which are essential to the safety and security of citizens in a free and democratic society.[126] This analysis must be attentive to the circumstances of a particular search.[127]

In *Southam*, the Supreme Court considered statutory provisions under the then *Combines Investigation Act*,[128] which authorized the

123. Tim Quigley *Procedure in Canadian Criminal Law* 2nd ed. (Toronto: Carswell, 2005), at 8.2(a).

124. *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, (*sub nom.* Hunter v. Southam Inc.) [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97, 41 C.R. (3d) 97 (S.C.C.), at pp. 159-60 (*Southam*) (Emphasis added).

125. *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841, 124 C.C.C. (3d) 129, 16 C.R. (5th) 1 (S.C.C.), at para. 19.

126. *Ibid.*

127. *Southam, supra*, footnote 123, at p. 115.

128. R.S.C. 1970, c. C-23, now the *Competition Act*, R.S.C. 1985, c. C-34.

Director of Investigation and Research to enter a premise and seize documents where he had agency approval. The court concluded that in the context of that particular search, that Parliament had not stuck the appropriate balance. In so doing, the court found that, in the circumstances of that particular search, that the interest of the individual in being left alone gave way to the interests of law enforcement where the police had attained prior authorization by a neutral adjudicator based on credibly-based probability.

Since *Southam* the Supreme Court of Canada has considered the constitutionality of various searches, such as, for example, residences,[129] computers,[130] media premises,[131] and even searches of the human body, such as DNA searches,[132] and strip searches.[133] Generally, the court has adhered to the *Southam* formulation of credibly-based probability, or some derivative thereof. In most instances the court has found that the *Southam* formulation has struck the appropriate balance between the interests of individual privacy, and the exigencies of law enforcement. However, this is not always the case.

As Justice Dambrot argues in *Riley*, "the contours of what may be constitutionally required beyond or in substitution for the *Southam* prerequisites must depend on the context".[134] *Southam* does not foreclose the possibility that, in the context of any given search, it may be appropriate to strike a different balance. Indeed, in *R. v. Lavallee, Rackel & Heintz*; (2002),[135] Justice Arbour and the majority of the Supreme Court of Canada held that a requirement largely analogous

129. See for example *R. v. Vu*, [2013] 3 S.C.R. 657, 302 C.C.C. (3d) 427, 6 C.R. (7th) 1 (S.C.C.) (*Vu*).

130. See generally *ibid.* In *Vu* the court considered whether a search warrant for a premise authorized the police to search computers on the premise. The court concluded that the privacy interests at stake for searches of computers require the devices to be treated as a different "place" not under the ambit of the original search warrant. This further illustrates that the *Southam* analysis is contextual and case-by-case.

131. *R. v. National Post*, [2010] 1 S.C.R. 477, (*sub nom.* National Post v. Canada) 254 C.C.C. (3d) 469, 74 C.R. (6th) 1 (S.C.C.).

132. See for example *R. v. B. (S.A.)*, [2003] 2 S.C.R. 678, 178 C.C.C. (3d) 193, 14 C.R. (6th) 205 (S.C.C.) (*B. (S.A.)*) and *R. v. C. (R.)*, [2005] 3 S.C.R. 99, (*sub nom.* R. v. C. (R.W.)) 201 C.C.C. (3d) 321, 32 C.R. (6th) 201 (S.C.C.).

133. *R. v. Golden*, [2001] 3 S.C.R. 679, 159 C.C.C. (3d) 449, 47 C.R. (5th) 1 (S.C.C.).

134. *Riley*, *supra*, footnote 111, at para. 67.

135. *R. v. Lavallee, Rackel & Heintz*, (*sub nom.* Lavallee, Rackel & Heintz v. Canada (Attorney General)) [2002] 3 S.C.R. 209, 167 C.C.C. (3d) 1, 3 C.R. (6th) 209 (S.C.C.) (*Lavallee*).

to "investigative necessity" was a requirement for the search of lawyers' offices. As she explains

> [s]ometimes the traditional balancing of interests involved in a s. 8 analysis is inappropriate. As it was stated in *R. v. Mills* . . .[136] "the appropriateness of the balance is assessed according to the *nature of the interests at stake in a particular context*, and the place of these interests within our legal and political traditions".[137]

Thus, s. 8 requires a case-by-case assessment of whether, in the context of a particular search, the public's interest in privacy must give way to the state's interest in law enforcement. It is necessary to take into account *all* of the circumstances. While *Southam* establishes a useful standard which may be appropriate for some searches, it does not foreclose the possibility that in the context of a particular search, it may be necessary impute other requirements to strike the appropriate balance. *Lavallee* demonstrates investigative necessity may be one such requirement.

With this in mind, it is necessary to consider the nature of electronic surveillance. Electronic surveillance is fundamentally different than traditional searches of premises, or even searches of the human body. It is not only extremely intrusive to the direct target of a police search, and has a potentially devastating effect on privacy and autonomy of *innocent third parties*. It requires a court to strike a different balance.

Indeed, wire-tap searches are extremely intrusive to suspects of investigation. But as lower courts are quick to point out, so are other forms of searches. Yet the Supreme Court of Canada has not seen fit to impose an investigative necessity requirement in relation to intrusive searches such as fingerprinting, blood sample demands, DNA warrants, or even strip-searches. However, while these searches are intrusive to the physical integrity of the human person, the particular character of electronic surveillance imbues a wire-tap interception with a degree of intrusion which embodies a more insidious threat. As Justice Laforest cautions "if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance".[138]

As the Supreme Court of Canada explains: "[r]espect for individual privacy is an essential component of what it means to be "free"". As a corollary, the infringement of this right undeniably

136. *R. v. Mills* (1999), [1999] 3 S.C.R. 668, 139 C.C.C. (3d) 321, 28 C.R. (5th) 207 (S.C.C.), at para. 86 (*Mills*).
137. *Lavallee*, *supra*, footnote 134, at para. 36 [Emphasis Added].
138. *Duarte, supra*, footnote 1, at p. 44.

impinges upon an individual's "liberty" in our free and democratic society".[139] Clearly, permanent electronic recordings probe the depths of our private and intimate lives, and violate the human person in a manner which last long after the ink is washed from the fingertips, or the prick of the needle is forgotten.[140] Let us not forget that while bodily integrity is a vital component to liberty and autonomy, in generations past individuals have given up their bodily integrity, even their very lives, to defend from the clutches of tyrants and despots, the principles of liberty and upon which our society is founded. We would do well to honour those sacrifices by not sacrificing their ideals.

Further, and perhaps most importantly, there is one element to electronic interception which distinguishes it from any other form of search. That element is the *effect on third parties*.

As Justice T. Ducharme astutely notes in *R. v. Spackman*,[141]

> Electronic surveillance is an incredibly powerful tool for combating crime, and experience has demonstrated that it is especially valuable in building a case against criminal organizations. But the use of electronic surveillance cannot be assessed as if it were solely being used against those involved in criminal activity. This is because, as our courts have consistently recognized, when the State intercepts our communications, not only are our personal privacy interests infringed *but also our collective democratic freedoms are endangered.*[142]

This is the most critical constitutional dimension of the dialogue, and one that is often overlooked during balancing interests in a s. 8 analysis. The prospect of wire-tap interception introduces a critical third dimension into the constitutional dialogue. Wiretaps do *not* just affect targets of police investigation. Wiretaps operate 24 hours a day, 7 days a week, for the period of the authorization, and capture all manner of private and intimate conversations, irrelevant to the investigation of crime, including the words of innocent third parties who are unfortunate enough to speak to the target of the investigation.

Further, while the police are required to name "known" targets of investigation,[143] it is permissible for police officers to include broad

139. *R. v. O'Connor*, [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1, 44 C.R. (4th) 1 (S.C.C.), at para. 114.

140. Granted, the gathering and storage of DNA evidence in the context of advancement of science gives rise to more complex issues.

141. *R. v. Spackman* (2008), 234 C.C.C. (3d) 24, 173 C.R.R. (2d) 333, [2008] O.J. No. 2722 (Ont. S.C.J.), at para. 2 (*Spackman*), reversed on other grounds *R. v. Spackman* (2012), 295 C.C.C. (3d) 177, 300 O.A.C. 14, 274 C.R.R. (2d) 196 (Ont. C.A.).

142. *Spackman*, *ibid.*, at para. 9 (emphasis added).

143. *R. v. Finlay* (1985), 23 C.C.C. (3d) 48, 48 C.R. (3d) 341, 23 D.L.R. (4th) 532

"basket clauses" that catch the private communications of unknown third parties,[144] or "resort to" clauses that allow the police to intercept private communications at locations, such as pay-phones, that a target is discovered to use.[145] Also, and perhaps even more offensive to the right of third parties, is the increase in the length of authorizations involving criminal organization from a length of sixty days to one year.[146]

Some of these investigations, and the webs which they spin are incredibly vast. Although definitive empirical data about the scope of electronic interception is, for obvious reasons, not readily available there is no question that wire-taps are broadly used, and used broadly, generally catching thousands, and even hundreds of thousands of communications. In one case a wiretap intercepted approximately *fourteen thousand* phone calls.[147] In another cases a single wire-tap investigation has captured upwards of *two-hundred and eighty thousand conversations*.[148]

Moreover, in *Telus* the Supreme Court of Canada found interception of electronic transmissions such as text messages are subject to the heightened protections afforded by Part VI of the *Criminal Code*. But under the amendments considered herein, in the context of certain investigation the Police are able to acquire text messages daily from telecommunication provider databases whether or not they have tried other methods of investigations. This is disconcerting, particularly where recent statistics indicate that Canadian telecommunication customers send *two-hundred and fifty million* text messages a *day* (approximately 23 billion per year).[149]

(Ont. C.A.), leave to appeal refused [1986] 1 S.C.R. ix (note), (*sub nom.* Finlay v. R.) 50 C.R. (3d) xxv, 54 O.R. (2d) 509 (S.C.C.) (*Finlay*).

144. *R. v. Chesson*, [1988] 2 S.C.R. 148, 43 C.C.C. (3d) 353, 65 C.R. (3d) 193 (S.C.C.). Granted, these clauses must be drafted carefully to avoid extending the reach of the authorization beyond an acceptable limit (*R. v. Grabowski*, [1985] 2 S.C.R. 434, 22 C.C.C. (3d) 449, (*sub nom.* Grabowski v. R.) 22 D.L.R. (4th) 725 (S.C.C.)).

145. *R. v. Thompson*, [1990] 2 S.C.R. 1111, 59 C.C.C. (3d) 225, 80 C.R. (3d) 129 (S.C.C.). However, a court will often impose make an authorization subject to limitations that attempt to minimize the impact on third parties.

146. See s. 186.1. It is noteworthy that the very purpose of seeking a renewal after 60 days is so that a judge is able to re-assess the investigation. Depending on the nature of the investigation, and the terms of the authorization, a wire-tap search may expand, and change as the investigation processes.

147. See *Spackman*, *supra*, footnote 140.

148. *R. v. Chan* (2003), 15 C.R. (6th) 53, [2004] 7 W.W.R. 88, 342 A.R. 201 (Alta. Q.B.), at para. 33.

149. Canadian Wireless Telecommunications Association "Stats/Press" Online <http://txt.ca/english/business/pdf/qrt_graph_2013Q3-en.pdf> (Accessed December 2nd, 2013).

As Justice LeBel explains in *Araujo*, the potential that the police could resort to electronic surveillance at their convenience, should "send a chill down the spine of every freedom-loving Canadian".[150] And it is not just Canadian citizens harbouring terrorists, or trafficking cocaine that need to be alarmed. Recall that George Orwell's "thought police" drove not just the aberrant, but innocent citizens into the refuge of shadows to speak in muted whispers. The reality of electronic surveillance is that countless third parties are inevitably caught in a vast web of electronic interception.

An investigative necessity requirement curtails the proliferation of intrusive and unnecessary electronic interception. It defends the privacy of innocent third parties. Where the police are compelled use other reasonable methods of investigation, they are able to refine their investigation, ensure that their suspicions are grounded, and in so doing reduce the likelihood that they will unwittingly interfere in the affairs of innocent third parties. In short, an investigative necessity requirement means less unnecessary wiretap investigations, less wiretaps in general, and less of a chance that the police are listening to the phone calls of innocent third parties.

The rights guaranteed by the *Charter* must be interpreted in a broad and purposive manner.[151] Consistent with this end, constitutional imperatives must be responsive to the mischief which they seek to address. We live in an era of unprecedented advancements to technology.[152] Left unchecked, electronic surveillance stands to be "the greatest leveller of human privacy ever known."[153] Canadian courts must be able to effectively weigh not only the impact of these new forms of technology on proximate parties to an investigation, but the residual impact of that technology on the privacy of the public at large.[154] To find that a search need only be based on credibly-based probability, and that investigative necessity, and third party privacy does not, of constitutional necessity, weigh into the balance, is to sterilize the ability of courts to react to these changes in a meaningful way. It is to put the defenders of our constitution in irons.

The question then arises, in the context of the wire-tap regime as a whole, is "investigative necessity" a constitutional requirement?

150. *Araujo*, *supra*, footnote 1, at para. 39.
151. *Southam*, *supra*, footnote 123.
152. Steven Penney, "Updating Canada's Communications Surveillance Laws: Privacy and Security in the Digital Age" (2008), 12 Can. Crim. L. Rev. 115.
153. *Duarte, supra*, footnote 1, at para. 11.
154. *R. v. Tessling*, [2004] 3 S.C.R. 432, 189 C.C.C. (3d) 129, 23 C.R. (6th) 207 (S.C.C.).

Section 8 of the *Charter* requires the court to strike an appropriate balance between the interest of law enforcement, and the interest of the individual in being left alone. As a necessary corollary of s. 8 protection, it is essential that courts take into account the public interest in privacy, specifically the interest of third parties in wire-tap authorizations. Has Parliament struck the appropriate balance?

It is necessary to frame the government's justification for these provisions in the most favorable light. In cases involving terrorists or criminal organizations it will be very easy to demonstrate investigative necessity. As the learned Honorable Minister Rock explains in these investigations a wiretap "it is almost always obvious that it is a last resort".[155] Why require the police to prove investigative necessity in these cases, when electronic surveillance is *almost always* a last resort? Undoubtedly the state will attempt to argue that removing this requirement will remove what Justice Minister Rock has described as a "paper burden", and may conserve critical police resources.

However, this argument does not hold up under closer examination. The actual benefit police will gain from not needing to prove investigative necessity is, by the learned Minister's own admission, nominal, as the requirement will "almost always" be met in the context of these investigations.[156] As demonstrated above, the investigative necessity requirement is not necessarily an onerous one, and in cases in which it is, such additional efforts are a worthy sacrifice for the preservation of our *Charter* rights.

It simply requires the police to show that a wire-tap authorization is practically speaking, the only method of investigation reasonable given the circumstances. Clearly, investigative necessity is attentive to the circumstances of a particular investigation. Moreover, even if, as the learned minister states in "almost" all cases investigative necessity is implied, what about the cases in which it is not? In those cases wire-taps are used unnecessarily and the privacy interests of innocent third parties are compromised unnecessarily. The "paper" burden which is removed is also suspect. If it is "obvious" that a wire-tap is an investigative necessity, then it should be plain on the facts of the investigation. Little further information would be required to prove investigative necessity.

However, it is *not* clear that in investigations involving criminal organizations and terrorist activity that electronic surveillance "almost always" a last resort. Indeed, there are many investigations

155. *Debates April 21, 1997*, *supra*, footnote 60, at p. 9976.
156. *Ibid.*

involving criminal organizations, or terrorist groups, where there will be other reasonable means of investigation readily available.

For example, the definition of "criminal organization" requires only a finding of (1) three or more persons"'(2) whose "main purpose" or "main activities" are "the facilitation or commission of one or more serious offences . . . [for] receipt of a material benefit"[157] This definition captures not only highly sophisticated criminal organizations. It also includes a wide spectrum of criminal organizations, ranging from small-time group of teenagers selling marijuana, to an international drug cartel. Is it correct to say that in almost all of these investigations there is no alternative to a wire-tap? Consider the example the small time marijuana dealers. In this case would conventional search warrants, routine surveillance, or police informants yield no results? Clearly this is not the case.[158] The police would be legally entitled to tap a number of smaller organizations such as these, and there are few safeguards to prevent them from proliferating numerous wiretaps on such small-time organizations, presumably with the intention of capturing bigger fish through broad basket clauses and collateral plain-sight interceptions.

Similarly, many would argue that the nature of a "terrorist" organization may indeed imply a higher degree of sophistication. However, the definition of "terrorist activity" is *extremely* broad. It includes not only extremely dangerous offences that threaten national security,[159] but also acts or omissions that for "political, religious or ideological purposes" that are committed to "intimidate[e] the public, or a segment of the public" regarding its security, even its "financial" security, that cause "substantial property damage".[160] Depending on the level of sophistication of various organizations, it is impossible to say with confidence that there are no circumstances under which investigative techniques such as undercover operations, surveillance, or traditional search warrants will yield *no* results. The investigative necessity requirement is satisfied when "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."[161] In any case involving serious terrorist threats this requirement would likely be

157. Section 467.1(1) "Criminal Organization".
158. Granted it is unlikely the police would use scarce resources and a wiretap to investigate such a crime, however it remains open to them to do so.
159. See s. 83.01 "terrorist activity" (a).
160. See generally, s. 83.01 "terrorist activity" (b).
161. Section 186(1)(b).

satisfied; but the investigative necessity requirement protects constitutional rights in the circumstances that it isn't.

On the other side of the scale, the interest of personal privacy is compelling. A wire-tap authorization is extremely intrusive to an accused, and potentially devastating to the privacy of third parties. Most significantly, however, is that where the police have not demonstrated investigative necessity, such an intrusion may be unnecessary. There stands to be a severe impact on the privacy of Canadians, and a nominal benefit to the state's interest in law enforcement. Put plainly, in introducing ss. 185(1.1) and 186(1.1) Parliament has *not* struck the appropriate balance. In the absence of investigative necessity, the search regime authorizes an unreasonable search. It offends s. 8 of the *Charter*.

In summary, *Southam* mandates a balancing of interests of individual privacy and the interests of law enforcements. In this instance Parliament has not struck the appropriate balance because of the potential to allow for an intrusive search, with a potentially devastating on the privacy and autonomy of third parties, where other methods may be readily available. While there certainly needs to be a dialogue between Parliament and the courts, and while there is often flexibility afforded to the legislature in creating a solution, it is not open to Parliament to create legislation which stands to have a dangerous, and ultimately unnecessary, effect on the privacy of all Canadians, ultimately sacrificing our freedoms to rid themselves of a "paper burden".

Given the nature of the interests as stake, the constitutional requirements for a wire-tap extend beyond credibly-based probability, and includes investigative necessity. Since ss. 185(1.1) and 186(1.1) remove this requirement, they offend the s. 8 of the *Charter*. The question remains: could these subsections represent a reasonable limitation under s. 1 of the Charter?

2. Section 1

Sections 185(1.1) and 186(1.1) offend s. 8 of the *Charter*. The remaining question is whether they might be saved under s. 1 of the *Charter*. Section 8 is a qualified right, and it is very likely justification fails at the "sufficient importance" stage or almost certainly fails at the "minimal impairment" stage.

As a preliminary point, it is crucial to note that s. 8 is a *qualified* right the determination of which naturally involves a balancing of interests.[162] Peter Hogg observes that it is "*theoretically* possible" that a law authorizing an unreasonable search could still represent a

"reasonable limit" in a free and democratic society.[163] Further, the Supreme Court of Canada has declared that in the context of it is "difficult to conceive" of such circumstances.[164]

In *Lavallee*, the Supreme Court of Canada found a law authorizing the search of lawyers offices offended s. 8 of the *Charter* if it did not require the police to explore other "reasonable alternatives", akin to the *investigative* necessity requirement required for wire-tap authorizations. In analogous circumstances to those explored here, the court concluded:

> I find that s. 488.1 (authorizing a search of lawyers office) more than minimally impairs solicitor-client privilege and thus amounts to an unreasonable search and seizure contrary to s. 8 of the Charter . . . Although this Court has left open the possibility that violations of ss. 7 and 8 could be saved under s. 1 in exceptional circumstances, this is clearly not such a case . . . In particular, if, as here, *the violation of s. 8 is found to consist of an unjustifiable impairment of the privacy interest protected by that section, everything else aside, it is difficult to conceive that the infringement could survive the minimal impairment part of the Oakes test*.[165]

Thus the Supreme Court has sent a strong message that it will only uphold a *prima facie* unjustifiable impairment of privacy interest" in "exceptional circumstances".[166] It would be *extremely* difficult to argue a nominal increase in administrative efficiency represents "exceptional" circumstances. As such, a brief s. 1 analysis is warranted, although there is little question that justification fails.

Section 1 of the *Charter* states that

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[167]

Oakes, sets out the basic framework for s. 1 analysis. The government must present evidence[168] to prove, on the balance of probabilities that:

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162. See Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto, Carsewell, 2013), at 38.14 ("Application to Qualified Rights").
163. *Ibid.*, at 38.14.
164. *Lavallee*, *supra*, footnote 134, at para. 46.
165. *Ibid.*, at para. 46 (citations omitted).
166. *Ibid.*
167. *Charter*, *supra*, footnote 5, s. 1.
168. *R. v. Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1 (S.C.C.) (*Oakes*); *Oakes* suggests the government must adduce *evidence* to justify an infringement. However, in some circumstances the court may make common sense observations (See generally *RJR-MacDonald Inc. v. Canada (Attorney*

(a) the legislation has an objective of sufficient importance to warrant overriding a *Charter* right;
(b) the means chosen are rationally connected to the objective;
(c) the means impair the right as little as possible; and
(d) there is proportionality between the effects of the infringing measure and the objective.[169]

Sections 185(1.1) and 186(1.1) likely do *not* have a pressing and substantial objective. The question will turn on the level of *generality* with which the court frames the objective.

Framed *broadly* the objective is sufficiently important. The purpose is to "deter... the commission of criminal activity by criminal organizations",[170] and "suppress, *investigative* and incapacitate terrorist activity".[171]

However, framed *narrowly*, the purpose is *not* sufficiently important. It would be to save a "paper burden" and provide a nominal increase in administrative efficiency. Except in times of extreme financial crisis,[172] the Supreme Court of Canada has declared that it will "look with strong scepticism at attempts to justify infringements of Charter rights on the basis of budgetary constraints [as] [t]o do otherwise would devalue the *Charter*".[173]

Professor Hogg observes that a court generally adopts a high level of generality, which moves inquiry to the proportionality stage of analysis.[174] However, In *RJR-MacDonald* Justice McLachlin (as she then was) declares a court must consider the objective related to the "*infringing measure*," in this case the removal of the investigative necessity requirement in the interest of administrative efficiency.[175]

General), [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114 (S.C.C.) (*RJR-Macdonald*). Legislative history is relevant, but the court will also conclude the purpose speaks for itself (See Hogg, *supra*, note 164 at 38.9(a)).

169. See generally *Oakes*, *supra*, footnote 170. Note the test was originally framed as a *two* stage inquiry, (a) representing the first stage and (b)-(c) representing the second branch, termed "proportionality". The requirements are divided into four parts herein for the sake of clarity.
170. See Bill C-95, *supra*, footnote 57, at "preamble".
171. *Anti-terrorism Act, supra*, footnote 58, at "preamble".
172. *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, 244 D.L.R. (4th) 294, (*sub nom*. Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees) 719 A.P.R. 113 (S.C.C.) (*Nape*), at para. 64. In *NAPE* the court stressed that the measures must be "proportional both to the fiscal crisis and to their impact on the affected Charter interests" (*ibid*., at para 64).
173. *Ibid*., at para 72.
174. Hogg, *supra*, footnote 164, at 38.9(a). Professor Hogg notes that in only two decisions has the Supreme Court found legislation to fail at this stage (*ibid*.).

This may well be a case in which a court frames the objective *narrowly* and declares a nominal interest in administrative efficiency is *not* an objective of sufficient importance. It may feel it is time send a strong message that our constitutionally protected freedoms cannot be sold in the interest of administrative efficiency. Even if it frames the objective *broadly*, paradoxically, this will ultimately prove *fatal* to the legislation at the *minimal impairment* stage.

Assuming a court frames the objective in a broad manner, it may find a rational connection, but such a finding will ultimately prove immaterial. A rational connection requires a legislative measure be "carefully designed" and not based on "arbitrary, unfair or irrational considerations".[176] While the legislation might be argued to be "irrational" it is possible the Crown may convince a court that a nominal increase in administrative efficiency in some way increases its capacity to battle crime and terrorism. This stage is largely irrelevant as this legislation almost certainly fails at the minimal impairment stage.

Given a broadly stated legislative purpose, these provisions clearly fail at the minimal impairment stage. A law should pursue an objective by the least drastic means available. While the government is entitled to a "margin of appreciation" in this respect,[177] it must impair the right as little as "reasonably possible".[178] Moreover, as the Supreme Court of Canada stresses in *Edwards*,[179] the effects of the legislation "must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless *outweighed by the abridgment of rights*".[180]

In *Lavallee*, the court found that "while effective police investigations are indisputably a pressing and substantive concern" permitting a search of lawyer's offices where other methods of investigation were available did *not* impair the right as little as reasonably possible.[181]

At this stage a *broad* statement of the purpose of the legislation as battling criminal organizations and diffusing terrorist threats. That is the case here. The measure chosen does *not* impair the right as little as

175. *RJR-MacDonald supra*, footnote 170, at para. 144, *per* McLachlin J. (as she then was).
176. *Oakes*, *supra*, footnote 170, at p. 139.
177. Hogg, *supra*, footnote 164, at 38.11.
178. *R. v. Videoflicks Ltd.*, (*sub nom.* R. v. Edwards Books & Art Ltd.) [1986] 2 S.C.R. 713, 30 C.C.C. (3d) 385, 55 C.R. (3d) 193 (S.C.C.) (*Edwards*), at para. 122.
179. *Ibid.*
180. *Ibid.* (emphasis added).
181. *Lavallee*, *supra*, footnote 139, at para 46.

reasonable possible. As explored in depth above ss. 185 (1.1) and 186 (1.1) permit a search with potentially devastating impact on third party privacy where other readily available forms of investigation are practical and reasonable in the circumstances. The legislative objective is *clearly* "outweighed by the abridgment of rights".[182]

The police have a *vast* and growing arsenal of tools at their disposal to advance complex criminal investigation in response to criminal organizations and terrorism. Given the ingenuity of legislative and the ambitions of law enforcement officials, one could envision countless legislative measures police could implement to facilitate criminal investigations, and streamline the process *without* unnecessarily endangering the privacy interests of the public.[183] As in *Lavallee* there is no question this legislation fails at the minimal impairment stage.

As Professor Hogg notes, justification is very seldom determined at the proportionality stage.[184] In any event, the practical effect of these subsections is to allow the police to use a wire-tap when there are other practical methods investigation available. This affords only a nominal interest in administrative efficiency. This interest is dwarfed by a potentially devastating effect on the privacy and autonomy of not only police targets, and but very often innocent third parties.

In conclusion, ss. 185(1.1) and 186(1.1) permit an unreasonable search. They remove a critical and integral safeguard within a scheme which regulates electronic surveillance and defends critical constitutional rights and freedoms. This stands to have potentially devastating effects on the privacy of Canadians for a nominal interest in administrative efficiency. This is *not* a reasonable limitation on constitutional rights in a free and democratic society. Unfortunately, this is illustrative of what commentators note to be a "world-wide trend for politicians to pander to law and order demands".[185]

182. See *Edwards*, *supra*, footnote 180, at para. 122. See generally (IV)(I) above and the s. 8 contained therein which invariably mirrors the "balancing" endeavour under the minimal impairment stage of analysis.

183. For a list of present initiatives, related resources and news releases see generally Government of Canada, Public Safety Canada, "Countering Crime" Online: < http://www.publicsafety.gc.ca/cnt/cntrng-crm/index-eng.aspx (Accessed December 6, 2013). The initiative states:Public Safety Canada's role in the fight against organized crime is one of policy development and coordination. It brings together law enforcement agencies with federal, provincial and territorial partners to develop unified strategies and policies, ensuring a direct link between the law enforcement community and public policy makers. Public Safety Canada also ensures a high level of policy coordination with international partners.

184. Hogg, *supra*, footnote 164, at pp. 38-43.

185. Don Stuart, "Politically Expedient But Potentially Unjust Criminal Legisla-

However, despite the fact that Parliament may have acceded to the crown's views that investigative necessity is a "humdrum or routine matter", the Supreme Court of Canada has affirmed, again and again, that "the *Charter* must not be seen as something to be swept away in the interests of expediency".[186] That said, even if a court does *not* find that these sections offend the *Charter*, an authorizing judge *still* maintains a right, and in fact has a duty to consider refuse to grant a wire-tap authorization where the crown has not demonstrated investigative necessity.

3. *Baron v. R.* and Residual discretion

There is one final, but critical point which ought to be considered. The introduction of ss. 185 (1.1) and 186 (1.1) fetters the discretion of an authorizing judge. This may support a finding that these sections are unconstitutional. It may also, as Justice Sproat explains if *R. v. Y. (N.)*, afford an authorizing judge a residual discretion, or even a duty, to consider investigative necessity notwithstanding ss. 185 (1.1) and 186 (1.1).[187] This proposition stems from the Supreme Court of Canada decisions in *Baron v. R.* (1993).[188]

In *Baron* the Supreme Court of Canada entertained a challenge to s. 231.3(3) of the *Income Tax Act*.[189] Section 231.3 provides that where there an authorizing judge has reasonable and probable grounds to suspect an offence under the act, that the judge "*shall*" authorize a search. The Supreme Court of Canada found that that s. 231.3 violated s. 8 of the *Charter*. This provision violated s. 8 of the charter because it removes the discretion of the issuing judge. That is to say, even if reasonable and probable grounds exist, a trial judge still maintains a residual discretion to refuse to issue a search warrant. Section 231.3 removed that discretion.

For a unanimous Supreme Court, Justice Sopinka stresses that at the root of s. 8 is a delicate balancing of individual privacy and law enforcement.[190] Further, "[t]he circumstances in which these conflicting interests must be balanced will vary greatly".[191] Thus,

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tion Against Gangs" (1998), 69 Int'l Rev. Penal L. 245 See also *Whitling*, *supra*, footnote 42, at pp. 120-121.

186. *R. v. M. (A.)*, [2008] 1 S.C.R. 569, 230 C.C.C. (3d) 377, 55 C.R. (6th) 314 (S.C.C.).

187. *Y. (N.)*, *supra*, footnote 115, at paras. 21, 22.

188. *Baron v. R.*, (*sub nom.* Baron v. Canada) [1993] 1 S.C.R. 416, 78 C.C.C. (3d) 510, 18 C.R. (4th) 374 (S.C.C.) (*Baron*).

189. R.S.C. 1952, c. 148 (am. S.C. 1970- 71-72, c. 63).

190. *Baron*, *supra*, footnote 190, at para. 32.

191. *Ibid.*, at para. 33.

> [i]n order to take account of the various factors affecting the balancing of the two interests, the authorizing judge must be empowered to consider all the circumstances. No set of criteria will always be determinative or sufficient to override the right of the individual to privacy. *It is imperative, therefore, that a sufficient degree of flexibility be accorded to the authorizing officer in order that justice be done to the respective interests involved.*[192]

This requirement stems from the reality that the balancing of competing interests is a delicate constitutional practice that rests exclusively within the ambit of judicial competence. It is what judges do.[193] It is not a step that can be taken lightly.[194]

Although *Baron* dealt with traditional search warrants, it applies, *a fortiori* where an authorizing judge is faced with a wire-tap application. As Justice Martin notes in *R. v. Finlay*:

> A 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.*[195]

Thus, as Justice LeBel affirms, an authorizing judge should *not* view himself as a "rubber stamp" but must "keep important values of Canadian society in sight and look seriously at whether there is, practically speaking, no other reasonable alternative method of investigation".[196] Her thoughts should turn to rights of innocent third parties, and how this investigation will affect them. These interests permeate any authorization, and ought not to be ousted from the purview of a trial judge's who sits in the best position to evaluate them.

Therefore, based on *Baron*, defence council could mount a compelling argument that the removal of the investigative necessity

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192. *Ibid.*, at para. 34 [emphasis added].

193. Indeed, this is why, while the Supreme Court expressly rejected an "investigative necessity" requirement in relation to the search of a media premise, they were careful to caution that even in "those situations where all the statutory prerequisites have been established, the justice of the peace should still consider all of the circumstances in determining whether to exercise his or her discretion to issue a warrant (*Société Radio-Canada c. Lessard*, (*sub nom.* Canadian Broadcasting Corp. v. Lessard) [1991] 3 S.C.R. 421, 67 C.C.C. (3d) 517, 9 C.R. (4th) 133 (S.C.C.); *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, (*sub nom.* Canadian Broadcasting Corp. v. New Brunswick (Attorney General)) [1991] 3 S.C.R. 459, 67 C.C.C. (3d) 544, 9 C.R. (4th) 192 (S.C.C.) (*CBC*)).

194. *CBC supra*, footnote 146, at p. 475.

195. *Finlay*, *supra*, footnote 145, at p. 68.

196. *Araujo, supra*, footnote 21, at pp. 1006-1007.

requirement offends s. 8 of the *Charter*. In ss. 185 (1.1) and 186 (1.1), Parliament has attempted to remove a critical factor from the purview of judicial consideration. In the alternative, even these sections are upheld, *Baron* would seem to support the proposition that a trial judge has the discretion, and the duty as a constitutional defender, to consider investigative necessity in spite of these sections.

Conclusion

In conclusion, investigative necessity is a critical constitutional component of the Canadian wire-tap regime. It requires the police to evaluate other practical methods of investigation before resorting to electronic surveillance. This reduces the occurrence of wire-tap authorization in circumstances where other less intrusive methods of investigation are available. It reduces the possibility that the police are listening in to our private conversations in unnecessary circumstances. However, in ss. 185 (1.1) and 186 (1.1) Parliament has abolished this requirement in relation to police investigations which relate to organized crime or terrorism.

Under s. 8 of the *Charter*, a search is reasonable where it strikes the appropriate balance between the exigencies of law enforcement and individual's right to privacy and autonomy. In removing investigative necessity Parliament has upset the balance. It authorizes devastating, and ultimately unnecessary intrusions in the privacy of innocent Canadians. Moreover, these subsections fetter the discretion of an authorizing judge, and attempt to enjoin her from to taking into account critical considerations in her delicate balancing of constitutional rights.

That said, a court ought to be cautious not to usurp the role of the legislature and allow it leniency in devising legislative initiatives in furtherance of importance societal ends. However, in a democratic society a judiciary acts as guardian of constitutional values. And as the Supreme Court of Canada declares in *R. v. Mills*,[197] "constitutionalism can facilitate democracy rather than undermine it . . . by ensuring that fundamental human rights and individual freedoms are given due regard and protection".[198]

In the face of troubling criminal activity, and in the wake of terrorist attacks, it is clear that many individuals will be willing to give up their precious privacy in the interest of security. When introducing these amendments to the House of Commons the Honourable Justice Minister Rock explained that removing the investigative necessity

197. *Mills*, *supra*, footnote 138.
198. *Ibid.*, at para 58.

requirement "sends a message".[199] He is correct. It does send a message. But it is a dangerous one. Our precious freedoms can be discarded for a marginal interest in administrative efficiency. The implications of this message extend beyond discrete provisions regulating electronic surveillance. It sets a precedent. It speaks to the extent, and basis upon which, we as a society are willing to suspend our fundamental human rights and individual freedoms in the interest of security. As Benjamin Frankin famously cautioned, "[t]hey who would give up essential Liberty, to purchase a little temporary safety, deserve neither liberty nor safety.[200]

One of the most important lessons history teaches us is this: sometimes it is not threats to our security that present the greatest peril to our democratic institutions. It is the dangerous measures that a society is prepared to take in the name of defending against them. It is precisely times like these that the defenders of the Canadian constitution need to be most vigilant. As Thomas Berger cautions "our freedoms are fragile".[201]

199. *Debates April 21, 1997*, *supra*, footnote 63, at p. 9976.
200. *Votes and Proceedings of the House of Representatives*, 1755-1756 (Philadelphia, 1756) 19-21 at 20.
201. Thomas Berger *Fragile Freedoms, Human Rights and Dissent in Canada* (Toronto-Vancouver: Clarke, Irwin & Company Limited, 1981).