2008 CarswellOnt 4331
Ontario Superior Court of Justice

R. v. Riley

2008 CarswellOnt 4331, [2008] O.J. No. 2889, 174 C.R.R. (2d) 288, 78 W.C.B. (2d) 148

HER MAJESTY THE QUEEN and TYSHAN RILEY, PHILLIP ATKINS and JASON WISDOM

M. Dambrot J.

Heard: March 10-June 5, 2008
Judgment: July 21, 2008
Docket: P299-07

Counsel: Suhail Akhtar, Maureen Pecknold, Scott Childs, Michael Passeri, Lesley Pasquino for Crown
David Midanik for Tyshan Riley
David Berg, Jody Matthew for Philip Atkins
Maurice Mirosolin, Emma Rhodes for Jason Wisdom

Subject: Criminal; Constitutional; Evidence

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Criminal law --- Pre-trial procedure — Admissibility of private communications — Authorization — Miscellaneous

Accused were known as gang members of criminal organization G — Accused allegedly shot at driver and passenger in car from their vehicle, killing two victims — Accused allegedly believed that victims were members of criminal organization M — Friend of accused R told detective that R was implicated in several shootings, and used several vehicles for purpose of shootings — For five days, police intercepted private communications of R without judicial authorization, relying on s. 184.4 of Criminal Code (Code) — Warrant was granted to authorize use of number recorders and tracking devices for accused R's cellular phones — Police decided not to arrest accused when he attended court for breach of conditional sentence because they didn't want to compromise homicide investigation — Unit commander of intelligent services (commander) believed that if R were arrested at court, he would not be in custody for long enough to serve any purpose — Accused R was subsequently arrested for shooting and killing two other victims — Accused were charged with first degree murder, attempted murder, and committing murder and attempted murder for benefit of criminal organization — Accused sought exclusion of evidence at trial pursuant to s. 24(2) of Canadian Charter of Rights and Freedoms — Voir dire was held to determine whether evidence obtained was admissible — Evidence of interception of private communications of accused A and R were unlawful, and in violation of s. 8 of Charter — Issue was whether interception of private communications pursuant to s. 184.4 of Code, which permitted interceptions to be made by peace officers without judicial approval to prevent serious harm to persons or property in narrowly defined exigent circumstances, violated right to be secure against unreasonable search and seizure — There was insufficient evidence that commander believed R was going to commit unlawful act that would cause serious harm to some person — Police did not have technology to know R's location from cell phone call — Arresting R at court would have succeeded in preventing him from shooting anyone else — Commander should have brought application for emergency authorization under s. 188 of Code before authorizing interception under s. 184.4 of Code — Commander did not adequately monitor intercepting that he approved.

Criminal law --- Charter of Rights and Freedoms — Unreasonable search and seizure [s. 8] — Reasonable grounds

Accused were known as gang members of criminal organization G — Accused allegedly shot at driver and passenger in car from their vehicle, killing two victims — Accused allegedly believed that victims were members of criminal organization M — Friend of accused R told detective that R was implicated in several shootings, and used several vehicles for purpose of shootings — For five days, police intercepted private communications of R without judicial authorization, relying on s. 184.4 of Criminal Code (Code) — Warrant was granted to authorize use of number recorders and tracking devices for accused R's cellular phones — Police decided not to arrest accused when he attended court for breach of conditional sentence because they didn't want to compromise homicide investigation — Unit commander of intelligent services (commander) believed that if R were arrested at court, he would not be in custody for long enough to serve any purpose — Accused R was subsequently arrested for shooting and killing two other victims — Accused were charged with first degree murder, attempted murder, and committing murder and attempted murder for benefit of criminal organization — Accused sought exclusion of evidence at trial pursuant to s. 24(2) of Canadian Charter of Rights and Freedoms — Voir dire was held to determine whether evidence obtained was admissible — Evidence of interception of private communications of accused A and R were unlawful, and in violation of s. 8 of Charter — Issue was whether interception of private communications pursuant to s. 184.4 of Code, which permitted interceptions to be made by peace officers without judicial approval to prevent serious harm to persons or property in narrowly defined exigent circumstances, violated right to be secure against unreasonable search and seizure — There was insufficient evidence that commander believed R was going to commit unlawful act that would cause serious harm to some person — Police did not have technology to know R's location from cell phone call — Arresting R at court would have succeeded in preventing him from shooting anyone else — Commander should have brought application for emergency authorization under s. 188 of Code before authorizing interception under s. 184.4 of Code — Commander did not adequately monitor intercepting that he approved.

Table of Authorities

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R. v. Laudicina (1990), 53 C.C.C. (3d) 281, 1990 CarswellOnt 809 (Ont. H.C.) — referred to

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Statutes considered:

Bankruptcy Act and to amend the Income Tax Act in consequence thereof, Act to amend the, S.C. 1992, c. 27
Generally — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 8 — considered

s. 24(2) — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 52 — considered

Criminal Code, R.S.C. 1970, c. C-34
s. 178.12 [en. 1973-74, c. 50, s. 2] — referred to

s. 178.15(1) [en. 1973-74, c. 50, s. 2] — considered

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

Pt. VI — referred to

s. 184.4 [en. 1993, c. 40, s. 4] — considered

s. 184.4(a) [en. 1993, c. 40, s. 4] — considered

s. 184.4(b) [en. 1993, c. 40, s. 4] — considered

s. 184.4(c) [en. 1993, c. 40, s. 4] — considered

s. 185 — referred to

s. 186 — referred to

s. 186(2) — considered

s. 188 — considered

s. 492.1 [en. 1993, c. 40, s. 18] — referred to

s. 492.2 [en. 1993, c. 40, s. 18] — referred to

VOIR DIRE to determine whether evidence obtained through interception of communications was admissible.

***M. Dambrot J.*:**

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

2 Riley, supported by Atkins, seeks the exclusion of evidence at their trial pursuant to s.24(2) of the *Charter*. They allege that the interception of their private communications pursuant to s.184.4 of the *Criminal Code*, which permits interceptions to be made by peace officers without judicial approval to prevent serious harm to persons or property in narrowly defined exigent circumstances, violated their right to be secure against unreasonable search and seizure guaranteed by s.8 of the *Charter*. Their rights were violated, they argue, both because s.184.4 is inconsistent with s.8, and so of no force or effect in accordance with s.52 of the *Charter*, and because it was used, in this case, in a manner that violated s.8. They also argue that a warrant authorizing the installation and monitoring of a number recorder on telephone lines associated with Riley, the fruits of which were used in deciding to make use of s.184.4, and later in an affidavit in support of an authorization to intercept private communications, was obtained in a manner that violated s.8 of the *Charter*. I have considered the challenge to the constitutional validity of s.184.4 in separate reasons. I will consider the remaining arguments in this ruling. If I find that there were violations of s.8, then, when the trial resumes, after giving the parties a further opportunity to be heard, I will consider whether any evidence that the Crown proposes to tender at this trial in addition to the intercepted private communications was also obtained in a manner that infringed s.8. Finally, I will I consider whether the admission of any of this evidence would bring the administration of justice into disrepute, and should be excluded.

Background

3 On March 3, 2004, at 5:20 p.m., Brenton Charlton was driving a blue Chrysler Neon southbound on Neilson Road in Toronto. Leonard Bell was in the front passenger seat. Charlton came to a stop in the passing lane at a red light at Finch Ave. The Toronto Police Service ("TPS") homicide detectives investigating the case believed that a black Nissan Pathfinder pulled up in the curb lane, slightly behind the Neon, and that three men who were in the Pathfinder began shooting at the Neon. Charlton got out of his vehicle and attempted to run, but was shot in the back and killed. Bell, who remained on the car, was shot several times, but survived.

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

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

6 On March 17, 2004, Comeau had units set up in the Malvern area, and put out a citywide notice for officers to look for the black Pathfinder believed to have been driven by the shooters of Charlton and Bell. Comeau instructed the officers set up in the Malvern area to conduct a high risk vehicle takedown if the vehicle was seen in the Malvern area and it was likely that the

occupants were armed and looking for another victim. He advised them that based on information he had received, if the vehicle slowed down and the occupants appeared to be looking at people, that was an indicator that they were about to do a shooting.

7 Comeau and Banks made daily requests for surveillance on Riley from March 23, 2004 to April 12, 2004. If Mobile Support Services officers were available on any given day, surveillance was attempted. At no time between March 23, 2004 and and April 19, 2004 did the police attempt to put Riley under 24-hour surveillance by Mobile Support Services. On April 14, however, Staff Inspector Ramer, the Unit Commander of Intelligence Services, ordered daily surveillance to midnight. In addition, if there was "activity", he ordered the surveillance to continue as long as it lasted. In addition, on occasion, the Guns and Gangs Task Force "spin" teams placed the black Pathfinder under surveillance throughout the night.

8 On March 12, 2004, Riley was sentenced by Ewaschuk J. of this court to a sentence of imprisonment for two years less one day, to be served in the community (a conditional sentence), as a result of a conviction for unauthorized possession of a firearm in a motor vehicle. The order required Riley to report to a supervisor as required by that supervisor. The order also required him to live with his father at 155 Prescott Avenue in Toronto, and, during the first year of the sentence, permitted him to be out of the residence only in the company of his father for the purpose of work, as well as on Saturdays between 2:00 p.m. and 8:00 p.m. and on Sundays between 9:00 p.m. and 5:00 p.m. in the presence of his mother. In addition, the order specifically prohibited him from being anywhere east of Victoria Park except in the presence of his father for employment purposes. Any breach of the order was required to be brought before the sentencing judge.

9 Comeau became aware of the terms of the conditional sentence order in late March 2004. Even before he became aware of the terms of the conditional sentence order, he was aware that Riley was required to report to a probation officer. Specifically, he was aware that Riley had to report to his probation officer at 1749 Jane St. on March 24, 2004 and on April 6, 2004. Officers under his direction were actually able to observe Riley reporting to his probation officer on April 6, although the officers who observed him on that date apparently were not able to identify him as Riley.

10 On March 24, 2004, Comeau interviewed Heather Kerr, a friend of Riley's. She told him about shootings done by members of the Galloway Boyz in retaliation for the shooting of their leader, Norris Allen. She said that Riley was involved in this as the leader of the Get Madd" crew, and implicated him in several shootings. She told him that Riley used a number of vehicles, including a black Pathfinder, and had used it in several shootings. He had sold the Pathfinder that day. The police were aware that Riley was using at least five vehicles at the time. Ms. Kerr also said that she had seen him in possession of a firearm on more than one occasion. She said, however, that Riley told her that he didn't know anything about the shooting at Neilson and Finch.

11 The police also received information that on March 31, 2004, Riley pulled a gun on a man at the Malvern Town Centre and pointed it at his head.

12 Riley breached both the residence and house arrest components of his conditional sentence almost immediately after it was imposed, and continued to be in breach on a regular basis. Specifically, he was not residing with his father, he was frequently out of his residence without his father, and on occasion he traveled east of Victoria Park without his father for reasons other than employment. Once Comeau became aware of the terms of the conditional sentence order in late March, he realized that Riley was in breach of it. Comeau testified that Riley was not arrested for these breaches because the police were engaged in a balancing act. While he and his partner Banks were concerned about public safety, particularly as a result of their information that Riley was driving into the Malvern area and shooting people, they did not arrest him because he might have been released again within a short period of time, and so would not be prevented from shooting somebody else. In addition, Comeau testified, it would have compromised their investigation into the Charlton and Bell shooting, and made it more difficult to obtain the evidence they needed to solve it, which was their goal. The police had the best chance of collecting evidence against Riley if he were out of custody. In addition, if he were arrested and released, he would realize that the homicide squad was investigating him, and become more cautious.

13 The Affidavit Section at Intelligence Services employs writers who assist officers who are preparing material for wiretap applications. By March 31, 2004, Det. Janine Crowley of Intelligence Services, and Annabelle Todd, a civilian

member of Intelligence Services, had begun the preparation of an affidavit in support of an application to intercept the private communications of Tyshan Riley. Such an authorization was ultimately obtained on June 7, 2004.

14 On April 12, 2004, at 10:30 p.m., a shooting took place on Empringham Drive in the Malvern area. On that occasion, the occupants of a red or purple SUV shot guns into a townhouse where a woman resided with her children. Fortunately, no one was hurt. The police had information linking Riley to this shooting. However, no surveillance was being conducted on Mr. Riley during the night of April 12, 2004, and the police were also in possession of other information that made it seem unlikely that Riley actually was involved in this incident.

15 On April 12, 2004, Comeau applied to the Ontario Court for a warrant to authorize the use of number recorders and tracking devices for Riley's cellular phones.

16 The information in support of the warrant was sworn by Comeau. In it, he outlined the information he had concerning the shooting of Charlton and Bell on March 3, 2004. Comeau said that the shooting was done by men in a black Nissan Pathfinder that was being driven behind the Neon, based primarily on images obtained from a security camera. He provided details of the observations of a number of witnesses, as well as information obtained from a variety of other individuals.

17 On that same date, Marshall J. of the Ontario Court granted the application, and issued:

- a warrant authorizing the police to install and monitor number recorders for cellular phones used by Tyshan Riley pursuant to s.492.1 of the *Criminal Code*
- a warrant authorizing the police to install and monitor tracking devices for cellular phones used by Tyshan Riley pursuant to s.492.2 of the *Criminal Code*
- a production order for telephone records
- an assistance order

18 The offences in relation to which the warrants were issued and orders made were first degree murder, conspiracy to commit murder, attempting to commit murder, being an accessory to murder and counseling murder.

19 The number recorders were to be used to track the movements of Riley in order to locate and investigate him.

20 The tracking devices were to be used to locate Riley and investigate him.

21 The paragraph in the warrant authorizing the installation and monitoring of number recorders and tracking devices contained the following proviso:

> PROVIDED HOWEVER:
>
> THAT AT NO TIME will any oral communications be intercepted while TELE-MOBILITY COMPANY telephone number (416) 799-1833 and/or any cellular telephones for which there are reasonable grounds to believe that Tyshan Riley is making use of or carrying on his person, is in use.

22 Det. Kim Gross, the officer in charge of the Project Liaison Unit at Intelligence Services in the Toronto Police Service explained that this clause was drafted by the police and routinely inserted in tracking warrants to remind police officers who execute tracking warrants that they cannot use the equipment installed for tracking purposes to intercept private communications.

23 Comeau was out of the country from April 13 to 20, 2004. During that time, Banks was the officer in charge of the investigation.

24 Riley had been charged with a drug offence in relation to a quantity of drugs seized in Oshawa in 2003 upon the execution of a search warrant. He was scheduled to appear in court in Oshawa at 9:00 a.m. on April 14, 2004 on that charge. The Toronto police were aware of this court appearance in advance. As a result, six surveillances officers from Mobile Support Services attended at the Ontario Court of Justice in Oshawa that morning under the direction of Comeau to conduct surveillance of Riley. They set up observations at 8:30 a.m.

25 Cst. Jansz was also at the Oshawa courthouse that morning. From March 16 to April 15, 2004, Cst. Jansz was responsible for passing information between the lead homicide investigators in this case and the mobile surveillance teams that were conducting surveillance of Riley. By coincidence, Jansz was also involved in Riley's Oshawa drug case. Jansz was the handler of an informant who provided information that was included in the search warrant. Jansz arrived at the courthouse at 8:00 a.m. that morning. At 9:00 a.m., Jansz met with Crown counsel in the courthouse to discuss the case.

26 The surveillance officers first observed Riley at 10:25 a.m., when he arrived at the front door of the courthouse in a white taxi. He left the car, met his lawyer and entered the courthouse. One of the surveillance officers contacted Jansz, who was still in the courthouse, and informed him that Riley had been seen and identified, and supplied him with a description.

27 Riley had to submit to a metal detector in order to enter the courthouse, and so it was apparent that at least once he was inside the courthouse, he would be unarmed. After Riley entered the courthouse, Jansz observed him in a hallway, saw him enter the courtroom and later saw him leave the courtroom and the courthouse.

28 At 10:52 a.m., the surveillance officers observed Riley leave the courthouse and walk in a westerly direction. After walking several blocks, Riley boarded a taxi at 11:06 a.m. For the next two hours, the taxi, with Riley as a passenger, drove around Durham, under surveillance.

29 At 12:12 p.m., Riley entered an Acura and sat in the front passenger seat. The police kept this car under continuous observation. The car proceeded to Toronto. Surveillance continued in Toronto until 12:47 p.m., whe the car was "misplaced" by the police near St. Clair Ave. East. The police lost sight of the vehicle and Riley at 12:40 p.m.

30 Neither Jansz nor the surveillance officers made any attempt to arrest Riley. Jansz testified that he had no instructions to do so. Comeau testified that Riley was not arrested on this occasion for the reasons as I outlined above. Comeau was trying to prevent Riley from doing another shooting, but was balancing that against investigating the Charlton homicide. At one point he stated that arresting Riley wasn't going to accomplish what was necessary in this case. "It was to investigate the homicide was the objective. And it was also to do our best to prevent Riley and the others from shooting anybody else."

31 Banks also gave an explanation for the decision not to arrest Riley at the courthouse on April 14, 2004. He was present at the courthouse that morning as backup for mobile support. He was aware that Riley could be arrested for a breach of his conditional sentence at that time, and he also knew that Riley was on some form of judicial interim release. He agreed that it would have been easy to arrest him when he came out of the courthouse. He wasn't arrested, however, based on a decision that he and Comeau had made. He explained that they were investigating the murder of Charlton and the attempted murder of Bell, and were conducting a balancing act between arresting him for a breach of his conditional sentence and trying to get the evidence for a murder. The decision they made between them was that they were not going to arrest strictly on the breach of conditional sentence because they didn't want to impair the homicide investigation. If Riley was seen in the Scarborough or Malvern area he was to be followed. If it looked as if he was about to commit an indictable offence, he was to be arrested for it.

32 Banks went on to explain that at a senior managers meeting in the afternoon of the April 14, 2004, the approach to arresting Riley was altered to some degree. The senior managers agreed that because of the risk involved, and because of liability issues, Riley would have to be arrested immediately for breaching his conditional sentence if he was found in Scarborough. This is recorded in Banks' notes. They wanted to preserve the homicide investigation as much as they could but agreed that they had to compromise if he was found in breach in Scarborough.

33 From April 15, 2004, to April 19, 2004, the police intercepted the private communications of Riley without judicial authorization, relying on s.184.4 of the *Criminal Code*. That provision permits peace officers to intercept private communications without judicial authorization to prevent unlawful acts that would cause serious harm to a person or property in narrowly circumscribed circumstances. In reasons released at the same time as these reasons, I upheld the constitutional validity of s.184.4. The decision to use s.184.4 came about as follows.

34 Staff Inspector Ramer was the Unit Commander of Intelligence Services in the Toronto Police Service from February 2004 to December 2006. He was responsible for managing 220 people, a $20 million budget, and a variety of functions including security arrangements for VIP's visiting Toronto, intelligence work, surveillance and wiretap monitoring. He received daily updates on operations and investigations that involved Intellillgence Services at his morning senior management meetings, but the purpose of these updates was to assist him in his responsibility for staffing and resourcing these operations. He was generally not responsible for or involved in investigative decisions. He was kept apprised of this investigation to a greater degree than others because of the seriousness of the matter.

35 One of Ramer's duties involved oversight of all investigations conducted by the Toronto Police Service that involved the interception of private communications under Part VI of the *Criiminal Code.* Before any application could be made to a Judge for an order authorizing such interception, an internal Form 649 had to be completed and sent to Ramer for approval. Ramer would approve going forward with an application without seeing the affidavit. The affidvit would subsequently be reviewed by a subject specialist and a Crown agent, and then taken to a Judge. A similar procedure was followed in respect of the use of s.184.4, although this case was the first time that Ramer had approved of its use. He agreed, in cross-examination, that in the case of the use of s.184.4, he in effect became the judge because he made the final decision.

36 Ramer indicated that before s.184.4 could be used, the requirements of s.184.4 had to be met. All he remebered of them at trial was that there had to be an urgency that required action on account of an immediate threat to an individual. When asked if he thought that before using s.184.4, there was a requirement that the police had to arrest the person of concern to them if that person were arrestable, he said that he thought that this alternative had to be considered. But he went on to say that an arrest could be rejected if the nature of the offence would not result in detention, or if the arrest would compromise the investigation of the substantive offence. He was not aware of the availability of an emergency authorization pursuant to s.188 of the *Criminal Code.*

37 Ramer said that the decision to use s.184.4 on April 15, 2004 was his, after consultation. It was used, he said, "on my sole authority and on my decision." At another point in his cross-examination, when asked if, ultimately, the decision was his, he replied, "Absolutely." Gross agreed. She described Ramer as "the decision-maker". Det.Sgt. MacCheyne, who had a great deal of experience dealing with wiretapping, shared this view. He said that the decision to invoke s.184.4 is a big one. It's rarely done. The main decision resides with the unit commanders.

38 In fact, in this case, using s.184.4 was Ramer's idea. After his briefing about the investigation on April 14, 2004, which was more detailed than usual, and included information from other wiretap projects, he became very concerned overnight. He thought about the information he had learned, the nature of the events under investigation, how long it would take to get an authorization to enable the police to keep tabs on Riley [1] , and the question of how the police could prevent someone from being shot or killed, and considered different investigative strategies. Although he knew that s.184.4 had only been used in the past by the TPS in relation to abduction matters, he thought that its use might be appropriate in this case and should be considered. As a result, he raised the matter with Gross, whom he described as his subject specialist. He specifically discussed the feasibility of this "investigative" strategy with Gross. Gross told him that the use of s.184.4 in this case raised some concerns for her. Ramer asked her to review the matter and consult with Ann Morgan, the Crown agent who regularly worked with the police on wiretap matters, and whom he considered to be an authority on Part VI of the *Criminal Code,* to obtain a legal opinion as to whether s.184.4 could be used in the circumstances.

39 Gross was able to to speak to Morgan later that morning. Morgan was attending a management conference at the Sutton Hotel that day, and was called out of a lecture to take the call. Their conversation took anbout ten minutes. Most of this time was taken up with Gross providing information to Morgan. She outlined the situation to Morgan, read certain conversations to

her and asked whether the scenario met the threshhold test for s.184.4. Morgan told Gross that she felt that the situation did meet the legal requirements of s.184.4. Morgan made no record of what Gross told her, or what she told Gross. Morgan has no recollection today of the details of the investigation or the basis for the advice she gave. Morgan did not testify on the *voir dire*. Counsel agreed that a statement prepared by her could be placed in evidence and relied upon.

40 After Gross advised Ramer of Morgan's opinion, he decided to permit the use of s.184.4. When he testified on the *voir dire*, Ramer was not able to recall what information he had about the investigation at the time that he gave the authority to proceed with the use of s.184.4. He said that even at the time, he only had a general understanding or overview of the investigation, but did not know the details. He said that he had received briefings about the investigation at his mangement meetings, including one such meeting the day before he gave his direction to proceed. He made no record of the information he received, and upon which he based his decision to authorize the police to commence wiretapping. The only record that does exist is his personal log, as Unit Commander, for all authorizations conducted in the unit, the 649 prepared by Banks asking for his authorization (albeit, as will be seen, after the fact) and a document authorizing his technical manager to undetake the intercepting.

41 The entirety of Ramer's log entry reads:

DATE:		04/04/15
TIME:		1100
AUTH.	NUMBER:200413.E	
PROJECT:	PATHFINDER	
JUDGE:		—
DESIGNATE:		—
AFFIANT:		—
VALID FROM:		04/04/15 —
INSTRUCTIONS:	DIRECTED D/S MACCHEYNE TO INTERCEPT PRIVATE COMMUNICATIONS PURSUANT 184.4 OF THE C.C.	

James Ramer

42 The 649 that Ramer received from Banks is dated April 15, 2004, and, in summary, discloses the following:

• A Part VI affidavit is being prepared in relation to the Charlton murder, but it is a lengthy process

• Riley is the main subject of the wiretap — he is a Galloway Boyz gang member, and a suspect in a number of Malvern area shootings. He has a history of and record for gun violence. There is a was between the Galloway Boyz and the Malvern Crew, which has prompted a number of retaliatory shootings. Mobile Support has met with limited success in trying to locate Riley. His cell phone activity is being tracked pursuant to a tracking warrant.

• Recent interceptions in two other Part VI investigations indicate that Riley has been in the Malvern area shooting at people. One individual remarked that Riley has been shooting at innocent people because the Galloway members don't know "who to get or who is who." The public is at risk.

• Most recently, on April 12, 2004, persons in a red SUV randomly shot off rounds in Malvern. An interception indicated that Riley was responsible.

• There is not sufficient time to wait for the Part VI application to be approved and there are reasonable grounds to believe that Riley is armed and the public is at risk. There is a serious risk of bodily harm to persons who may be in the Malvern area when Riley and his associates attend to shoot persons they believe belong to the Malvern Crew.

• Banks was seeking permission to use s.184.4 to intercept Riley's private communications on his cell phone.

- The interceptions would be live monitored for Riley's communications only.
- Every effort was being made to obtain a Part VI authorization as soon as possible.

43 Ramer said that he was aware that Riley could have been arrested for a breach of some kind, but he thought that if he was arrested, he would not be in custody for long enough to serve any purpose. In addition, he said that to arrest a person like Riley who had been on a shooting spree, it would be necessary to use a level of force, perhaps by the Emergency Task Force, and this would probably compromise the homicide investigation.

44 He did say that he knew that Riley would be attending his probation office the following Wednesday, and would probably be arrested at that time. "The intervening period", he said, "was the difficulty we were having." The issue for him, he said, and the ultimate goal, was "to prosecute homicide." He also said that preserving the integrity of the investigation and getting evidence against Riley was as important a goal as protecting the public by arresting him.

45 When asked to outline the considerations he took into account before making his decision, he enumerated the following:

- the length of time to get a reduced parameter authorization, which he thought would be ten days
- very compelling evidence from other wiretaps that Riley was involved in the shootings in the Malvern area
- the fact that this violence was random
- the potential victims were unknown, but likely were young men in Malvern
- if someone challenged Riley when driving the results would potentially have been tragic
- physical surveillance to keep tabs on Riley, despite the use of sophisticated techniques, was ineffective
- the fact that the police were unable to prevent something from happening

46 The purpose of listening to Riley pursuant to s.184.4, according to Ramer, was to determine his location so that the police could keep tabs on him, and to determine what he was doing and who his next target might be.

47 I note, however, that the mere fact that a cell phone call involving Riley is intercepted does not tell the police what his location is. Cellular location does no more than provide the "neighbourhood" of the call, which can be several miles square. While analog cellular services permitted tracking a cellular hand set to a physical location, the advent of digital technology has made this more difficult. In the case of Telus, for example, radio frequency equipment cannot be used to hone in on a cell phone. There is specialized equipment that does permit this, but it is only available in Canada for national security use. Of course, the content of a communication involving Riley might be of assistance in locating him.

48 Ramer gave permission to the police to intercept the private communications of Riley on his cell phone, at (416) 799-1833. They could listen to other persons only to determine whether Riley was on the line or not. Once they established that Riley was not participating in a telephone call, they were not permitted to listen further.

49 Although there was no time limit in the permission to intercept private communications given by Ramer, he testifed that he was updated daily on the investigation, and evaluated whether or not the exigent circumstances had ended. He would terminate the intercepting when that happened.

50 It is apparent that Ramer gave consideration to the possibility of obtaining a conventional authorization under s.186 rather than using s.184.4. It is equally apparent that he gave no consideration to the possibility of getting an emergency authorization from a judge pursuant to s.188. Section 188 permits a peace officer specially designated in writing for the purpose of this section by, in this case, the Attorney General of Ontario, to apply to a judge of the Superior Court designated by the Chief Justice for an authorization to intercept private communications if the urgency of the situation requires the interception to commence before

an authorization could, with reasonable diligence, be obtained under s.186. It has been held by the Alberta Court of Appeal that since s.188 makes no mention of the need for an affidavit, an emergency authorization can be granted on the basis of *viva voce* evidence under oath, probably memorialized in some way. [2] I note, however, that the language of the pertinent provision of the *Code* has been altered subsequent to that decision. At the time, s.178.15(1) provided: "Notwithstanding section 178.12, an application for an authorization may be made ... by a peace officer specially designated in writing for the purposes of this section ...". Section 188 now reads: "Notwithstanding section 185, an application made *under that section* for an authorization may be made ... by a peace officer specially designated in writing for the purposes of this section ..." (emphasis added.) The addition of the italicized words now make it clear that s.188 does not create a separate emergency authorization, but merely modifies the procedure for a s.186 authorization in an emergency. If an emergency application is still an application made under s.185, then the affidavit requirement in that section would appear to apply to it.

51 There was, however, an impediment to the use of s.188 in Ontario at the time. Since 1993, the year that s.184.4 was enacted, no one in the Toronto Police Service has been designated to make applications pursuant to s.188 of the *Criminal Code*. In addition, while it appears that designations of judges in relation to s.188 made on or before October 1993 are still in effect, this is so little known that it would undoubtedly come as a surprise even to most of the judges so designated. Ramer was not even aware of the existence of s.188. Gross, however, was aware of it. But she believed that as a result of the absence of designates, s,188 was not available to the police. She agreed, however, that had a designated judge and designated agent been available, *and assuming the application could be made verbally*, rather than in writing, it wouldn't have taken any more time to get a s.188 order than it took to satisfy Ramer that it was appropriate to use s.184.4. If an affidavit was required, however, as I believe it was, then she was of the view that there wasn't time to prepare a sworn affidavit and find a designated judge.

52 Banks had a different understanding of who made the decision to use s.184.4. He testified that in the morning of April 14, 2004, Gross called him and explained to him about the possibility of using s.184.4. He wasn't fully aware of the provision, and she explained to him what the section involved. She told him that this was a resource that was available to Banks should he, as a lead investigator, decide to use it. Banks agreed that this was something that the police should use, and asked Gross to get the ball rolling so that they could get it done as soon as possible. He told her that he would come to her office later to finish the paper work for the Unit Commander.

53 Banks didn't know what the statutory prerequisites of s.184.4 were at the time, and relied on information provided to him by Gross, whom he considered to be an expert in the area. She told him that she had gone through their case, and in her opinion the investigation met the requirements of s.184.4. She told him that she had contacted a Crown Attorney, and her legal opinion was the same. He understood that the 649 was a formality, and that Gross had already spoken to Ramer. As a result, Det. Banks prepared the first 649 on April 15, 2004 after 2:00 p.m. when he got to the Intelligence office, although the intercepting began sometime earlier. Gross gave him a draft 649 that she had prepared, and he reviewed it and signed it without making any changes.

54 Det. Sgt. MacCheyne was the officer-in-charge of Technical Support Intelligence Services at the time, under the command of Ramer. One of his principle responsibilities related to technological surveillance. It was his job to implement technological warrants and orders, including tracking warrants and wiretap orders. On April 15, 2004, he received a written direction from Ramer to carry out Ramer's responsibilities in relation to the interception of private communications pursuant to s.184.4. MacCheyne noted on the document that on April 15, at 11:00 a.m., Ramer instructed him to intercept wireless service (416) 799-1833, but only to intercept the private communications of the target, Tyshan Riley. This service was a Telus cell phone service registered to Nicole Bryan, and known by the police to be used by Riley.

55 Because the s.184.4 intercepting arose unexpectedly, the intercepting was done using the lines and the monitors of an existing homicide wiretap project know as Project Mentor.

56 On April 15, at 4:00 p.m., after the commencement of the s.184.4 intercepting, MacCheyne came to see Ramer and advised him that the first line was of no value, but that he had additional information leading him to believe that Riley would be in contact with his girlfriend on her line. Ramer instructed MacCheyne to go up on this line. Once again, Banks had prepared a 649. It was virtually identical to the first one, except instead of asking to intercept Riley's cell phone, Banks stated:

> Information from the tracking warrant shows that at least one call [presumably to Riley, but this is not stated] came from (416) 438-2983, the land line of Dana Williams at 567 Scarborough Golf Club Road, apt. 1607.

57 Banks sought the authority to intercept Riley's private communications on that line.

58 MacCheyne noted on the original document received from Ramer that at 4:00 p.m. that same day, Ramer instructed him to intercept Bell land line service (416) 438-2983, and again to live monitor for Tyshan Riley only. This, he noted, was a land line registered to Danalee Williams at 567 Scarborough Golf Club Rd., apt. 1607, an address that the police knew to be used by Riley.

59 On April 19, Ramer gave approval to intercept a third line, at wireless service (416) 662-8814. He gave this approval to MacCheyne in a direct conversation with him. MacCheyne noted that at 8:30 a.m. on April 19, 2004, Ramer instructed him to intercept wireless service (416) 662-8814, and again only to intercept the private communications of Tyshan Riley. This service was a Rogers cell phone service known to be used by Riley but registered to someone else.

60 Again, Banks had prepared a 649 in connection with this request that day, but had erroneously dated it April 15. The 649 reproduced much of the content of the earlier 649's, but added the following:

- On April 15, 2004, a request was granted to intercept Riley's cell phone (416) 799-1833, and the telephone at (416) 438-2983.

- On April 16, 2004, numerous calls, which he outlined, were intercepted from (416) 438-2983 to (416) 662-8814. On two occasions there was a conversation. In each of these, Riley was one of the speakers.

- On April 17, 2004, Riley received a call on his cell phone and told the caller to call him on his new phone.

- A Rogers Wireless check confirmed that (416) 662-8814 was activated on April 14, 2004, and was registered to Kevin Bellmore at 4110 Lawrence Ave. East, apt. 1204.

- A data check showed no record of that name or address.

- Banks believed that Riley was the primary user of cell phone (416) 662-8814, and apparently intended to request permission to intercept Riley's calls on that line. He actually asked, no doubt as a result of failing to edit his last request carefully enough, to intercept on Dana Williams line, which, of course, was already being done.

61 Ramer testified that he had not seen this document before granting permission to intecept on the third line. He read it later in the day.

62 Ramer testified that once he gave permission to intercept pursuant to s.184.4, he delegated to MacCheyne the task of ensuring that the police were operating within the parameters of the law, and doing it properly. MacCheyne would keep Ramer informed of what he deemed appropriate. Ramer would decide when to terminate the intercepting, based on the information he received. He received no information about what was going on with Riley between April 15, 2004 and April 19, 2004, until he received Bank's Form 649 on April 19. Based on the information that he already had, he believed that the exigency continued throughout this period, until Riley was arrested.

63 MacCheyne gave evidence about the manner in which the intercepting was carried out. In particular, he testified that while Ramer gave no specific instructions about solicitor-client interceptions, "solicitor-client privilege would have been upheld." The monitors, he said, were trained that when they realize that the target of interception is talking to a lawyer, the call must be minimized.

64 Some time after the arrest of Riley, his private communications were intercepted pursuant to conventional judicial authorizations granted by McRae J. on June 7, 2004, and Hamilton J. on August 5, 2004. Information obtained pursuant to s.184.4 was contained in the affidavits sworn in support of these conventional authorizations.

65 On April 19, 2004, at 1:22 p.m., the police intercepted a private communication of Atkins. Mr. Riley was not a participant in that communication. The monitor who listened to that call had listened to Mr. Riley's voice one half hour earlier. The Crown did not call this monitor as a witness, and I can only infer that the monitor did not think that the police were intercepting Riley in this call. The Crown concedes that this interception was unlawful.

66 Riley was arrested on April 19, 2004 for the attempted murder of Christopher Hyatt and Kofi Patrong in the Malvern area earlier that day. Riley is alleged to have shot both men. If he did the shooting, it is apparent that the use of s.184.4 had proved to be ineffective.

Issues

67 Riley argues that the interceptions made pursuant to s.184.4 were unreasonable within the meaning of s.8 of the *Charter* for the following reasons:

> (1) section 184.4 of the *Criminal Code* is unconstitutional, and so any interceptions made pursuant to it are unreasonable
>
> (2) even if s.184.4 is constitutional, the prerequisites to its use in s.184.4(a), (b) and (c) were not met
>
> (3) use of s.184.4 was precluded, in any event, by the terms of the April 12, 2004 number recorder and tracking device order
>
> (4) the manner of interception was unreasonable

68 Riley also argues that:

> (1) the April 12, 2004 number recorder and tracking device warrant was granted in violation of s.8 of the *Charter*
>
> (2) the conduct of Crown counsel who gave advice to the police violated s.8 of the *Charter*.

69 In addition to the issues raised by Riley, Atkins argues that on the one occasion when a private communication of his was intercepted, that interception was unlawful because Riley, the sole target of interception, was not a party to the communication, to the knowledge of the monitor.

70 I will consider these issues in this judgment, although not necessarily in the manner or order that they were raised by the applicants. First, however, I will consider the onus of proof on this application, and will determine who made the decision to invoke s.184.4, a matter of dispute between the parties. It is essential that I resolve this dispute, because I cannot determine if the prerequisites to the use of s.184.4 were met unless I can identify whose decision to use s.184.4 I am reviewing.

Analysis

1. The Onus of Proof

71 Although s.24(2) of the *Charter* places the onus on the applicant to establish a violation of his or her rights under the *Charter*, the Supreme Court concluded in *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.* (1984), 14 C.C.C. (3d) 97 (S.C.C.) that a warrantless search is *prima facie* unreasonable under s.8 of the *Charter*, and that the party seeking to justify a warrantless search is required to rebut this presumption of unreasonableness.

72 In *R. v. Evans* (1996), 104 C.C.C. (3d) 23 (S.C.C.), Sopinka J. elaborated, at para. 23:

> 23 ... According to this Court in *Hunter*, *supra*, a warrantless search is *prima facie* unreasonable. In other words, a warrantless search is presumed to be unreasonable unless the party seeking to justify the search can "rebut this presumption of unreasonableness" (*Hunter*, *supra*, at p. 161). According to this Court in *R. v. Collins* [1987] 1 S.C.R. 265, at p. 278, in

> order to rebut the presumption of unreasonableness the Crown must establish three things, namely (1) that the search was authorized by law, (2) that the law authorizing the search was reasonable, and (3) that the manner in which the search was carried out was reasonable. Only where these three criteria are met is the "presumption of unreasonableness" rebutted: in all other cases, a warrantless search infringes s. 8 of the Charter.

73 The Crown argues, however, that where a statutory search power such as s.184.4 authorizes warrantless searches in exigent circumstances, there is no *Charter* presumption against it, and so an applicant for a remedy under s.24(2), and not the Crown, bears the burden of proof. In support of this position, the Crown says, in its factum:

> Because s.184.4 applies to exigent circumstances, there is no *Charter* presumption against it. This starting point for the s.8 analysis has been repeatedly asserted by the Supreme Court. In *Tessling* [*R. v. Tessling* [2004] 3 S.C.R. 432], the Court states:
>
> > The law is clear that warrantless searches are presumptively unreasonable, absent exigent circumstances (*Hunter v. Southam, supra; Collins, supra*, at p.278; *Evans, supra*; and *Grant, supra*). [emphasis added]

74 The Crown's position is based on a misunderstanding of the significance of this short passage from the judgment of Binnie J. in *R. v. Tessling* [2004 CarswellOnt 4351 (S.C.C.)]. It is helpful to read the passage in context. Binnie J. stated the following at para. 33 in *Tessling*:

> With respect to this second question [If there was a reasonable expectation of privacy in this case, was it violated by the police conduct?], as Abella J.A. pointed out, the law is clear that warrantless searches are presumptively unreasonable, absent exigent circumstances (*Hunter v. Southam*, *supra*; *Collins*, *supra*, at p. 278; *Evans*, *supra*; and *Grant*, *supra*). However, the second question is only reached if the first question [Did the respondent have a reasonable expectation of privacy?] is answered in the affirmative.

75 In fact, Binnie J. answered his first question in the negative, and never reached his second question, and so his brief formulation of the law underlying the second question was clearly *obiter*. But more than that, the formulation was not his own. He borrowed it from Abella J.A., as she then was, in the court below, whose judgment he was reversing. What is more, this statement of the law was also *obiter* in the judgment of Abella J.*A.* She stated, at para. 71 of her judgment, reported at (2003), 171 C.C.C. (3d) 361 (Ont. C.A.):

> [71] Having concluded that the appellant had a reasonable expectation of privacy in the heat emanating from activities inside his home, the next issue is whether the search was an unreasonable intrusion on the right to privacy. The law is clear that warrantless searches are presumptively unreasonable, absent exigent circumstances (*Hunter v. Southam Inc*., [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641;*R. v. Collins*, [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1; *Evans*, *supra*; and *R. v.Grant*, [1993] 3 S.C.R. 223, 84 C.C.C. (3d) 173.) There were no such circumstances in this case and no other evidence sufficient to rebut the presumption of unreasonableness.

76 It might appear from the brief sentence in the judgment of Abella J.A. quoted by Binnie J. that she had conflated two legal principles, namely: (1) warrantless searches are presumptively unreasonable; and (2) this presumption may be overcome where a warrantless search is conducted in exigent circumstances that render obtaining a warrant impracticable (see *R. v. Grant*, [1993] 3 S.C.R. 223 (S.C.C.) at para. 31). If Abella J. was saying, as the Crown suggests, that a statutory prerequisite for a warrantless search can rebut the presumption of unreasonableness, then, with great respect, my opinion would be that she was wrong. The presumption can only be rebutted by proof of the existence of exigent circumstances. Certainly the language she used cannot be found in any of the cases she cited. But it is plain from the remainder of paragraph 71, and in particular the last sentence in the paragraph, that Abella J.A. was under no misapprehension about the effect of exigent circumstances. She was saying nothing more than that the existence of exigent circumstances can rebut the presumption of unreasonableness that attaches to a warrantless search. I can find no case in which an accused who alleged that his or her rights under s.8 were infringed by a warrantless search under a statute that authorizes warrantless searches in exigent circumstances was made to bear the onus of proof on the issue.

77 I am accordingly of the view that the Crown bears the burden of proof on this application.

2. Who Made the Decision to Exercise the Power in Section 184.4?

78 It is the rare case where a court is called upon to determine who made the decision to make use of a search power. This is that rare case. Each of Banks and Ramer testified that he made the decision. The Crown urges me to find that Banks made the decision. The accused favour Ramer. The issue has significance because the prerequisites to the use of s.184.4 have subjective and objective components. I have to know whose opinion I am assessing.

79 I have little difficulty resolving the issue. The evidence overwhelmingly favours Ramer. It is the policy of the TPS that the extraordinary and intrusive power given to a police officer by s.184.4 be exercised only by a senior officer. The evidence of Ramer, MacCheyne and Gross set out above on this point is unequivocal and convincing. On the other hand, it is most unlikely that an officer with no experience in the use of s.184.4, who did not know what the statutory prerequisites for its use were, and who relied entirely on the advice of others, could have been left to make the decision. I hasten to say that I do not consider Banks to be untruthful on the issue. I simply think that he misunderstood the decision that was being given to him. He was being told that Ramer had authorized the use of s.184.4. But, as the acting lead investigator, it was open to him, presumably, to say, for whatever reason, "We don't need it." He simply accepted the option that was provided to him, and nothing more.

80 I note that in deciding how to process a request to use s.184.4, the TPS has improvised, instead of developing a unique process tailored to the specific requirements of s.184.4. It has simply adapted its process for obtain authority to apply for an authorization pursuant to s.186 to this situation. This has lead to some confusion. Although the process in each case looks the same, the significance of the parts played by the various actors is quite different.

81 In the case of an authorization, the Unit Commander of Intelligence Services is simply providing an administrative approval to the officer seeking an authorization. In the end, the application is made by a designate of the Attorney General. The 649 form prepared by the officer and presented to the Unit Commander is adequate to the task. There is no need for the Unit Commander, in giving his or her administrative approval, to be fully informed of the evidence in the possession of the police. He or she is properly concerned with the appropriateness of the case for wiretapping, in particular from the point of view of the appropriateness of dedicating resources to it, and the availability of those resources. The decision has no legal significance.

82 In the case of s.184.4, however, the Unit Commander of Intelligence Services is exercising a statutory function. The Unit Commander must exercise that function responsibly and apply the prerequisites meaningfully. He or she must act according to law. If the 649 form is intended to provide the Unit Commander with the factual underpinning for a decision, then it effectively takes the place of the affidavit required in a s.186 application, and it must apprise the Unit Commander of the facts sufficiently to enable him or her to act according to law. The simple adoption of the 186 process to the 184.4 situation too easily leads to confusion about the fulfillment of the obligations of those involved in the process, as I believe it did here.

Were the Interceptions Made Pursuant to Section 184.4 Unreasonable?

1. Were the Interceptions Made Pursuant to Section 184.4 Unreasonable Because Section 184.4 Is Unconstitutional?

83 I have concluded, in separate reasons released at the same time as these reasons that s.184.4 is not unconstitutional, and so this aspect of the argument fails. I note, however, that I have concluded that s.184.4 of the *Criminal Code* is inconsistent with the *Charter* in two respects: (1) by virtue of the overbreadth of the definition of peace officer in the context of s.184.4, the availability of the extraordinary power to intercept without prior judicial approval exceeds what is reasonable within the meaning of s.8 of the *Charter*; and (2) the absence of an obligation to give notice to objects of interception is inconsistent with s.8 of the *Charter*. I concluded that these failings could be cured by reading down the definition of peace officer, and by reading in a notice requirement.

84 If these alterations to s.184.4 are necessary to preserve the constitutionality of s.184.4, then the failure to comply with them in a particular case would violate s.8 of the *Charter*, despite the fact that the state actors could not have known, in advance,

that they were required to comply with them. The fate of such violations under s.24(2) analysis would, of course, be a different matter entirely.

85 In this case, however, there was no violation of s.8 arising from the constitutional frailties that I found in s.184.4. In regard to overbreadth, I note that the decision to invoke s.184.4 was made by a police officer, and so did not fall within the part of the definition of s.184.4 that I concluded was overbroad. In regard to notice, I note that Riley was given notification of the fact that his private communications were intercepted pursuant to s.184.4, as well as full disclosure of the interceptions, although not within the time period that I have read into s.184.4. The precise timing of the notice, however, does not go to the core of the constitutional shortcoming that I found to exist in that provision. If notice must be given, then of course it is necessary to impose a time limit, and I adopted the one already imposed by Parliament in the case of s.186. But there is no constitutional magic in the time limit I imposed. What is more, I do not consider that the timing of the notice in this case, particularly having regard for the need to complete the investigation of other alleged participants in the shooting of Charlton and Bell, was unduly prolonged.

86 In short, to the extent that I found that aspects of s.184.4 were inconsistent with s.8, this does not form the basis of a finding that Riley's rights were violated.

2. Were the Prerequisites to the Use of Section 184.4 Met?

(1) Was Section 184.4(b) Satisfied?

87 Flowing from my ruling respecting the constitutionality of s.184.4, I conclude that in order for s.184.4(b) to have been met, Ramer had to have believed, on reasonable grounds, that:

- Riley was going to commit an unlawful act
- That act would cause serious harm to some person
- Intercepting Riley's private communications was immediately necessary, that is: necessary at that very time to prevent the act that would cause serious harm, likely to be effective to prevent the harm, and no equally effective alternative was available to prevent the harm.

88 I will examine these issues in turn.

(a) Did Ramer believe, on reasonable grounds, the Riley was going to commit an unlawful act that would cause serious harm to some person?

89 I have no doubt that Comeau and Banks had reasonable grounds to believe that Riley was going to commit an unlawful act that would cause serious harm to some person. It must be remembered that the police did not need to have reasonable grounds to believe that Riley was one of the persons who shot Charlton or Bell, nor did they need to have reasonable grounds to believe that he was a participant in the Empringham shooting. As I have endeavoured to show in my ruling concerning the constitutionality of s.184.4., it is not an investigative tool. It may only be used to prevent serious harm. I am satisfied that the following information is sufficient to satisfy this requirement for the use of s.184.4:

- The information from Heather Kerr that:
    - as a result of the shooting of their leader, the Galloway Boyz were engaged in retaliatory shootings
    - Riley was involved in these shootings as the leader of the Get Madd crew, and was implicated in several shootings
    - Riley had access to several vehicles for this purpose
    - Kerr had seen him in possession of a firearm more than once
- Information that on March 31, 2004, Riley pulled a gun on a man at the Malvern Town Centre and pointed it at his head.

• On March 12, 2004, a conditional sentence was imposed on Riley for unauthorized possession of a firearm in a motor vehicle.

• Within weeks of the imposition of that sentence, Riley was in breach of the residence and house arrest components of the sentence.

• Recent interceptions in two other Part VI investigations indicate that Riley has been in the Malvern area shooting at people.

90 I recognize that there was other information that contradicted or undermined some of the information I have outlined to some degree. But the police were not required to accept or believe any or all of that other evidence. Kerr provided them with detailed information, and a credible basis to know it. It was corroborated at least to some degree. Comeau and Banks were entitled to rely on it and conclude that they had reasonable grounds to believe that Riley was going to commit an unlawful act that would cause serious harm to some person.

91 The real problem on this issue is that Ramer was not able to recall what information he was aware of about the investigation at the time that he gave the authority to proceed with the use of s.184.4. He said that even at the time, he only had a general understanding or overview of the investigation, but did not know the details. He said that he had received briefings about the investigation at his management meetings, including one particularly detailed briefing the day before he gave his direction to proceed. He made no record of the information he received, and upon which he based his decision to authorize the police to commence wiretapping.

92 This brings into sharp focus an issue raised by Mr. Midanik on the argument that s.184.4 is unconstitutional. He argued that there is a constitutional requirement that the decision maker make a record of the information he or she relies on. I rejected that argument, but I stated:

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

93 That is exactly the problem faced by the Crown here. I simply do not know what Ramer knew of the investigation when he made the decision to use s.184.4. I suspect that he knew enough to reasonably believe that Riley was going to commit an unlawful act that would cause serious harm to some person. But suspicion is not good enough to satisfy the onus of proof.

94 Had Ramer received and considered Bank's 649 when he made the decision, I might have been satisfied that Ramer had the requisite grounds. Mr. Midanik made much of the fact that Comeau and Banks also had information that detracted to some small degree from the conclusion that Riley was going to commit an unlawful act that would cause serious harm to some person. It is hard to know precisely where to draw the line of full and frank disclosure when the police are faced with an urgent circumstance that placed human life at risk. But certainly it would have been better to expose Ramer to the investigative warts. Nevertheless, I am satisfied that if all of the information known to Comeau and Banks had been presented to Ramer, he would still have been entitled to reach the conclusion that Riley was going to commit an unlawful act that would cause serious harm to some person. As a result, nothing constitutional would flow from the shortfall in information in the 649, if Ramer had made his decision based on it.

95 The problem for the Crown on this point, however, is that Ramer made and implemented his decision to use s.184.4 before reading the 649, and did not suggest that when he did read it, he considered afresh whether to continue with the use of s.184.4. In fact, it is safe to say, he has no present recollection of reading the 649 at all. The same is true of the second and third 649's.

96 As a result of the foregoing, I cannot be satisfied that Ramer believed, on reasonable grounds, the Riley was going to commit an unlawful act that would cause serious harm to some person.

(b) Did Ramer believe, on reasonable grounds, that intercepting Riley's private communications was immediately necessary, that is: intercepting was necessary at that very time to prevent the harm, intercepting was likely to be effective to prevent the harm, and no equally effective alternative to intercepting was available to prevent the harm?

(i) Was the use of s.184.4 necessary at the very time to prevent harm?

97 Ramer testified that before s.184.4 could be used, the requirements of s.184.4 had to be met. But all he remembered of them at trial was that there had to be an urgency that required action on account of an immediate threat to an individual. He did not recall, if he knew at all, that the action that was required had to be *immediately necessary* to prevent the unlawful act that would cause serious harm, that is, *necessary at that very time* to prevent the act that would cause serious harm. I am prepared to infer, however, from the circumstances leading him to his decision, and the manner in which he reached the decision, that he did, in fact, understand that in order to use s.184.4, the necessity had to be immediate. I have already said that I am of the view that there was an objective basis for the conclusion that Riley presented an immediate threat to the safety and well-being of residents of the Malvern area, that is, there were reasonable grounds for Ramer's belief that Riley was going to commit an unlawful act that would cause serious harm to some person. It follows that there was an objective basis to conclude that, if it was necessary to use s.184.4, the need was immediate.

(ii) Was the use of s.184.4 likely to be effective to prevent harm?

98 To determine whether or not Ramer believed, on reasonable grounds, that the use of s.184.4 was likely to be effective to prevent harm, it is necessary to understand how he thought s.184.4 would be used.

99 In trying to understand Ramer's thinking, it is helpful to begin with a reminder of the police strategy at the time. It will be recalled that on April 14, 2004, the day before the wiretapping began, the approach had changed. Banks explained that at a senior managers meeting in the afternoon of the 14th, the senior managers agreed that because of the risk involved, and because of liability issues, Riley would have to be arrested immediately for breaching his conditional sentence if he was found in Scarborough. This is recorded in Banks' notes. They wanted to preserve the homicide investigation as much as they could but agreed that they had to compromise if Riley was found in Scarborough, in breach of his conditional sentence order.

100 Ramer testified that the purpose of listening to Riley pursuant to s.184.4 was to determine his location so that the police could keep tabs on him, and to determine what he was doing and who his next target might be. When that answer is considered in the context of the decision taken by the senior managers, and some of the other answers Ramer gave and which I have summarized above, it becomes apparent that Ramer's thinking was that: (1) Riley would likely commit an offence that would cause serious harm to some person *if he was in Scarborough*; (2) as a result, to prevent the harm, Riley would have to be arrested if he was located in Scarborough — he would not otherwise be arrested so as not to jeopardize the murder investigation of Riley relating to the killing of Charlton; (3) surveillance of Riley was inadequate to keep tabs on Riley; and (4) intercepting his private communications would enable the police to determine Riley's location, what he was doing and where he was going, and so keep tabs on him, and advance the goal of preventing him from shooting someone else.

101 In view of the foregoing, I am prepared to accept that Ramer believed that the use of s.184.4 would likely be effective to prevent harm. I do not, however, believe that he had reasonable grounds for this belief. I say this because there is little objective basis for this belief.

102 As I have noted, the police did not have the technology to know Riley's location from a cell phone call. They were dependent on the content of his calls for this information. I begin then with the simple reality that the police had no reason to believe that Riley, a man who changed cars and telephones frequently, and was successful in evading police surveillance, would be so oblivious to the interest the police had in him as to announce his whereabouts, plans and destination on the telephone. On the contrary, it seems to me to be a certainty that he would not. But even if he did, the notion that such information could immediately be converted to police action that would enable them to locate and arrest Riley before he actually did any harm was entirely fanciful. Even if Riley announced, and I stress that I consider this to be highly unlikely, that he was on the way to a particular intersection in Malvern in a particular motor vehicle where he hoped to find and shoot a particular Malvern Crew member, the notion that the police could get there first and prevent it from happening seems to me to be a long-shot at best.

103 It is apparent to me the police strategy remained a dangerous balancing act — they would keep on investigating the murder of Charlton, and do what they could to try to prevent any further shooting by Riley. Ramer was losing sleep because he was not sure that the preventative side of the strategy would be successful. I simply do not accept that there was an objective basis for the belief that the use of s.184.4 would likely be effective in the prevention of harm.

104 The difficulty that the Crown has in demonstrating that the use of s.184.4 was likely to be effective in preventing harm in the circumstances here is not surprising. It is no coincidence that all of the other 19 instances since 1993 that the TPS has used s.184.4 involved an abduction or a hostage taking. When Bill C-109, which included this provision, was considered by the Standing Senate Committee on Legal and Constitutional Affairs, counsel for the Minister of Justice testified that the situations that had been identified as requiring immediate wiretapping without an authorization were "hostage takings, bomb threats and armed standoffs." [3] The urgency and usefulness of wiretapping in those cases is obvious. While I do not suggest that s.184.4 is not available in other situations, it's availability in other situations will be most rare. It is easy to understand how intercepting will assist in locating a bomb or a hostage. It is less easy to understand, returning to this case, how intercepting will help to locate the place that a random shooting may take place, or the whereabouts of the persons who intend to carry out the shooting when they stumble on an "acceptable" target.

(iii) Was no equally effective alternative available to prevent the harm?

105 Even if I am wrong, and there was some basis for the belief that the use of s.184.4 would be effective, it is clear that Ramer did not appreciate that intercepting could not be immediately necessary if an equally effective alternative was available to prevent the harm.

106 When asked if he thought that before using s.184.4, there was a requirement that the police had to arrest the person of concern to them if they were arrestable, he said that he thought that this alternative had to be considered. But he went on to say that an arrest could be rejected if the nature of the offence would not result in detention, or if the arrest would compromise the investigation of the substantive offence.

107 I might have been prepared to conclude that Ramer understood this aspect of the prerequisite of immediate necessity, were it not for the last part of his answer. In my view, it simply is not correct to say that an equally effective alternative to intercepting could be rejected on the basis that it might compromise an investigation of an offence. The provisions of s.184.4 create a hard choice for the police. Before they can use s.184.4., they must exhaust the possibility of using equally effective alternatives. They cannot balance the prevention of serious harm against the desire to successfully investigate a crime. If they feel that such a balancing is the proper course of action, they must attempt it without the aid of s.184.4.

108 The fact of the matter is, in this case, there was an absolutely certain way to prevent the harm that the police feared. While it might have undermined the murder investigation, although I am far from certain that this is so, undoubtedly immediately arresting Riley on a breach of his conditional sentence would have succeeded in preventing him from shooting anyone else. While the police might have been right that an arrest would undermine their murder investigation, their reservations about the effectiveness of an arrest were ill-conceived.

109 This was a man with a serious record for violence, who was on release for drug charges, and who had violated in a serious way a conditional sentence freshly imposed by a Superior Court judge for a firearm's offence, a disposition that was lenient to begin with. The idea that he would simply have been re-released into the community if arrested for that breach is a disturbing one. Of course all things are possible, but it was far more likely that an arrest would have taken Riley off the street for a considerable period of time and so would have been more effective than intercepting his communications in preventing serious harm.

110 The Crown tries to have it both ways on the issue. On the one hand, the Crown presented evidence that the police chose not to immediately arrest Riley for fear that the arrest would jeopardize their murder investigation, but would only arrest him if he was found in Scarborough. On the other hand, the Crown suggests that the police intended to arrest Riley, but were having trouble locating him, and wanted to take him down as safely as possible as soon as they could. Consistent with this second theory, the Crown concedes that s.8 was violated by the interception of Riley's communications on the 19th because of the failure of the police to dedicate sufficient resources and to ensure an effective execution of the stated purpose of the interceptions — the location and arrest of Riley when he entered Scarborough.

111 I do not accept this concession by the Crown. It is no doubt true that if the police had dedicated massive resources to keeping track of Riley, they would have been able to arrest him upon his entry into Scarborough on the 19th. But in my view the breach began much earlier, when the police began intercepting Riley's private communications instead of arresting him as soon as possible, whether or not he was in Scarborough. In fact, a perfect opportunity to arrest Riley presented itself when he attended at the Oshawa courthouse on April 14. The police chose not to arrest him on that occasion, although they could have done so easily and safely. The simple fact is that from the beginning, by deciding not to arrest Riley unless he was located in Scarborough, the police declined to make use of a more effective means of preventing harm, and so violated s.184(b) and the *Charter* when they commenced intercepting.

(c) Conclusion regarding s.184.4(b)

112 Having regard to the foregoing, the Crown has not established that the prerequisite to the use of s.184.4 in s.184.4(b) was satisfied.

(2) Was Section 184.4(a) Satisfied?

113 Flowing from my ruling respecting the constitutionality of s.184.4, I conclude that in order for s.184.4(a) to have been met, Ramer:

- had to believe on reasonable grounds that the immediate necessity to intercept Riley's private communications to prevent serious harm was such that no other authorization under Part VI could be obtained with reasonable diligence
- had to immediately put in motion an effort to obtain judicial authorization with dispatch, if that is possible, or risk being out of compliance with s.184.4

(a) Did Ramer believe on reasonable grounds that no other authorization under Part VI could have been obtained with reasonable diligence?

114 I am satisfied that Ramer believed, on reasonable grounds, that no other authorization under Part VI could have been obtained with reasonable diligence at the time that he decided to commence intercepting. The drafting of an affidavit in support of an application for an authorization pursuant to s.186 in relation to the Charlton and Bell shooting had been commenced on March 31, 2004, but was far from ready.

(b) Did Ramer immediately put in motion an effort to obtain judicial authorization with dispatch?

115 The effort to obtain a s.186 authorization intensified after the decision to use s.184.4 was made. More could have been done to complete the process with dispatch, but nothing really turns on that, because an affidavit in support of a s.186 application could not have been ready before the use of s.184.4 ended in any event.

116 More troubling is the failure to attempt to obtain an emergency authorization under s.188 of the *Code.* Ramer was not even aware of the existence of s.188, but Gross was. She no doubt would have brought it to Ramer's attention had she thought that it was possible to apply for a s.188 order, but she thought that it was not. She reached that conclusion because an application under s.188 had to brought by a peace officer specially designated by the Attorney General, and brought to a Superior Court Judge designated by the Chief Justice. Gross thought that there were no designated judges and no specially designated peace officers. In fact, there were specially designated judges, but there were no specially designated peace officers. For reasons that are not before me, no peace officers had been specially designated since 1993.

117 What then is the implication of the failure to designate peace officers to apply for s.188 orders? I consider it to be a serious problem. Section 184.4(a) requires the police to consider an order under s.188 as an alternative to the use of s.184.4. If they use the power in s.184.4, they are obliged to immediately set in motion the preparation necessary to bring an application under s.188, unless grounds for a s.188 authorization do not exist, or unless, for some reason, a s.186 application could be brought before a judge just as expeditiously.

118 I do not doubt that the grounds existed in this case to make an application under s.188, and certainly the police do not doubt they had the grounds. But they gave no real consideration to an application under s.188 because, as I have explained, there were no peace officers specially designated to make applications under s.188. In my view, this is fatal to the lawfulness of their use of s.188. It seems to me that the Attorney General cannot make it impossible to obtain an order under s.188 by refraining form designating peace officers to apply for them, and then argue in a prosecution that the police are excused from the obligation to seek an order under s.188 on account of that same failure to designate peace officers. I do not say that the Attorney General was obliged to specially designate police officers for the purpose of s.188. But by failing to do so, the Attorney General has at the very least seriously undermined the possibility of the police being able to make use s.184.4.

119 The fact is that in this case, I do not think that an emergency authorization would have been as easy to prepare and obtain as counsel for Riley would have it. But the evidence on this point is entirely *post facto* reasoning. No one considered making a s.188 application at the time, and so no one thought through how long it would take to prepare one. In the end, in the circumstances of this case, I can only conclude that because no police officer was specially designated to make an application pursuant to s.188, the police were unable to fully comply with the requirement to put in motion an effort to obtain judicial authorization with dispatch.

(c) Conclusion regarding s.184.4(a)

120 Having regard to the foregoing, the Crown has not established that the prerequisite to the use of s.184.4 in s.184.4(a) was satisfied.

(1) Was Section 184.4(c) Satisfied?

121 Flowing from my ruling respecting the constitutionality of s.184.4, I conclude that in order for s.184.4(c) to have been met, Ramer had to have believed, on reasonable grounds, that:

- The target of interception was the person who would commit the unlawful act or the victim.

122 Clearly Ramer believed on reasonable grounds that Riley was the person who would commit the unlawful act. This prerequisite to the use of s.184.4 was met.

3. Was Use of Section 184.4 Precluded by the Terms of the April 12, 2004 Number Recorder and Tracking Device Order?

123 It will be recalled that on April 12, 2004, Marshall J. of the Ontario Court issued a warrant pursuant to s.492.2 of the *Criminal Code* that, among other things, authorized the police to install and monitor tracking devices for cellular phones used by Tyshan Riley. The paragraph in the warrant authorizing the installation and monitoring of these tracking devices contained the following proviso:

> PROVIDED HOWEVER:
>
> THAT AT NO TIME will any oral communications be intercepted while TELE-MOBILITY COMPANY telephone number (416) 799-1833 and/or any cellular telephones for which there are reasonable grounds to believe that Tyshan Riley is making use of or carrying on his person, is in use.

124 Mr. Midanik argues that on a plain reading of this provision, the police were precluded from the use of s.184.4 while the order permitting the use of cellular telephone tracking devices was in effect, and that as a result of their failure to ask Marshall J. to remove this provision, the use of s.184.4 was in breach of a judicial order, and unreasonable on this basis as well.

125 Det. Gross, who, it will be remembered, was the officer in charge of the Project Liaison Unit at Intelligence Services in the Toronto Police Service, explained that this clause was drafted by the police and routinely inserted in tracking warrants to remind police officers who execute tracking warrants that they cannot use the equipment installed for tracking purposes to intercept private communications. Apparently, the technology used for tracking cell phones can be used to intercept private communications, and so this warning was thought to be advisable.

126 Undoubtedly, the warning could have been worded more clearly. But it is obvious that Marshall J. had no intention of precluding the otherwise lawful use of any of sections 184 to 188 that permit or provide for the granting of authorizations that permit wiretapping while her order was in effect. I say this because there was no logical reason for her to have had such an intention, while there was a good reason for her to have had the intention that Gross described in her evidence in order to prevent any unintentional abuse of her order. I see no reason to interpret the order of Marshall J. to have an absurd meaning instead of a logical one. Moreover, it was within the jurisdiction of Marshall J. to impose the restriction to her own order described by Gross. On the other hand, Marhall J. had no jurisdiction to make an order which, for example, would have precluded a Superior Court judge from giving an order under s.186. Again, given a choice between interpreting the order of Marshall J. as one made within jurisdiction, and one made in excess of jurisdiction, I obviously prefer the former.

127 Accordingly, I conclude that the use of s.184.4 was not precluded by the terms of the April 12, 2004 number recorder and tracking device order.

4. Was the Manner of Interception Unreasonable?

128 There are two questions arising from the manner in which s.184.4 was used in this case that I think bear some discussion, namely: (1) did Ramer adequately monitor the intercepting that he approved; and (2) did he fail to ensure that solicitor-client privilege was not undermined?

(1) Did Ramer adequately monitor the intercepting that he approved?

129 Once he decided to permit the use of s.184.4, Ramer divided his responsibilities in two. On the one hand, on April 15, 2004, Ramer gave a written direction to MacCheyne to carry out Ramer's responsibilities in relation to the interception of private communications pursuant to s.184.4. Ramer explained that this meant that he had delegated to MacCheyne the task of ensuring that the police were operating within the parameters of the law, and doing it properly. Ramer expected MacCheyne to keep him informed of what MacCheyne deemed appropriate. On the other hand, Ramer did not delegate to MacCheyne his authority to add additional lines to the interception activity, or to decide when to terminate it. Ramer maintained personal responsibility for those decisions, and did in fact make them, based on additional information he received on April 15 and April 19. On April 16, 17 and 18, however, he received no information about what was going on with Riley. He simply concluded

that the exigency continued on those days based on the information he had already received. He testified that in his view, the exigency continued until Riley was arrested.

130 There can be no criticism of Ramer for delegating the responsibility for implementing his decision to use s.184.4 to MacCheyne, or for keeping the responsibility to decide when to add to or terminate the intercepting. But I am troubled by the fact that Ramer did not receive, and did not demand input between the 15th to the 19th. In my judgment concerning the constitutionality of s.184.4, at para 70, I noted the following :

> The power to intercept under s.184.4, however, is quite unlike an authorization. The conclusion that the prerequisites are met gives no power to intercept for any period of time at all. The narrow prerequisites must persist on each occasion that an interception is made under s.184.4. On its face, s.184.4 requires that the peace officer must believe, on reasonable grounds, that each interception that is made is immediately necessary to prevent harm. If he or she does not have that reasonable belief, then the interception is not lawful.

131 I do not mean to suggest by this that, in the circumstances of this case, each time the monitor was about to intercept a communication, he or she first had to obtain Ramer's approval. I appreciate that such an approach would be unworkable. But I do think that Ramer, as the decision-maker, was obliged to be up to date at all times while the interception activity continued. At the very least, he should have been updated daily. The failure to update him on the 16th, 17th and 18th of April fell short of the mark, and leads me to conclude on this basis as well that the interception activity after April 15 were unreasonable.

(2) Did Ramer fail to ensure that solicitor-client privilege was not undermined?

132 Sub-section 186(2) of the *Criminal Code* provides that no authorization may be given to intercept private communications at the office or residence of a solicitor, or certain other places used by a solicitor, unless the solicitor or another person in his or her employ or household is engaged in an offence. In addition, as a term of most authorizations in Ontario, a specific prohibition is placed on the interception of solicitor-client communications. Mr. Midanik argues that the failure to address either of these issues in Ramer's instructions to MacCheyne, or MacCheyne's instructions to the monitors, is a violation of s.8 of the *Charter*.

133 I am satisfied that there was no failure by Ramer to ensure that solicitor-client privilege was not undermined, and resulting breach of s.8.

134 With regard to the argument flowing from s.186(2), the simple answer is that Ramer gave no blanket permission to intercept Riley's private communications. Over the five day period of intercepting, he specified two cell phone lines and a residential line as places where intercepting would take place. None of these were offices of, residences of, or places used by solicitors. Assuming that s.186(2) represents a statement of a constitutional principle, that principle was not violated here. Ramer's decision did not authorize any interception at the office, residence or other place used by a solicitor, and no such interception took place.

135 With respect to the second branch of this argument, I note once again that MacCheyne testified that while Ramer gave him no specific instructions about solicitor-client interceptions, the "solicitor-client privilege would have been upheld." The monitors, he said, were trained that when they realized that the target of interception was talking to a lawyer, the call had to be minimized. While it certainly would have been good practice to specifically remind the monitors not to intercept solicitor-client communications, Ramer and MacCheyne did not violate s.8 by relying on the training of the monitors to ensure that solicitor-client communications were not intercepted.

5. Was the April 12, 2004 Number Recorder and Tracking Device Order Granted in Violation of Section 8 of the Charter?

136 Mr. Midanik's principal argument was that Comeau, who swore the information in support of the warrant issued by Marshall J., failed to make full and frank disclosure by omitting to include the following information:

> (a) Regarding Heather Kerr:

(i) her criminal record;

(ii) her outstanding charges;

(iii) the terms of her release on outstanding charges;

(iv) the date of her release from custody; and

(v) details of unfounded allegations she made against a cellmate in February/March, 2004;

(b) Regarding Tyshan Riley:

(i) he was on a conditional sentence with an expiry date of March 11, 2006;

(ii) the terms of that order included house arrest, except when with a surety, a boundary condition and a residence requirement;

(iii) Mr. Riley was also on a recognizance with a residence and boundary restriction;

(iv) Mr. Riley was in breach of both the conditional sentence order and the recognizance and was *arrestable* on both; and

(v) with regard to "the shooting at Neilson Road and Finch", Comeau did not make it clear that the incident referred to was the March 3, 2004, shooting of Charlton and Bell.

(vi) Comeau also omitted Heather Kerr's statement to the effect "if he was involved, I would have heard of it".

137 Mr. Midanik also argues that Comeau failed to make full and frank disclosure because: (1) his assertion that the police had been unable to locate Riley was incorrect, despite Comeau's later reference to the fact that Riley had been observed on April 5, 2004, because he was also seen attending a probation interview on April 6, 2004 (although the surveillance officers apparently did not know that the person they saw was Riley); and (2) he omitted from the information the details of the police "surveillance or lack of surveillance" between April 8 and 12, 2004.

138 The requirement of full and frank disclosure in wiretap applications bedevils the Crown, despite the explanation made by LeBel J. in *R. v. Araujo*, [2000] 2 S.C.R. 992 (S.C.C.) at para. 46:

> Looking at matters practically in order to learn from this case for the future, what kind of affidavit should the police submit in order to seek permission to use wiretapping? The legal obligation on anyone seeking an *ex parte* authorization is full and frank disclosure of material facts: *cf. Dalglish v. Jarvie* (1850), 2 Mac. &G. 231, 42 E.R. 89; *R. v. Kensington Income Tax Commissioners*, [1917] 1 K.B. 486 (C.A.); *Re Church of Scientology and The Queen* (No. 6) (1987), 31 C.C.C. (3d) 449 (Ont. C.A.), at p. 528; *United States of America v. Friedland*, [1996] O.J.No. 4399 (QL) (Gen. Div.) (Gen. Div.), at paras. 26-29, per Sharpe J. So long as the affidavit meets the requisite legal norm, there is no need for it to be as lengthy as *À la recherche du temps perdu*, as lively as the *Kama Sutra*, or as detailed as an automotive repair manual. All that it must do is set out the facts fully and frankly for the authorizing judge in order that he or she can make an assessment of whether these rise to the standard required in the legal test for the authorization. Ideally, an affidavit should be not only full and frank but also clear and concise. It need not include every minute detail of the police investigation over a number of months and even of years.

139 Given the many and detailed prerequisites to the granting of an authorization, it is no easy task to determine what information known to the police is immaterial and may safely be omitted from the affidavit. As a result, unsurprisingly, despite the recommendation of LeBel J., overly long affidavits persist. But Mr. Midanik's approach would import the practice of drafting enormous and detailed affidavits on wiretap applications to the drafting of search warrant informations. In my view, that would be entirely unnecessary and quite unfortunate. Full and fair disclosure of material facts is, of course, required in the drafting of

search warrant informations. But materiality should be grounded in the simpler requirements for a search warrant, and needless detail should be avoided. This is particularly true in the case of a tracking warrant pursuant to s.492.1 of the *Criminal Code* or a number recorder warrant pursuant to s.492.2 of the *Criminal Code*. In each of these cases, the applicant need only establish that there are reasonable grounds to *suspect* that an offence has been or will be committed, and that information relevant to the offence in the case of s.492.1, or relevant information that would assist the investigation of the offence in the case of s.492.2, could be obtained if an order is granted.

140 I found the answer of Det. Gross when cross-examined about full and frank disclosure by Mr. Midanik to be insightful. She agreed that the same obligation to make full and frank disclosure exists in the case of tracking warrants as in the case of Part VI authorizations. The difference, she said, is that in the case of Part VI authorizations, it is the investigative necessity requirement that pushes the full fair and frank disclosure requirement. I agree.

141 In this case, it might have been better if, in particular, Comeau had included some of the information known to him that affected Kerr's credibility in the information sworn in support of the tracking warrant. I see no need, on the other hand, for the details concerning Mr. Riley's conditional sentence or recognizance. Investigative necessity is not a prerequisite to an ordinary search warrant, far less a tracking warrant. But I do not think that anything flows from any of the omissions.

142 I am entirely satisfied that if Comeau's information were amplified by the addition of all of the information Mr. Midanik alleges is missing from it, Marshall J. could still, quite properly, have issued the warrant. In other words, even taking into consideration the facts omitted by Comeau that Mr. Midanik argues were material, there would continue to be a basis for the decision of the issuing judge. There would still be at least some evidence that might reasonably be believed on the basis of which the warrant could have issued. Nor could it be said that there was anything in Comeau's conduct that was subversive of the search warrant process.Accordingly, there was no violation of s.8 in the granting of the tracking warrant. (See the discussion in *R. v. Araujo* at paras. 50-61.)

6. Did the Conduct of Crown Counsel Who Gave Advice to the Police Violate Section 8 of the Charter?

143 It will be recalled that Ramer, through Gross, sought and obtained the legal opinion of Ann Morgan, in her position as Crown counsel, before making use of s.184.4. Mr. Midanik argues that there were many inadequacies in the advice she gave and the way she gave it, as well as inadequacies in the policy of the Attorney General governing the giving of such advice, and that all of this provides a foundation for a determination by me that there were additional breaches of s.8 perpetrated by Crown counsel and the Attorney General that should be taken into account on this application.

144 I do not find it necessary to consider the substance of these various allegations. My silence should not be taken as an indication that I find any merit in them. I simply do not believe that these allegations against the Crown can form any part of this application. In my view, neither Crown counsel who gives erroneous or incomplete advice to the police about the use of s.184.4, nor an Attorney General who fails to provide guidance to Crown counsel giving such advice, are implicated in the decision taken by the police to make use of s.184.4 for purposes of *Charter* scrutiny.

145 Aside altogether from the unfortunate deterring of the giving of legal advice to the police by Crown counsel that would flow from such a determination, Mr. Midanik's theory of responsibility for police actions on the part of Crown counsel and the Attorney General is alien to our system. In our system, the hallmark of the relationship between police and Crown counsel is mutual independence. I cannot do better than adopt the following excerpt from the *Martin Report* in describing this relationship:

> As a matter of law, police officers exercise their discretion in conducting investigations and laying charges entirely independently of Crown counsel. The police seek the advice of the Crown only where they think it appropriate. And while it is no doubt prudent to do so in many cases, the police are not bound to follow the advice of Crown counsel as that advice relates to the conduct of the investigation and the laying of charges. The Crown likewise exercises independent discretion in the conduct of the prosecution before the court, having no obligation to prosecute simply because a charge is laid by the police. [4]

146 Similarly, in the *Marshall Report*, the Commissioner stated:

> We recognize that cooperation and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function — that of investigation and law enforcement — is distinct from the prosecution function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice. [5]

147 It is true that by virtue of s.185, when an application for an authorization pursuant to s.186 is made, the application is usually brought by an agent specially designated in writing for that purpose by the Attorney General or the Minister of Public Safety and Emergency Preparedness. That person is invariably Crown counsel. In that situation, Crown counsel is constitutionally responsible for the investigatory decisions he or she makes. In most cases, however, including this one, Crown counsel is simply a legal advisor whose advice may be accepted or ignored by the police. Errors made by Crown counsel when acting as legal advisor to the police in the conduct of an investigation do not attract *Charter* scrutiny, at least absent a showing of malice. Treating advice by Crown counsel as being part of the decision-making process in a police investigation as advocated by Mr. Midanik puts at risk the maintenance of the distinct line between the investigative and prosecutorial functions that is essential to the proper administration of justice.

148 I reject the argument.

7. Did the Interception of One Private Communication of Atkins Violate Section 8?

149 As I noted above, on April 19, 2004, at 1:22 p.m., the police intercepted a private communication of Atkins. Mr. Riley was not a participant in that communication. The monitor who listened to that call had listened to Mr. Riley's voice one half hour earlier. The Crown did not call this monitor as a witness, and I can only infer that the monitor did not think that he or she were intercepting Riley. The Crown concedes that this interception was unlawful.

150 This concession is rightly made. Ramer made no decision to intercept the private communications of Atkins. This communication could only have been lawfully intercepted if the other party to the communication was Riley, or if the monitor was listening to the communication in an effort to determine if one of the parties to it was Riley. Neither of these justifications is available in this instance.

151 Accordingly, I conclude that the interception of Atkins' private communication was unlawful, and in violation of s.8 of the *Charter*.

Summary

152 I conclude that the police violated s.8 of the *Charter* in the following ways:

> (1) Although I suspect that Ramer believed, on reasonable grounds, that Riley was going to commit an unlawful act that would cause serious harm to some person, and although I am satisfied that reasonable grounds existed for such a conclusion, the fact that Ramer neither remembers nor has any record of what he was told about the investigation prevents me from being satisfied that his belief was based on reasonable grounds. As a result, he did not satisfy this aspect of the prerequisite to intercepting in s.184.4(b).
>
> (2) Although I am satisfied that Ramer believed that the use of s.184.4 would likely be effective to prevent harm, I am not satisfied that he had reasonable grounds for this belief. I do not accept that there was an objective basis for the belief that the use of s.184.4 would likely be effective in the prevention of harm. As a result, he did not satisfy this second aspect of the prerequisite to intercepting in s.184.4(b).
>
> (3) By deciding not to arrest Riley unless he was located in Scarborough, the police declined to make use of a more effective means of preventing harm, and so violated this third aspect of the prerequisite to intercepting in s.184.4(b).

(4) Although it might not have been possible to obtain a judicially authorized emergency wiretap authorization pursuant to s.188 by April 19, 2004, nevertheless, because the Attorney General had not designated any police officer to make such an application, the police were unable to fully comply with the requirement to put in motion an effort to obtain judicial authorization with dispatch. As a result, the police violated s.184.4(a).

(5) Ramer did not adequately monitor the intercepting that he approved.

(6) The interception of one of Atkins' private communication was unlawful, and in violation of s.8 of the *Charter*.

Disposition

153 The intercepting of the private communications of Riley and Atkins pursuant to s.184.4 of the *Criminal Code* violated their rights under s.8 of the *Charter* for the reasons I have just summarized. As a result, I reach the inevitable conclusion that the evidence of those private communications was obtained in a manner that infringed s.8 of the *Charter*. When the trial resumes, I will consider whether any additional evidence that the Crown proposes to tender at this trial was also obtained in a manner that infringed s.8. Finally, I will I consider whether the admission of any of this evidence would bring the administration of justice into disrepute, and should be excluded.

Order accordingly.

Footnotes

1 It would have taken at least ten days, he thought, to get an authorization that would be a pared down version of the one ultimately obtained in June 2004.

2 See *R. v. Galbraith* (1989), 49 C.C.C. (3d) 178 (Alta. C.A.); foll'd: *R. v. Laudicina* (1990), 53 C.C.C. (3d) 281 (Ont. H.C.).

3 Evidence of Fred Bobiasz, *Proceedings of the Standing Senate Committee*, June 2, 1993, p.44:10.

4 G.A. Martin, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Toronto: Queen's Printer for Ontario, 1993) at 29.

5 *Royal Commission on the Donald Marshall Jr. Prosecution, Volume 1: Findings and Recommendations*. Halifax, Nova Scotia: Queen's Printer. 1989.