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# Twenty-Five Years in Search of a Reasonable Approach

Michal Fairburn\*

## I. INTRODUCTION

Over the last quarter-century, the *Canadian Charter of Rights and Freedoms*<sup>1</sup> has proven to be fertile ground for litigation. Nowhere is this more true than in the context of police powers of search. In 1984, *Hunter v. Southam*<sup>2</sup> taught us that section 8 of the Charter and the right to be secure against unreasonable search and seizure was an individual right grounded in privacy and not property interests. *Hunter* placed a protective Charter cloak over all reasonable expectations of privacy. We learned that in order to penetrate that cloak, state actors had first to obtain prior judicial authorization and that a failure to do so would result in a presumptively unreasonable search. Since *Hunter*, much judicial energy has been invested in developing a meaningful construct by which to locate the line between a reasonable and unreasonable expectation of privacy. As the years have passed and the courts have stamped creative investigative techniques with a privacy label, we have seen a corresponding proliferation of search provisions in the *Criminal Code*.<sup>3</sup> While Parliament must be commended for attempting to keep stride with the evolution of section 8 Charter rulings, the ongoing dialogue between the courts and Parliament has resulted in nothing short of a complex labyrinth of *Criminal Code* provisions that have become virtually impossible to navigate and more difficult to apply. Police officers often find themselves spending more time debating which search provisions apply to their investigative techniques and the parameters of their constitutional requirements than involved in the investigation itself. Twenty-five years later, it is time to

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter “the Charter”].

<sup>2</sup> *Canada (Combiner Investigation Act, Director of Investigation and Research) v. Southam Inc.*, [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97 (S.C.C.) [hereinafter “*Hunter v. Southam*”].

<sup>3</sup> R.S.C. 1985, c. C-46.

pause, catch our breath, and think about how the administration of justice, the community at large and individual Charter interests can be best served going forward.

## II. IN THE BEGINNING THERE WAS SECTION 487 OF THE *CRIMINAL CODE*

Section 487 of the *Criminal Code*<sup>4</sup> is the most commonly resorted to provision by which to gain prior judicial authorization to search. It has existed since the beginning of time — well, at least since the beginning of the *Criminal Code*.<sup>5</sup> While it was amended periodically over the years, the core essence of section 487 has remained unchanged. In the beginning, it required that before a warrant issue, there exist reasonable grounds to believe that there were, in a named location, things that would “afford evidence as to the commission” of an offence.<sup>6</sup> In its current formulation, section 487(1)(b) of the Code requires that there exist reasonable grounds to believe that an offence has been or is being committed and that there exists, in a specific location, “anything” that “will afford evidence with respect to the commission of an offence”.<sup>7</sup> Assuming these criteria are met, a warrant may issue permitting the search of a “building, receptacle or place for any such thing and to seize it”.<sup>8</sup>

Life was simple back in 1892 when what is now section 487 was first enacted and stood as the beacon for prior judicial authorization. After all, there was no need for anything more. The expression “search and seizure” had an obvious meaning back in pre-Charter days. It meant looking for, locating and taking away tangible items. Before the turn of the 20th century and, indeed, well into it, no one would have imagined that a request for mere information would constitute a “search” or

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<sup>4</sup> R.S.C. 1985, c. C-46.

<sup>5</sup> *Criminal Code*, S.C. 1892, c. 29.

<sup>6</sup> Section 569 of the *Criminal Code*, S.C. 1892, c. 29. It has been amended over the years by: R.S.C. 1906, c. 146; S.C. 1909, c. 9; R.S.C. 1927, c. 36; S.C. 1953-54, c. 51; R.S.C. 1970, c. C-34; R.S.C. 1985, c. C-46; R.S.C. 1985, c. 27 (1st Supp.) s. 68; S.C. 1994, c. 44, s. 36; S.C. 1997, c. 23, s. 12; S.C. 1997, c. 18, s. 41; S.C. 1999, c. 5, s. 16.

<sup>7</sup> In *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1998] S.C.J. No. 87, 133 C.C.C. (3d) 426, at para. 13 (S.C.C.) Major J., for the Court, offered these words an expansive interpretation, meaning anything relevant or rationally connected to the offence under investigation. Today, s. 487(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46 also permits the search for and seizure of a thing where there are reasonable grounds to believe it will “reveal the whereabouts of a person who is believed to have committed an offence ...”.

<sup>8</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 487(1)(d).

“seizure”.<sup>9</sup> The term “biographical core of personal information” had not been coined.<sup>10</sup> Computers had not been invented and so non-tangible electronic data did not challenge the outside parameters of the precursor to section 487. Tracking devices, digital number recorders, and pinhole video cameras were not even the things of science fiction novels, let alone part of the investigator’s tool kit. Who would have known that individuals held a genetic fingerprint in their bodily substances and how critically important that genetic fingerprint would become to the administration of justice?<sup>11</sup> Come to think of it, fingerprints were not even introduced into the Canadian law enforcement world until the 20th century. Yes, life was simple back then. It has taken a turn.

### III. SECTION 8 OF THE CHARTER AND THE AGE OF INVESTIGATIVE INNOVATION

After the Charter’s proclamation in 1982, it did not take long for section 8 to achieve a special and sustained spotlight in the Supreme Court of Canada. The Court quickly set to work on providing meaningful content to the 12 simple words: “Everyone has the right to be secure against unreasonable search and seizure.” In its 1984 *Hunter v. Southam*<sup>12</sup> debut, Dickson J., as he then was, decided that, barring some compelling reason, section 8 protected reasonable expectations of privacy from the state’s prying eyes. As the years passed, the court provided necessary guidance on how to identify section 8 privacy protected interests. To name but a few, cases like *R. v. Edwards*, *R. v. Duarte* and *R. v. Tessling* represent valiant attempts by the Court to provide a lens through which to determine whether a Charter protected privacy interest exists.<sup>13</sup> While our understanding of what constitutes a reasonable expectation of

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<sup>9</sup> *R. v. Plant*, [1993] S.C.J. No. 97, 84 C.C.C. (3d) 203 (S.C.C.).

<sup>10</sup> This expression is taken from *R. v. Plant*, [1993] S.C.J. No. 97, 84 C.C.C. (3d) 203, at 212-13 (S.C.C.), *per Sopinka J.*

<sup>11</sup> The introduction of forensic DNA to the criminal justice system has served to identify both the innocent and the guilty. Names like David Milgaard, Guy Paul Morin and Thomas Sophonow resonate as examples of those who have been fully exonerated as a result of forensic DNA. See: *R. v. B. (S.A.)*, [2003] S.C.J. No. 61, 178 C.C.C. (3d) 193, at para. 51 (S.C.C.) *per* Arbour J.; *R. v. Briggs*, [2001] O.J. No. 3339, 157 C.C.C. (3d) 38, at paras. 22-23 (Ont. C.A.) *per* Weiler J.A., leave to appeal refused [2002] S.C.C.A. No. 31 (S.C.C.).

<sup>12</sup> [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97 (S.C.C.).

<sup>13</sup> *R. v. Edwards*, [1996] S.C.J. No. 11, 104 C.C.C. (3d) 136 (S.C.C.); *R. v. Duarte*, [1990] S.C.J. No. 2, 53 C.C.C. (3d) 1 (S.C.C.); *R. v. Tessling*, [2004] S.C.J. No. 63, 189 C.C.C. (3d) 129 (S.C.C.).

privacy and how to arrive at that determination has evolved over the years, there is bound to be further clarification of this important concept in the years to come.<sup>14</sup>

For now, while peering through the privacy lens, we know that the courts have arrived at a liberal construction for privacy which goes well beyond what was historically considered protected. The birth of Charter protected informational privacy in *R. v. Plant*, in 1993, left no doubt about the fact that the Supreme Court was willing to stretch the limit beyond our traditional understanding of privacy. In what has become an oft-quoted passage, Sopinka J. observed:

... In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.<sup>15</sup>

Today, this “liberal approach to the protection of privacy” is firmly embedded in section 8 jurisprudence.<sup>16</sup>

It did not take long to realize that the *Criminal Code*<sup>17</sup> was ill equipped to accommodate this expansive approach to privacy. Given the *Hunter v. Southam*<sup>18</sup> conclusion that searches impressing themselves on reasonable expectations of privacy would be presumptively unreasonable, barring prior judicial authorization, suddenly section 487 was not enough.<sup>19</sup> This

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<sup>14</sup> Distilled, the current approach takes into account the totality of the circumstances, including consideration of any subjective expectation of privacy held by the individual asserting the privacy interest and the objective reasonableness of that expectation. (See *R. v. Edwards*, [1996] S.C.J. No. 11, 104 C.C.C. (3d) 136, at 150-51 (S.C.C.), *per* Cory J.) We are very likely to benefit from the Court’s expanded views on this issue in two cases currently under reserve in the Supreme Court of Canada: *R. v. M. (A.)*, [2006] S.C.J. No. 1663, 208 C.C.C. (3d) 438 (Ont. C.A.), leave to appeal granted [2006] S.C.C.A. No. 229 (S.C.C.); *R. v. Brown*, [2006] A.J. No. 755, 210 C.C.C. (3d) 317 (Alta. C.A.), motion to extend time granted [2006] S.C.C.A. No. 323 (S.C.C.).

<sup>15</sup> *R. v. Plant*, [1993] S.C.J. No. 97, 84 C.C.C. (3d) 203, at 212-13 (S.C.C.), *per* Sopinka J.

<sup>16</sup> *R. v. Law*, [2002] S.C.J. No. 10, 160 C.C.C. (3d) 449, at paras. 15-16 (S.C.C.), *per* Bastarache J.

<sup>17</sup> R.S.C. 1985, c. C-46.

<sup>18</sup> [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97 (S.C.C.).

<sup>19</sup> There are, of course, some warrantless searches that can overtake the presumption of unreasonableness, including: abandonment (*R. v. Stillman*, [1997] S.C.J. No. 34, 113 C.C.C. (3d) 321 (S.C.C.)); *R. v. Law*, [2002] S.C.J. No. 10, 160 C.C.C. (3d) 449 (S.C.C.); consent (*R. v. Borden*, [1994] S.C.J. No. 82, 92 C.C.C. (3d) 404 (S.C.C.)); exigent circumstances (*R. v. Grant*, [1993] S.C.J. No. 98, 84 C.C.C. (3d) 173 (S.C.C.)); search incident to arrest (*R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308 (S.C.C.)); *R. v. Caslake*, [1998] S.C.J. No. 3, 121 C.C.C. (3d) 97 (S.C.C.); and

raised the question, what would be enough? Judicial authorization, but informed by what? According to Dickson J. in *Hunter*, the answer to that question lay in the context of the search. What might be enough in one context, might not be in another. He put it this way:

... Section 443 [now section 487] of the *Criminal Code* authorizes a warrant only where there has been information upon oath that there is “reasonable ground to believe” that there is evidence of an offence in the place to be searched. ... The state’s interest in detecting and preventing crime begins to prevail over the individual’s interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement. Where in the state’s interest is not simply law enforcement as, for instance, where state security is involved, or where the individual’s interest is not simply his expectation of privacy, as for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one. ...<sup>20</sup>

So it was, with these words, that the contextual approach to prior judicial authorization was born. It was restated by Wilson J. a few years later in *R. v. McKinlay Transport Ltd.* as follows:

Since individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is ‘reasonable’ in a given context must be flexible if it is to be realistic and meaningful.<sup>21</sup>

Sometimes, reasonable grounds to believe certain facts would suffice to get a warrant. When that threshold test met constitutional standards, the state’s interest would prevail over the individual’s privacy interest when “credibly based probability” replaced suspicion. But, this threshold test would not always be required. Other contexts may permit the constitutionalization of a suspicion standard. Yet others may require more than simple belief. Time would tell.

As the common law has evolved in the post-Charter era, and the courts have found section 8 privacy interests adversely impacted by a constellation of investigative techniques and police powers, the need to provide the jurisdiction for prior authorization has become a not-infrequent

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search incident to investigative detention (*R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449 (S.C.C.)).

<sup>20</sup> *Hunter v. Southam*, [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97, at 114-15 (S.C.C.).

<sup>21</sup> *R. v. McKinlay Transport Ltd.*, [1990] S.C.J. No. 25, 55 C.C.C. (3d) 530, at 542-43 (S.C.C.).

challenge for Parliament. In an effort to either pre-empt or quickly respond to section 8 decisions, Parliament has taken a contextual approach to setting out the requirements for such authorization. This has led to a remarkable proliferation of search provisions in the *Criminal Code*.<sup>22</sup> As noted by Rosenberg J.A. in *R. v. Backhouse*:

Since proclamation of the *Charter of Rights and Freedoms* there has been an explosion of legislative activity in the field of search and seizure. In *Hunter v. Southam*, [cite omitted] the Supreme Court of Canada held that warrantless searches for purposes of criminal investigation are presumptively unreasonable and in *R. v. Collins* the Court held that for a search to be reasonable it must be authorized by law. In the result, Parliament has moved quickly to fill in gaps in the legislative scheme of search and seizure to provide the police with the necessary tools to investigate crime while ensuring that the public and individual interests in privacy are adequately protected.<sup>23</sup>

Unfortunately, the different search provisions are sometimes inconsistent and difficult to reconcile. What follows is a discussion of specific examples of section 8 Charter dialogue between the courts and Parliament and how that dialogue has been, in part, responsible for the maze of search provisions we have today. It is followed by some, hopefully, practical observations about how Parliament might start to rejig these provisions in a manner that, while staying true to section 8 interests, brings clarity and some level of simplicity to the *Criminal Code*.<sup>24</sup>

#### IV. FIRST THERE WAS *R. v. DUARTE* AND THEN THERE WERE PARTICIPANT SURVEILLANCE AUTHORIZATIONS

Prior to *R. v. Duarte*,<sup>25</sup> while Part VI of the *Criminal Code*<sup>26</sup> allowed for judicial authorization for electronic surveillance of third parties,

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<sup>22</sup> R.S.C. 1985, c. C-46. I am not the first person to have written on this subject and trust I will not be the last. For an earlier excellent discussion of the confusion that reigns in the many search provisions in the *Criminal Code*, with a particular focus on ss. 487 and 487.01 warrants, and a “modest” proposal for change, see Renee Pomerance, “Criminal Code Search Warrants: A Plea for a New Generic Warrant” in *Towards a Clear and Just Criminal Law*, Don Stuart, R.J. Delisle & Allan Manson, eds. (Scarborough, ON: Carswell 1999). See also Kent Roach’s illuminating discussion in “Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures” (2001) 80 Can. Bar Rev. 481.

<sup>23</sup> [2005] O.J. No. 754, 194 C.C.C. (3d) 1, at para. 110 (Ont. C.A.).

<sup>24</sup> R.S.C. 1985, c. C-46.

<sup>25</sup> [1990] S.C.J. No. 2, 53 C.C.C. (3d) 1 (S.C.C.).

there was no Code provision allowing for an authorization to permit intercepts of conversations where there was a consenting party.<sup>27</sup> There was a strong basis upon which to suggest that section 8 did not apply as, some thought, a person could not have a reasonable expectation of privacy in a conversation that he or she had with another person. After all, the recipient of those words could simply repeat them at will. The intercept would be nothing more than an accurate recording of those words and, ergo, allow for an accurate recounting of the conversation.<sup>28</sup> As noted by Cory J.A., as he then was, in the court below, “the admission of electronic recordings of those conversations would seem to be a reasonable, logical and sequential step in trial proceedings.” Indeed, he made the practical observation that an “accurate transcript of the conversation should so often benefit the accused as the informant”.<sup>29</sup>

The Court of Appeal was in good company in arriving at this conclusion. It had on its side the United States Supreme Court. In *Lopez v. United States* the following words were used to describe participant surveillance:

Stripped to its essentials, petitioner’s argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent’s memory, or to challenge the agent’s credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory.<sup>30</sup>

This position was rejected by the Supreme Court of Canada. In his oft-quoted passage, La Forest J. emphasized the highly intrusive nature of all electronic surveillance, regardless of who may be consenting to its interception:

The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our

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<sup>26</sup> Then Part IV.1 of the *Criminal Code*.

<sup>27</sup> This type of technique is often referred to as “consent” or “participant” surveillance. Typically, an undercover police officer or state agent will be a party to a communication which he or she consents to being electronically captured.

<sup>28</sup> This is most likely the rationale behind exempting a consenting person (including a state actor) from the offence provision within s. 184(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. Section 184(2)(a) ensures that a consenting party to a communication (either the originator or the recipient of the communication) may wilfully intercept that communication without committing an offence. See *R. v. Goldman*, [1979] S.C.J. No. 136, 13 C.R. (3d) 228 (S.C.C.).

<sup>29</sup> *R. v. Duarte*, [1987] O.J. No. 821, 38 C.C.C. (3d) 1, at 10 (Ont. C.A.), affd [1990] S.C.J. No. 2, [1990] 1 S.C.R. 30 (S.C.C.).

<sup>30</sup> 373 U.S. 427, at 438-39 (1963).



communications will remain private. A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning. As Douglas J., dissenting in *United States v. White, supra*, put it, at p. 756: “Electronic surveillance is the greatest leveler of human privacy ever known.” If the state may arbitrarily record and transmit our private communications, it is no longer possible to strike an appropriate balance between the right of the individual to be left alone and the right of the state to intrude on privacy in the furtherance of its goals, notably the need to investigate and combat crime.<sup>31</sup>

With this approach to electronic surveillance, it is not surprising that La Forest J., for the Court, recognized that while the Charter cannot protect people from their friends repeating their words, it must protect them from permanent recordings of their conversations with their “friends”.<sup>32</sup> Individuals must be protected, not from the state repeating their words, but from the “much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words”.<sup>33</sup> In the end, La Forest J. concluded that it would be “unacceptable in a free society that the agencies of the state be free to use this technology at their sole discretion” as it would pose a “wholly unacceptable” threat to privacy.<sup>34</sup>

Parliament responded to the call for prior judicial authorization with section 184.2 of the *Criminal Code*.<sup>35</sup> This became the means by which to gain authorization to intercept communications where at least one party to the communication was consenting to its capture. Parliament approached the legislative exercise by taking into account the specific privacy interests at play. In doing so, despite the strong *dicta* from *R. v.*

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<sup>31</sup> *R. v. Duarte*, [1990] S.C.J. No. 2, 53 C.C.C. (3d) 1, at 11 (S.C.C.). It is not without some irony that La Forest J. places emphasis on the passage from *United States v. White*, 201 U.S. 745 (1971) to demonstrate the highly intrusive nature of electronic surveillance when, in fact, in the United States, there is no prior authorization needed to capture a communication where at least one party consents to its capture.

<sup>32</sup> *R. v. Duarte*, [1990] S.C.J. No. 2, 53 C.C.C. (3d) 1, at 11 (S.C.C.).

<sup>33</sup> *R. v. Duarte*, [1990] S.C.J. No. 2, 53 C.C.C. (3d) 1, at 11 (S.C.C.).

<sup>34</sup> *R. v. Duarte*, [1990] S.C.J. No. 2, 53 C.C.C. (3d) 1, at 13-14 (S.C.C.).

<sup>35</sup> R.S.C. 1985, c. C-46, as am. S.C. 1993, c. 40, s. 4. At the same time that s. 184.2 was proclaimed in force, so were officer lifelines and emergency wires: ss. 184.1 and 184.4 of the Code respectively. In brief compass, these provisions specifically allow for non-judicially authorized electronic surveillance in situations where serious bodily harm may result to a consenting party, usually a police officer or police agent, or to a victim of crime, and there is insufficient time to obtain a judicial authorization.

*Duarte*,<sup>36</sup> one would be forgiven for thinking that Parliament was somewhat swayed by what it considered to be a diminished expectation of privacy for the person caught speaking to the consenting party. As such, while it responded to the *Duarte* call for legislation to permit prior authorization, Parliament chose to deal with participant surveillance differently than a full blown third party authorization to intercept private communications where there is no consenting party. The fluctuating privacy interest has led to dramatically different application and authorization requirements.

The requirements for third party authorizations are governed by sections 185 and 186 of the *Criminal Code*<sup>37</sup> and it is beyond the scope of this paper to study them in full. Suffice it to say that the statutory criteria surrounding the application and issuance process for a third party authorization contains the most robust requirements within the *Criminal Code*. A third party application requires that the applicant, a specially designated agent of the Attorney General or Minister of Public Safety and Emergency Preparedness, bring the application before a superior court judge, accompanied by an affidavit setting out a peace officer's grounds to believe a number of factors enumerated in section 185(c)-(h). An application may only be brought in respect of an offence designated for such a purpose in section 183 of the Code. The authorization may issue where the judge is satisfied that "it would be in the best interests of the administration of justice to do so" (see s. 186(1)(a)) and where it meets the requirements of investigative necessity. Interestingly, section 186 of the Code is missing a threshold test for the issuance of the authorization. Unlike most other search provisions in the Code that require the issuing justice to be satisfied on reasonable grounds of some nature, section 186 only speaks in terms of the judge being satisfied that the "best interests of the administration of justice" would be served by allowing the authorization. In *R. v. Finlay* Martin J.A. interpreted these words to be mutually inclusive, in this context, with a reasonable grounds to believe standard:

... Thus, it appears to me that the prerequisite that the judge must be satisfied that it would be in the best interests of the administration of justice to grant the authorization, the context of the legislative scheme, imports as a minimum requirement that the authorizing judge must be satisfied that there are reasonable grounds to believe that a particular

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<sup>36</sup> [1990] S.C.J. No. 2, 53 C.C.C. (3d) 1 (S.C.C.).

<sup>37</sup> R.S.C. 1985, c. C-46.

offence or a conspiracy, attempt or incitement to commit it has been, or is being, committed.<sup>38</sup>

In terms of the investigative necessity requirement, section 186(1)(b) of the Code requires that the applicant establish that “other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures”. In *R. v. Araujo* LeBel J. held that “investigative necessity” means that “[t]here must be, practically speaking, no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry.”<sup>39</sup>

By way of contrast, the post-*Duarte*<sup>40</sup> requirements for an authorization permitting participant surveillance rest on simple reasonable grounds to believe that any *Criminal Code*<sup>41</sup> or federal offence has been or will be committed, that there is a consenting party to the interception of the communication and that “information” concerning the offence will be obtained through the interception. The application can be made by a peace or public officer to a provincial court judge. Importantly, there is no requirement for investigative necessity.

In its response to *R. v. Duarte*,<sup>42</sup> Parliament gave officers section 184.2 to permit participant surveillance to continue with proper authorization. Clearly, they did not feel that this type of authorization was as pressing on privacy interests as a full-blown third party authorization. In the end, while Parliament required that participant surveillance comply with a *Hunter v. Southam*<sup>43</sup> reasonable grounds to believe threshold, it evidently revealed its perception of the different constitutional context for this type of interference with privacy. It did this by eliminating investigative necessity and Crown agents from the formula, as well as permitting an authorization to be issued by a provincial court judge for any *Criminal Code*<sup>44</sup> or federal offence that had been or might be committed in the

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<sup>38</sup> [1985] O.J. No. 2680, 23 C.C.C. (3d) 48, at 70-71 (Ont. C.A.), *per* Martin J.A., leave to appeal refused [1986] 1 S.C.R. ix (S.C.C.).

<sup>39</sup> [2000] S.C.J. No. 65, 149 C.C.C. (3d) 449, at para. 29 (S.C.C.), *per* LeBel J.

<sup>40</sup> *R. v. Duarte*, [1990] S.C.J. No. 2, 53 C.C.C. (3d) 1 (S.C.C.).

<sup>41</sup> R.S.C. 1985, c. C-46.

<sup>42</sup> [1990] S.C.J. No. 2, 53 C.C.C. (3d) 1 (S.C.C.).

<sup>43</sup> [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97 (S.C.C.).

<sup>44</sup> R.S.C. 1985, c. C-46.

future.<sup>45</sup> These are fundamentally different legislative provisions, informed by, what Parliament perceived to be, fundamentally different constitutional standards.

#### V. FIRST THERE WAS *R. v. WONG* AND THEN THERE WERE VIDEO-WARRANTS

Mr. Wong was engaged in illegal gambling in a hotel room. With the permission of the hotel, the police installed video equipment in the room and, on a number of occasions, monitored it from the adjacent room. They did this without prior authorization. After all, there was none to be had. Close on the heels of *R. v. Duarte*,<sup>46</sup> La Forest J., on behalf of the majority, concluded that the unauthorized video-surveillance used in *R. v. Wong*<sup>47</sup> constituted a section 8 Charter breach. He did not mince words in setting out his vision of the Orwellian world we would live in if state actors could decide, on their own, when to videotape the activities of citizens:

I am firmly of the view that if a free and open society cannot brook the prospect that the agents of the state should, in the absence of judicial authorization, enjoy the right to record the words of whomever they choose, it is equally inconceivable that the state should have unrestricted discretion to target whomever it wishes for surreptitious video surveillance. George Orwell in his classic dystopian novel, *1984*, paints a grim picture of a society whose citizens had every reason to expect that their every movement was subject to electronic video surveillance. The contrast with the expectations of privacy in a free society such as our own could not be more striking. The notion that the agencies of the state should be at liberty to train hidden cameras on members of society wherever and whenever they wish is fundamentally irreconcilable with what we perceive to be acceptable behaviour on the part of government. ... we must always be alert to the fact that modern

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<sup>45</sup> In *R. v. Bordage*, [2000] J.Q. no 2045, 146 C.C.C. (3d) 549, at paras. 36-40 (Que. C.A.), the constitutionality of s. 184.2 of the *Criminal Code*, R.S.C. 1985, c. C-46 and, specifically, the absence of an investigative necessity requirement, was upheld. See also the comments of Deschênes J.A. for the court in *R. v. Doiron*, [2007] N.B.J. No. 189, 221 C.C.C. (3d) 97, at paras. 43-45 (N.B.C.A.); *R. v. Gyles*, [2005] O.J. No. 5513 (Ont. C.A.); *R. v. Pires*, [2005] S.C.J. No. 67, 201 C.C.C. (3d) 449, at para. 21 (S.C.C.).

<sup>46</sup> [1990] S.C.J. No. 2, 53 C.C.C. (3d) 1 (S.C.C.).

<sup>47</sup> [1990] S.C.J. No. 118, 60 C.C.C. (3d) 460 (S.C.C.).

methods of electronic surveillance have the potential, if uncontrolled, to annihilate privacy.<sup>48</sup>

This passage has far-reaching effects. At first glance, it leaves the impression that La Forest J. was of the view that, like *R. v. Duarte*,<sup>49</sup> prior authorization was required any time the state wished to electronically record the citizen. He later qualified his comments by suggesting that the question for consideration was whether “in a society such as ours persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy”.<sup>50</sup> Unlike *Duarte*, then, La Forest J. was prepared to accept that the police were only precluded from capturing individuals on videotape where they were involved in activity in an environment where they had a reasonable expectation of privacy. In the end, he concluded that Mr. Wong had a reasonable expectation of privacy in the hotel room set up for the gambling activity.<sup>51</sup> In observing that no legislative mechanism existed for video-surveillance authorizations, La Forest J. commented on the role of the legislature: it is for “Parliament, and Parliament alone, to set out the conditions under which law enforcement agencies may employ video surveillance technology”.<sup>52</sup>

Parliament did not take long to respond. They chose a questionable manner in which to do so. The general warrant was proclaimed in force shortly after *R. v. Wong*.<sup>53</sup> The general warrant provision, section 487.01, located in Part XV of the *Criminal Code*<sup>54</sup> (where most of the search provisions are located) allows a judge of the provincial or superior court to issue a warrant permitting an officer to “use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person’s property”. This provision filled a void left by section 487 of the Code, permitting officers to engage in investigative activity touching on section 8 privacy interests, but not involving a search for tangible items. Bearing in mind that section 487

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<sup>48</sup> *R. v. Wong*, [1990] S.C.J. No. 118, 60 C.C.C. (3d) 460, at 478-79 (S.C.C.), *per* La Forest J.

<sup>49</sup> [1990] S.C.J. No. 2, 53 C.C.C. (3d) 1 (S.C.C.).

<sup>50</sup> *R. v. Wong*, [1990] S.C.J. No. 118, 60 C.C.C. (3d) 460, at 481 (S.C.C.).

<sup>51</sup> Chief Justice Lamer and McLachlin J. (as she then was) dissented on this point, finding that, in the circumstances of this case, the hotel room being used for a gambling operation where numerous and open invitations were out in the public to attend, there was no reasonable expectation of privacy.

<sup>52</sup> *R. v. Wong*, [1990] S.C.J. No. 118, 60 C.C.C. (3d) 460, at 486 (S.C.C.).

<sup>53</sup> *An Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act*, S.C. 1993, c. 40, s. 15. *R. v. Wong*, [1990] S.C.J. No. 118, 60 C.C.C. (3d) 460 (S.C.C.).

<sup>54</sup> R.S.C. 1985, c. C-46.

of the Code only permitted the seizure of a “thing”,<sup>55</sup> with the emphasis on prior judicial authorization in the post-Charter era, there was a clear need for the general warrant to accommodate those investigative activities that involved an intersection with privacy interests but did not result in officers walking away with tangible seizures.

Interestingly, what has been dubbed the “general warrant” in section 487.01, requires that the “best interests of the administration of justice” be met before the warrant issue. No such requirement exists in section 487 of the Code.<sup>56</sup> Presumably, this was an effort by Parliament to recognize a broader invasion of privacy that could be triggered by the use of one of these warrants. What is curious is that it is not entirely clear what the “best interests” requirement means in the context of the general warrant. We know from *R. v. Finlay*,<sup>57</sup> that the requirement in section 186(1)(a) of the Code means reasonable grounds to believe that an offence has been or is being committed, and that the use of the investigative technique will assist in advancing the investigation. But, section 487.01(1)(a), the general warrant provision, already articulates a reasonable grounds to believe threshold test. A provincial or superior court judge (not justice of the peace) must have reasonable grounds to believe that an offence against the *Criminal Code*<sup>58</sup> or any other Act of Parliament “has been or will be committed”. In *Finlay*, Martin J.A. went on to suggest that the “best interests of the administration of justice” test in section 186(1)(a), beyond incorporating a reasonable grounds standard, also required a delicate balance to be achieved between competing interests. As he noted:

... Although the term “in the best interests of the administration of justice” is incapable of precise definition it imports, in my view, in the context, two readily identifiable and mutually supportive components. The first component is that the judge must be satisfied that the granting of the authorization will further or advance the objectives of justice.

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<sup>55</sup> Section 487(1)(d) of the *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>56</sup> There are other differences between the provisions, including that a general warrant cannot be issued by a justice of the peace. As well, a general warrant cannot issue unless, pursuant to s. 487.01(1)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46, “there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done”.

<sup>57</sup> [1985] O.J. No. 2680, 23 C.C.C. (3d) 48 (Ont. C.A.), leave to appeal refused [1986] 1 S.C.R. ix (S.C.C.).

<sup>58</sup> R.S.C. 1985, c. C-46.

The second component imports a balancing of the interests of law enforcement and the individual's interest in privacy.<sup>59</sup>

As noted by Doherty J.A. in *R. v. Bernardo*, the phrase, "interests of justice" is found throughout the Code and simply suggests judicial discretion to be exercised on a case-by-case basis, balancing societal and individual interests.<sup>60</sup> These comments, and those of Martin J.A. in *R. v. Finlay*,<sup>61</sup> have a distinct section 8 ring to them. They suggest that the phrase requires a judicial officer to engage in a final balancing of individual and state interests before issuing process. These words, then, dovetail with section 8 requirements. As noted by Cory J. in *Quebec (Attorney General) v. C.B.C.*,<sup>62</sup> once statutory conditions for issuing a warrant are met, the issuing justice or judge must still determine whether to exercise his or her discretion in favour of issuing the authorization. This discretion can only be exercised after taking into account a final delicate balance between the competing interests of the state and the individual's right to privacy.<sup>63</sup> These comments were made in the context of a section 487 warrant that does not include the subject phrase. In other words, section 8 always requires the balance adverted to by reference to the "best interests" of justice language. In light of this fact, despite its inclusion in section 487.01 (and some other search provisions), query its necessity? Perhaps it is just a friendly reminder to the justice, in some search provisions, to engage in the final constitutionally required balance.

Parliament chose the general warrant as the vehicle within which to absorb the need to provide for judicial authorization for video-warrants. Section 487.01(4) and (5) is the legislative response to *R. v. Wong*.<sup>64</sup> It provides for a warrant that allows a peace officer to observe a person by means of a video camera where he or she is "engaged in activity in circumstances in which the person has a reasonable expectation of privacy".

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<sup>59</sup> *R. v. Finlay*, [1985] O.J. No. 2680, 23 C.C.C. (3d) 48, at 70 (Ont. C.A.), per Martin J.A., leave to appeal refused [1986] 1 S.C.R. ix (S.C.C.).

<sup>60</sup> *R. v. Bernardo*, [1997] O.J. No. 5091, 121 C.C.C. (3d) 123, at 131 (Ont. C.A.); *R. v. Briggs*, [2001] O.J. No. 3339, 157 C.C.C. (3d) 38, at paras. 47-50 (Ont. C.A.), per Weiler J.A.

<sup>61</sup> [1985] O.J. No. 2680, 23 C.C.C. (3d) 48 (Ont. C.A.), leave to appeal refused [1986] 1 S.C.R. ix (S.C.C.).

<sup>62</sup> [1991] S.C.J. No. 87, 67 C.C.C. (3d) 517 (S.C.C.).

<sup>63</sup> [1991] S.C.J. No. 87, 67 C.C.C. (3d) 517, at 533-34 (S.C.C.), per Cory J.; *C.B.C. v. New Brunswick (Attorney General)*, [1991] S.C.J. No. 88, 67 C.C.C. (3d) 544, at 560-61 (S.C.C.), per Cory J.; *R. v. C.B.C.*, [2001] O.J. No. 706, 52 O.R. (3d) 757 (Ont. C.A.); *Baron v. Canada*, [1993] S.C.J. No. 6, 78 C.C.C. (3d) 510 (S.C.C.).

<sup>64</sup> [1990] S.C.J. No. 118, 60 C.C.C. (3d) 460 (S.C.C.).

The provision requires that the judge “shall” place such terms and conditions on the warrant as is considered advisable to “ensure the privacy of the person or of any other person” as much as possible.<sup>65</sup>

Despite its decision to place the *R. v. Wong*<sup>66</sup> video amendment in Part XV of the *Criminal Code*,<sup>67</sup> Parliament heeded La Forest J.’s approach to video surveillance and approached it like other forms of electronic surveillance cared for in Part VI of the Code. As such, particular note must be made of section 487.01(5), incorporating by reference, aspects of Part VI of the *Criminal Code*. Among others, section 487.01(5) incorporates sections 183, 184.2, 185 and 186 of the *Criminal Code* with such “modifications as required”. This means that all of the safeguards applicable to electronic surveillance, built into Part VI of the Code, are applicable to video-warrants. For instance, where there is a consenting party for the video capture, the s. 184.2 requirements apply. Note, though, that the warrant issues under section 487.01 of the Code, meaning that, unlike other forms of electronic participant surveillance in Part VI, a “best interests of the administration of justice” criterion applies to video participant surveillance. Because consent video-warrants are governed by the requirements of section 184.2, a police officer may bring the application.

Where there is no consenting party, the video-warrant is subject to the same strenuous requirements of a third party authorization reviewed above. Again, the warrant issues under section 487.01. This causes some uncomfortable inconsistency between provisions. For instance, section 487.01(1) allows a general warrant to issue where there are sufficient reasonable grounds to believe that an offence “has been or will be committed”. As noted in the passage from *R. v. Finlay*<sup>68</sup> set out above, the “best interests of the administration of justice” criterion within section 186(1)(a) has been judicially interpreted to mean reasonable grounds to believe that “a particular offence or a conspiracy, attempt or incitement to commit it has been, or is being, committed”. There is no ability to access a section 186(1)(a) authorization for an anticipated offence. It is difficult to reconcile this inconsistency between the provisions, or to know what is available. As well, how do the “best interests of the administration of justice” components within sections 186(1)(a) and

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<sup>65</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 487.01(4).

<sup>66</sup> [1990] S.C.J. No. 118, 60 C.C.C. (3d) 460 (S.C.C.).

<sup>67</sup> R.S.C. 1985, c. C-46.

<sup>68</sup> [1985] O.J. No. 2680, 23 C.C.C. (3d) 48 (Ont. C.A.), leave to appeal refused [1986] 1 S.C.R. ix (S.C.C.).



487.01(1)(b) differ? Do they mean different things in these different contexts? How does a judge exercise his or her discretion properly? Moreover, based on the application of sections 185 and 186, a designated agent must be the applicant and only a superior court judge can issue a video-warrant. This is in contradistinction to section 487.01 warrants which can be applied for by peace officers and issued by either provincial or superior court judges. Confusion often attends on these applications. That confusion arises out of the legislative means chosen by Parliament to respond to the Court's comments in *R. v. Wong*.<sup>69</sup>

#### VI. FIRST THERE WAS *R. v. FEGAN* AND THEN THERE WERE DIGITAL NUMBER RECORDERS

The issue in *R. v. Fegan*<sup>70</sup> was whether it constituted an unreasonable search and seizure, within the meaning of section 8 of the Charter, when Bell Canada attached a digital number recorder ("DNR") to Mr. Fegan's home telephone, to record numbers dialled to and from that telephone, in an effort to determine whether he was responsible for making certain calls.<sup>71</sup> Justice Finlayson concluded that, in the circumstances of the case, there was no state actor involved in the application of the DNR and, therefore, the Charter did not apply. However, the clear implication of the judgment was that state actors engaging in similar conduct would be held to account under section 8. In other words, individuals have a privacy interest in the numbers dialled to and from their phones.

Close on the heels of *R. v. Fegan*<sup>72</sup> came section 492.2 of the *Criminal Code*.<sup>73</sup> Interestingly, this provision, unlike search provisions in the *Criminal Code* that predated it, only required that the issuing "justice" have reasonable grounds to "suspect that an offence ... has been or will be committed and that information that would assist in the investigation of the offence could be obtained through the use of a number recorder".<sup>74</sup> Where these circumstances prevail, a justice may

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<sup>69</sup> [1990] S.C.J. No. 118, 60 C.C.C. (3d) 460 (S.C.C.).

<sup>70</sup> [1993] O.J. No. 733, 80 C.C.C. (3d) 356 (Ont. C.A.).

<sup>71</sup> *R. v. Fegan*, [1993] O.J. No. 733, 80 C.C.C. (3d) 356 (Ont. C.A.).

<sup>72</sup> [1993] O.J. No. 733, 80 C.C.C. (3d) 356 (Ont. C.A.).

<sup>73</sup> R.S.C. 1985, c. C-46, as am. S.C. 1993, c. 40, s. 18.

<sup>74</sup> Section 492.2(2) of the *Criminal Code*, R.S.C. 1985, c. C-46 maintains that where the circumstances referred to in subsection (1) exist, a justice may order anyone possessing a record of a telephone number originated or received or intended to be received at a certain number, to provide the record to a person named in the order.

issue a DNR for up to 60 days. This was Parliament's first clear and intentional shift away from the *Hunter v. Southam*<sup>75</sup> reasonable grounds to believe threshold in the criminal context.

In *R. v. Monney*,<sup>76</sup> Iacobucci J. commented on the suspicion threshold used and found to be constitutionally acceptable in the *Customs Act*<sup>77</sup> context:

Dickson C.J. also referred to the caveat expressed in the reasons in *Hunter* that the reasonableness of a search must be assessed in context. The relevant qualification of the reasonableness standard as stated in *Hunter* is that the standard of reasonableness is subject to change “[w]here the state’s interest is not simply law enforcement as, for instance, where state security is involved, or where the individual’s interest is not simply [an] expectation of privacy as, for instance, when the search threatens ... bodily integrity” (p. 168) Adopting a contextual approach to the assessment of reasonableness for the purposes of s. 8, the Court concluded in *Simmons* that the degree of personal privacy reasonably expected at border crossings is lower than would otherwise be available in a wholly domestic setting.<sup>78</sup>

DNR’s are used in a “wholly domestic setting” and for criminal investigations. Yet Parliament chose to use this standard in section 492.2 of the Code. While the suspicion threshold is incapable of exact definition, it is, undoubtedly, an easier standard to achieve than reasonable grounds to believe. As noted in *R. v. Monney*, reasonable grounds to suspect “can be viewed as a lesser but included standard in the threshold of reasonable and probable grounds to believe”.<sup>79</sup>

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<sup>75</sup> [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97 (S.C.C.).

<sup>76</sup> [1999] S.C.J. No. 18, 133 C.C.C. (3d) 129 (S.C.C.).

<sup>77</sup> R.S.C. 1985, c. 1 (2nd Supp.).

<sup>78</sup> *R. v. Monney*, [1999] S.C.J. No. 18, 133 C.C.C. (3d) 129, at para. 35 (S.C.C.). See also: *R. v. McKinlay Transport Ltd.*, [1990] S.C.J. No. 25, 55 C.C.C. (3d) 530, at 542-43 (S.C.C.), per Wilson J.; *Hunter v. Southam*, [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97, at 113-14 (S.C.C.), per Dickson J.; *R. v. Briggs*, [2001] O.J. No. 3339, 157 C.C.C. (3d) 38, at para. 32 (Ont. C.A.).

<sup>79</sup> *R. v. Monney*, [1999] S.C.J. No. 18, 133 C.C.C. (3d) 129, at para. 49 (S.C.C.); *R. v. Jacques*, [1996] S.C.J. No. 88, 110 C.C.C. (3d) 1 (S.C.C.).

The particular legislative construct chosen for section 492.2 was Parliament's way of recognizing the need for judicial authorization to allow for the installation of a DNR, while at the same time reflecting the diminished expectation of privacy in number recorder data. In other words, while an individual has a privacy interest in this data, the suspicion threshold was perhaps a reflection of Parliament's less than convinced attitude that it was a strong privacy interest deserving of a full *Hunter v. Southam*<sup>80</sup> standard.

Parliament may have been wrong on this, yet only time will tell. So far, the suspicion threshold has been successfully challenged as constitutionally insufficient in *R. v. Nguyen*.<sup>81</sup> Justice Halfyard concluded that the *Hunter v. Southam*<sup>82</sup> standard must always apply in criminal investigations. Relying on a comment of La Forest J. in *Thomson Newspapers Ltd. v. Canada*, "when the state seeks information ... in the course of a criminal investigation ... the citizen has a very high expectation of privacy in respect of such investigation", Halfyard J. concluded that the "*Hunter* standards must apply" to DNRs.<sup>83</sup>

In an opposite result, the Quebec Superior Court has upheld the provision as constitutionally sufficient in *R. v. Whitman-Langille*.<sup>84</sup> In this case, Cohen J. concluded that she saw "nothing in the *Hunter* decision nor in the other jurisprudence ... that would require the same standard of belief in the case of number recorder warrants as is required for wiretaps".<sup>85</sup> She based her conclusion on both the early stage of the investigation when DNRs are typically used and the skeletal data available with the use of this investigative tool.<sup>86</sup> This decision was upheld on appeal. Justice Hilton emphasized the contextual approach to section 8 and held:

... It is an exaggeration to assimilate the information of a telephone number and the duration that a telephone is off the hook with anything

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<sup>80</sup> [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97 (S.C.C.).

<sup>81</sup> [2004] B.C.J. No. 247, 2004 BCSC 76 (B.C.S.C.).

<sup>82</sup> [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97 (S.C.C.).

<sup>83</sup> *Thomson Newspapers Ltd. v. Canada*, [1990] S.C.J. No. 23, 54 C.C.C. (3d) 417, at 476-77 (S.C.C.), per La Forest J. Justice Halfyard also relied upon *R. v. Grant*, [1993] S.C.J. No. 98, 84 C.C.C. (3d) 173, at 187 (S.C.C.) in coming to this conclusion. See *R. v. Nguyen*, [2004] B.C.J. No. 247, 2004 BCSC 76, at paras. 25-30 (B.C.S.C.).

<sup>84</sup> [2004] Q.J. no 14164 (Que. S.C.).

<sup>85</sup> *R. v. Whitman-Langille*, [2004] Q.J. no 14164, at para. 25 (Que. S.C.).

<sup>86</sup> In fact, DNRs are often used in an effort to glean enough investigative fact to get the police to the next level of authorization. By way of example, a s. 492.2 (of the *Criminal Code*, R.S.C. 1985, c. C-46) DNR is often engaged to determine telephone numbers of individuals and associations between individuals before a wiretap application can be made.

that can reasonably be considered so “private” so as to require the highest standard of protection of section 8 of the *Canadian Charter*, especially when the information does not indicate which person is using the telephone, whether there was a conversation, and if so, with whom the conversation is taking place, as well as its details.<sup>87</sup>

What is interesting about the suspicion threshold contained within section 492.2, is that it stands in stark contrast with section 487 of the Code. It leaves a situation where, if officers wish to obtain historical phone records, they must obtain a section 487 search warrant, informed by reasonable grounds to believe that an offence has been or is being committed. But, if the same officer wishes to obtain future phone records, on a go-forward basis, he or she must only demonstrate reasonable suspicion that an offence has been, is being, or will be committed. One might reasonably suggest that these fluctuating standards not only inject a sense of confusion, but are difficult to reconcile from a constitutional perspective.

In addition, in its haste to legislate, Parliament only provided a “justice” with jurisdiction to authorize a DNR. “Justice” is defined in section 2 of the Code as a justice of the peace or a provincial court judge. Absent provincial legislation, superior court judges have no jurisdiction to issue this type of warrant. This creates substantial problems where rolled-up applications are required to be brought before a superior court judge. For instance, where an officer is seeking a DNR to complement a wiretap authorization, in some provinces, superior court judges cannot make both orders.<sup>88</sup> It appears that, in its possible exuberance to demonstrate its view of the minimal privacy interest engaged by DNR information, thereby leaving this type of prior authorization to lower courts, Parliament may have created some unintentional jurisdictional hurdles.

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<sup>87</sup> *R. v. Cody*, [2007] Q.J. no 11001, 2007 QCCA 1276, at para. 25 (Que. C.A.).

<sup>88</sup> In Ontario, this jurisdictional issue is resolved by s. 5 of the *Justices of the Peace Act*, R.S.O. 1990, c. J.4, which says: “Every judge of the Supreme Court of Canada, the Federal Court of Canada, the Court of Appeal, the Superior Court of Justice and every provincial judge is by virtue of his or her office a justice of the peace and also has power to do alone whatever two or more justices of the peace are authorized to do together.” Some provinces do not have similar provincial legislation.

## VII. FIRST THERE WAS *R. v. WISE* AND THEN THERE WERE TRACKING WARRANTS

In *R. v. Wise*,<sup>89</sup> the Court was invited to accept a Crown concession that the installation of a tracking device inside a vehicle constituted an unreasonable search within the meaning of section 8, as there was no prior judicial authorization. In accepting this concession, Cory J., for the majority, concluded that while the installation and monitoring of the tracking device invaded a reasonable expectation of privacy, it was only minimally intrusive. This finding was, in part, based on Cory J.'s observation that the tracking device in question was highly rudimentary and was installed in a motor vehicle, where there is a significantly reduced reasonable expectation of privacy.<sup>90</sup> Justice Cory gave legislative direction in the following comments:

I agree with my colleague that it would be preferable if the installation of tracking devices and the subsequent monitoring of vehicles were controlled by legislation. I would also agree that this is a less intrusive means of surveillance than electronic audio or video surveillance. Accordingly, a lower standard such as a "solid ground" for suspicion would be a basis for obtaining an authorization from an independent authority, such as a justice of the peace, to install a device and monitor the movements of a vehicle.<sup>91</sup>

On the heels of *R. v. Wise*<sup>92</sup> came section 492.1 of the *Criminal Code*.<sup>93</sup> As with the DNR warrant provision, Parliament decided to attach a minimal threshold of reasonable grounds to suspect. Section 492.1 permits a tracking warrant to issue where there exist reasonable grounds to suspect that an offence has been or will be committed, and that "information that is relevant to the commission of the offence, including the whereabouts of any person, can be obtained through the use of a tracking device". Where the justice is satisfied that these circumstances exist, he or she can authorize the installation, maintenance and removal of a tracking device "in or on any thing, including a thing

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<sup>89</sup> [1992] S.C.J. No. 16, 70 C.C.C. (3d) 193 (S.C.C.).

<sup>90</sup> In fact, the tracking device used in this case was so rudimentary that on the evening when Mr. Wise toppled a million-dollar communications tower, the police had the wrong motor vehicle under surveillance because the beeper device was so inaccurate.

<sup>91</sup> *R. v. Wise*, [1992] S.C.J. No. 16, 70 C.C.C. (3d) 193, at 229 (S.C.C.), *per* Cory J.

<sup>92</sup> [1992] S.C.J. No. 16, 70 C.C.C. (3d) 193 (S.C.C.).

<sup>93</sup> R.S.C. 1985, c. C-46, as am. S.C. 1993, c. 40, s. 18.

carried, used or worn by any person”.<sup>94</sup> Like the DNR, only a justice may issue this type of authorization for up to 60 days.

Based on the comments of Cory J. in *R. v. Wise*,<sup>95</sup> Parliament clearly felt comfortable setting out a suspicion threshold. Query whether the constitutional threshold should fluctuate depending on where the installation is being made? What about the motor vehicle that has to be removed from private property to effect the installation? What about where the tracking device is actually installed in something “worn” or “carried” by the person being tracked? Once the installation is complete and the state is truly “tracking” the whereabouts of the person, the privacy interest is arguably attenuated. The live constitutional question surrounds what must take place in order to get to the stage where the state can effectively track the individual. It is somewhat ironic that police officers may only get authorization to enter a car to conduct a search under section 487 of the Code, on the basis of reasonable grounds to believe, yet may enter the same vehicle to install a tracking device on the basis of reasonable grounds to suspect.

Moreover, a general warrant under section 487.01 of the Code to enter a motor vehicle to engage in an investigative technique, may only be issued by a provincial or superior court judge. Yet a justice of the peace may authorize entry to install a tracking device (section 492.1). As well, while a justice of the peace may order entry into a private place under section 487 to permit the seizure of a tangible item, the item to be seized may only relate to an offence that has been or is being committed. Yet, the same justice may authorize entry into the same private place to surreptitiously install a tracking device for an offence that may occur in the future.

These legislative inconsistencies arise out of the *R. v. Wise*<sup>96</sup> decision. While Parliament was entitled to act on the comments of the Court in *Wise*, lowering the threshold requirements for a judicial authorization, it has resulted in a good deal of confusion.

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<sup>94</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 492.1(1)(a).

<sup>95</sup> [1992] S.C.J. No. 16, 70 C.C.C. (3d) 193 (S.C.C.).

<sup>96</sup> [1992] S.C.J. No. 16, 70 C.C.C. (3d) 193 (S.C.C.).

### VIII. FIRST THERE WAS *R. v. BORDEN* AND THEN THERE WERE DNA WARRANTS

In *R. v. Borden*,<sup>97</sup> the Supreme Court was asked to assess the constitutionality of a “consent” seizure of bodily substances taken from a suspect in an investigation. The consent was found to be constitutionally lacking as Mr. Borden was not informed of all the purposes the state had in mind for his DNA sample. (At the time it was taken, the officers knew that they would use the bodily sample to compare Mr. Borden’s DNA in relation to a crime and crime scene sample he was not apprised of.)<sup>98</sup> As a result, the taking of his bodily substance, without lawful consent, constituted a section 8 Charter breach. As noted by Iacobucci J.: “the respondent had an expectation of privacy with respect to his bodily integrity and the informational content of his blood.”<sup>99</sup>

DNA “information” was much too valuable to leave without a proper legislative tool to permit seizure. What resulted in the wake of *R. v. Borden*<sup>100</sup> was an intricate legislative scheme, carefully crafted to permit the seizure of bodily substances directly from the body, while at the same time attending to and caring for the heightened privacy interest engaged. Sections 487.04-09 represented Parliament’s attempt to set up a scheme that set out the constitutional requirements that must be met before a DNA warrant issues and the procedures that must attend the execution of the warrant.<sup>101</sup>

In brief compass, a provincial court judge may issue a DNA warrant when satisfied, pursuant to section 487.05(1), that there exist reasonable grounds to believe that an offence designated in section 487.04 has been committed, that a bodily substance related to the commission of the

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<sup>97</sup> [1994] S.C.J. No. 82, 92 C.C.C. (3d) 404 (S.C.C.).

<sup>98</sup> The Supreme Court of Canada later acknowledged in *R. v. Arp*, [1998] S.C.J. No. 82, 129 C.C.C. (3d) 321 (S.C.C.) that to constitute a s. 8 compliant, fully informed consent, officers need only inform the accused of what they know at the time the consent sample is taken. In other words, officers are not held to a standard of clairvoyance when informing an accused of the purposes for which a DNA sample will be used. Once the state lawfully possesses that sample, taken with a lawful and informed consent, it can be used for other purposes in the future, unknown at the time the sample was taken. Of course, the ratio in *Arp* must be read in conjunction with s. 487.09 of the *Criminal Code*, R.S.C. 1985, c. C-46, requiring the destruction of bodily samples in certain specified instances.

<sup>99</sup> *R. v. Borden*, [1994] S.C.J. No. 82, 92 C.C.C. (3d) 404, at 417 (S.C.C.), *per* Iacobucci J.

<sup>100</sup> [1994] S.C.J. No. 82, 92 C.C.C. (3d) 404 (S.C.C.).

<sup>101</sup> *An Act to amend the Criminal Code and the Young Offenders Act (forensic DNA analysis)*, S.C. 1995, c. 27, s. 1.

offence has been found,<sup>102</sup> that the person from whom the DNA sample is sought was “a party to the offence” and that forensic DNA analysis of the person’s bodily substance will provide “evidence” about whether the crime scene sample was from that person.<sup>103</sup> Under section 487.05(2) the justice must be satisfied that there is a person qualified to take the sample. Section 487.06 sets out the types of samples that may be taken and section 487.07 sets out the mandatory procedures required to be followed when executing the order. This includes providing the subject of the warrant with privacy and providing him or her with information about the warrant and process being executed. Section 487.08 sets out the use to which bodily samples and DNA profiles taken from that sample can be put, as well as creating an offence for a use not articulated in the provision. Section 487.09 sets out the circumstances under which samples taken pursuant to warrant and the profiles that result must be destroyed.

There is no question that, other than Part VI of the *Criminal Code*,<sup>104</sup> no other provision in the Code is as demanding. This is likely owing to Parliament’s appreciation for the heightened privacy interest attached to bodily substances.<sup>105</sup> Even so, in *R. v. B. (S.A.)*,<sup>106</sup> the appellant suggested that section 8 (and section 7) demanded more than the scheme required. For instance, the appellant said that a *Hunter v. Southam*<sup>107</sup> reasonable grounds to believe threshold was insufficient. In rejecting this argument, Arbour J. noted that the “standard of ‘reasonable grounds’ is well recognized in the law and I see no reason to adopt a higher one in the case of DNA warrants”.<sup>108</sup>

The appellant also maintained that investigative necessity, similar to section 186(1)(b), should be required before a DNA warrant issue. Justice Arbour, on behalf of the court, rejected this argument. She held that the legislative scheme that responded to *R. v. Borden*<sup>109</sup> was sufficient to

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<sup>102</sup> This includes on or within the body of the victim, on anything worn by or carried by the victim, or on or within the body of any person or thing or at any place “associated with the commission of the offence”. See s. 487.05(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>103</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 487.05(1) (a)-(d).

<sup>104</sup> R.S.C. 1985, c. C-46.

<sup>105</sup> This heightened privacy interest was acknowledged in *R. v. Stillman*, [1997] S.C.J. No. 34, 113 C.C.C. (3d) 321 (S.C.C.) and has been repeatedly confirmed since that time. As recently as *R. v. Tessling*, [2004] S.C.J. No. 63, 2004 SCC 67 (S.C.C.), Binnie J. commented on the hierarchy of privacy interests, placing bodily substances at the top of the privacy pile (see paras. 21-22).

<sup>106</sup> [2003] S.C.J. No. 61, 178 C.C.C. (3d) 193 (S.C.C.).

<sup>107</sup> [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97 (S.C.C.).

<sup>108</sup> *R. v. B. (S.A.)*, [2003] S.C.J. No. 61, 178 C.C.C. (3d) 193, at para. 55 (S.C.C.).

<sup>109</sup> [1994] S.C.J. No. 82, 92 C.C.C. (3d) 404 (S.C.C.).



meet all constitutional requirements. In doing so, she read the “best interests of the administration of justice” requirement within section 487.05 as precluding a “judge from issuing a warrant where it is unnecessary to do so”.<sup>110</sup>

#### IX. FIRST THERE WAS *R. v. STILLMAN* AND THEN THERE WERE IMPRESSION WARRANTS

On two separate occasions, while he was detained in custody, teeth impressions were taken from Mr. Stillman without his consent. On the second occasion, the process took almost two hours. Justice Cory found that this constituted a significant section 8 (and section 7) Charter breach. He concluded that the seizure of “bodily samples [and impressions] was highly intrusive. It violated the sanctity of the body which is essential to the maintenance of human dignity. It was the ultimate invasion of the appellant’s privacy.”<sup>111</sup> As such, the need for legislation was clear.<sup>112</sup>

The same year *R. v. Stillman*<sup>113</sup> was released, Parliament enacted what is now section 487.092, permitting a search warrant to issue for the seizure of a “handprint, fingerprint, footprint, foot impression, teeth impression or other print or impression of the body or any part of the body”, where a justice is satisfied that there are reasonable grounds to believe that an offence has been committed and that “information concerning the offence will be obtained by the print or impression”. The justice must be further satisfied that such a warrant will be in the “best interests of the administration of justice”. Pursuant to section 487.092(2), the justice shall impose terms and conditions considered “advisable” to ensure that the search and seizure authorized by the warrant is “reasonable in the circumstances”.<sup>114</sup>

It is not clear what is meant by the “best interests of the administration of justice” consideration in this provision. Could it be like the DNA provision? We know it is not like the Part VI provision, judicially

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<sup>110</sup> *R. v. B. (S.A.)*, [2003] S.C.J. No. 61, 178 C.C.C. (3d) 193, at para. 54 (S.C.C.), *per* Arbour J.

<sup>111</sup> *R. v. Stillman*, [1997] S.C.J. No. 34, 113 C.C.C. (3d) 321, at para. 51 (S.C.C.).

<sup>112</sup> While *R. v. Stillman*, [1997] S.C.J. No. 34, 113 C.C.C. (3d) 321 (S.C.C.) also discussed the Charter issues involved in the warrantless seizure of bodily substances, by the time it was argued in the Supreme Court of Canada, the DNA search warrant provisions had already been enacted.

<sup>113</sup> [1997] S.C.J. No. 34, 113 C.C.C. (3d) 321 (S.C.C.).

<sup>114</sup> *Criminal Code*, R.S.C. 1985, c. C-46, as am. 1997, c. 18, s. 45; 1998, c. 37, s. 23.

defined in *R. v. Finlay*<sup>115</sup> as reasonable grounds to believe, as it would be repetitious. Note that despite the strong Charter interests articulated in *R. v. Stillman*,<sup>116</sup> a justice of the peace may issue an impression warrant. It is one thing to speak in terms of hand and footprints, but it is an entirely different constitutional question when authorizing the print or impression of a more private area of the body, as is permitted under the provision. This means that while a justice of the peace may authorize the taking of an impression of a highly private area of the body, he or she cannot authorize the taking of a bodily substance, that involves a comparatively minimally intrusive procedure.<sup>117</sup>

## X. ENOUGH DIALOGUE

There has been a great deal written about Charter dialogue between the courts and legislatures. As noted by Binnie J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, the court has “frequently recognized the importance of fostering a dialogue between courts and the legislatures”.<sup>118</sup> The proliferation of search provisions in the *Criminal Code*,<sup>119</sup> coinciding with the release or anticipated release of important section 8 judgments, is a testament to the fact that dialogue works.<sup>120</sup> In the case of provisions providing for prior authorization, perhaps it is working too well.

While dialogue between the courts and legislatures is generally considered a desirable result, it has led to somewhat of a knee-jerk reaction in the area of section 8.<sup>121</sup> In striving to craft legislation that

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<sup>115</sup> [1985] O.J. No. 2680, 23 C.C.C. (3d) 48 (Ont. C.A.), leave to appeal refused [1986] 1 S.C.R. ix (S.C.C.).

<sup>116</sup> [1997] S.C.J. No. 34, 113 C.C.C. (3d) 321 (S.C.C.).

<sup>117</sup> See *R. v. F. (S.)*, [2000] O.J. No. 60, 141 C.C.C. (3d) 225, at para. 27 (Ont. C.A.), per Finlayson J.A.; *R. v. Rodgers*, [2006] S.C.J. No. 15, 207 C.C.C. (3d) 225 (S.C.C.).

<sup>118</sup> *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120, at para. 268 (S.C.C.), per Binnie J.; *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at para. 57 (S.C.C.); *R. v. Hall*, [2002] S.C.J. No. 65, 167 C.C.C. (3d) 449, at paras. 43-44 (S.C.C.). See also Peter Hogg & Allison Bushell, *Charter Dialogue Between Courts and Legislatures* (1997) 35 Osgoode Hall L.J. 75; Kent Roach, “Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures” (2001) 80 Can. Bar Rev. 481.

<sup>119</sup> R.S.C. 1985, c. C-46.

<sup>120</sup> Kent Roach made this observation in his article “Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures” (2001) 80 Can. Bar. Rev. 481.

<sup>121</sup> This is not to mention the many search warrant and authorization provisions that have been enacted since 1984, outside of a direct response to judicial decisions. (For instance, ss. 487.011-487.017 were recently enacted (S.C. 2004, c. 3, s. 7) to allow for production orders to be directed at people to produce documents, copies of documents and bank-related information.) As

responds to section 8 concerns articulated by the Supreme Court of Canada, Parliament has introduced unnecessary complexity into the *Criminal Code*.<sup>122</sup> Officers are forced to debate which section of the Code governs their proposed investigative technique and which legislative demands, including jurisdictional concerns, apply. Bearing in mind the observations of Dickson J. in *Hunter v. Southam*<sup>123</sup> about the need for a contextual approach to the reasonable expectation of privacy, and the manner in which it can be overtaken, it would be naive to think that all of the complexities could be removed by providing for one simple “über provision”. While some provisions could be condensed into a single section, the reality is that fluctuating privacy thresholds do not permit a single overriding provision. In short, some of the complexities embedded in the *Criminal Code* are unavoidable.

With that said, there is clearly room for improvement. What follows are only some limited suggestions about, at a minimum, tweaking the authorization provisions to allow for a more coherent and simpler approach.<sup>124</sup>

## XI. THERE HAS TO BE A BETTER WAY

### 1. Move the Video-Warrant Provision to Where It Belongs

*R. v. Wong*<sup>125</sup> maintained that video surveillance is akin to other forms of electronic surveillance. It does not belong in Part XV of the *Criminal Code*.<sup>126</sup> This is clear by virtue of the fact that Parliament had to adopt, by reference, among others, sections 183, 184.2, 185 and 186

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well, the DNA data bank sections, enacted by the proclamation of Bills C-3 and S-10 on June 30, 2000, while not in response to a judicial decision, are critically important search provisions: ss. 487.04-091. It should be noted that this paper has intentionally steered away from discussing home entry warrants to effect an arrest (ss. 529-529.5 of the *Criminal Code*, R.S.C. 1985, c. C-46). These provisions were enacted in direct response to the decision of *R. v. Feeney*, [1997] S.C.J. No. 49, 115 C.C.C. (3d) 129 (S.C.C.), but, strictly speaking, are not used as investigative tools.

<sup>122</sup> R.S.C. 1985, c. C-46.

<sup>123</sup> [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97 (S.C.C.).

<sup>124</sup> For some years now, the federal government has had the Lawful Access initiative. See online: <[http://www.justice.gc.ca/en/cons/la\\_al/summary/index.html](http://www.justice.gc.ca/en/cons/la_al/summary/index.html)>; <[http://www.justice.gc.ca/en/cons/la\\_al/](http://www.justice.gc.ca/en/cons/la_al/)>. While it has come close a few times, the initiative has not yet resulted in complete legislation. This ongoing legislative initiative has been looking at some of the issues raised and would be a perfect vehicle to address some of the complexities and deficiencies in the *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>125</sup> [1990] S.C.J. No. 118, 60 C.C.C. (3d) 460 (S.C.C.).

<sup>126</sup> R.S.C. 1985, c. C-46.

of the Code. Barring a participant surveillance video, these are Crown agent applications. They are driven by considerations unique to Part VI of the Code. The jurisdiction to issue a video-warrant should reside in that Part of the Code. In fact, it should simply be merged into the pre-existing provisions. Locating the video-warrant provision in Part VI would remove confusion in this area and ensure that the provision properly reflects the enhanced privacy interest recognized in *Wong*.

## 2. “Best Interests of the Administration of Justice”

This term introduces significant confusion into the Code. It is unclear what it means. The only thing we know for sure, as acknowledged by Martin J.A. in *R. v. Finlay*,<sup>127</sup> is that it means different things in different contexts. This is really nothing more than an acknowledgment of basic section 8 principles, that an issuing justice must balance all interests concerned, including the state’s interest in law enforcement and the individual’s interest in privacy, when determining whether to issue process. If this is what it means, though, then is it not correct that each search provision in the Code should contain this constitutional requirement? Why only some? Is it only worth reminding justices and judges to engage in this required balance in some contexts? If this discretion is inextricably linked to the exercise of judicial discretion, then adding the words “best interests of the administration of justice” is redundant and adds confusion that is unnecessary and duplicitous. The confusion in this area could be resolved by removing this phraseology from the provisions altogether.

The one exception is section 186(1)(a) of the Code. In *R. v. Finlay*,<sup>128</sup> “best interests of the administration of justice” was interpreted to mean “reasonable grounds to believe”. This provision should be amended by replacing the “best interests” language with the specific threshold test for issuance.

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<sup>127</sup> [1985] O.J. No. 2680, 23 C.C.C. (3d) 48 (Ont. C.A.), leave to appeal refused [1986] 1 S.C.R. ix (S.C.C.).

<sup>128</sup> [1985] O.J. No. 2680, 23 C.C.C. (3d) 48 (Ont. C.A.), leave to appeal refused [1986] 1 S.C.R. ix (S.C.C.).

### 3. Make All Warrants and Judicial Authorizations Available for Past, Current and Future Offences

Currently, there are a number of provisions that do not permit seizures or surveillance where an offence is anticipated to occur in the future. For instance, section 186(1)(a) of the Code, setting out the “best interests” test, has been judicially interpreted as reasonable grounds to believe an offence has been or is being committed. This stands in direct contrast to section 184.2 of the Code permitting a participant surveillance authorization in circumstances where there exist grounds to believe an offence will occur in the future. Section 487 of the Code does not accommodate tangible seizures in relation to offences anticipated to occur in the future. This stands in stark contrast with other warrant provisions, such as DNRs, tracking warrants and general warrants. In fact, the general warrant, section 487.01, is often used for tangible seizures, where an offence is anticipated in the future, because section 487 will not accommodate such a seizure. There is no constitutional reason supporting this distinction. It should be remedied by making all forms of prior judicial authorization available for anticipated offences.<sup>129</sup>

### 4. Collapse the Search Provisions

There is no reason that we need to have so many provisions dealing with prior authorization: regular warrants, general warrants, production orders, DNA warrants, tracking warrants, DNR orders, impression warrants and the like. Renee Pomerance suggested a collapse of sections 487, 487.01 and 487.091 (now section 487.092).<sup>130</sup> This makes good sense. I would add to this list the new production orders. The production scheme, sections 487.011-487.017, was added to the Code in an effort to allow third parties to produce documents and information sought by the police, instead of the police searching for those items. The reality is that this ability already existed. In fact, until the production orders were enacted, sections 487 and 487.01, with the use of an assistance order under section 487.02, were widely used to have innocent third parties, such as banks and

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<sup>129</sup> It should be noted that there are a few types of authorizations which are not conducive to anticipatory offences. By way of example, the grounds for DNA and impression warrants are informed by whether there exists a crime scene “sample” of either DNA or an impression that will be conducive to comparison.

<sup>130</sup> Renee Pomerance, “Criminal Code Search Warrants: A Plea for a New Generic Warrant” in *Towards a Clear and Just Criminal Law*, Dan Stuart, R.J. Delisle & Allan Manson, eds. (Scarborough, ON: Carswell, 1999).

telecommunication companies, collect documents and information and provide it to the police under warrant.<sup>131</sup> While there are certain helpful aspects to the production order scheme, such as the ability to require a person to whom the order is directed to “prepare a document based on documents or data already in existence and produce it”, there is no reason that this power could not be absorbed into the larger and more comprehensive warrant provision.<sup>132</sup>

As a result of the lower constitutional threshold brought to bear on DNR and tracking warrants, it would be difficult to absorb them within a larger provision consolidating other search powers. At a minimum, though, they should be distilled into a single provision, allowing for any technique to be used to track a target and to gather DNR information. If these warrants were to be absorbed into the larger provision, it would be important to recognize the fluctuating threshold of grounds to suspect.

DNA warrants should likely remain a free-standing warrant. This is owing to the fact that they reside within a complex and sophisticated legislative framework, creating powers and responsibilities in relation to the execution and post-execution phase of the warrant, including the state’s significant responsibilities respecting the DNA sample. It is difficult to imagine breaking these warrants off from the legislative scheme that bootstraps their constitutionality.<sup>133</sup> As well, the DNA data bank provisions are inextricably linked to that legislative scheme. Severing off DNA warrants could result in confusion for the data bank provisions.<sup>134</sup>

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<sup>131</sup> *Canadian Imperial Bank of Commerce v. Canada*, [1997] O.J. No. 5573 (Ont. Gen. Div.); *Re Canada (Department of National Revenue)*, [1998] O.J. No. 3517, 56 C.R.R. (2d) 145 (Ont. Prov. Ct.).

<sup>132</sup> It is noted that there is a problem with s. 487.012(3)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, setting out the requirements for issuance of a production order. It requires that there exist reasonable grounds to believe that “an offence ... has been or is suspected to have been committed”. In other words, a “justice or judge” must have reasonable grounds to believe that an offence is suspected to have been committed. At a minimum, even if the production order remains a free-standing provision in the Code, this confusion must be resolved. Also, note the difference between the requirements that the offence “has been” committed in s. 487.012 and reasonable grounds to believe that “an offence ... has been or will be committed” within s. 487.013.

<sup>133</sup> *R. v. B. (S.A.)*, [2003] S.C.J. No. 61, 178 C.C.C. (3d) 193 (S.C.C.).

<sup>134</sup> See *R. v. Briggs*, [2001] O.J. No. 3339, 157 C.C.C. (3d) 38 (Ont. C.A.); *R. v. Rodgers*, [2006] S.C.J. No. 15, 207 C.C.C. (3d) 225 (S.C.C.); ss. 487.04-487.091 of the *Criminal Code*, R.S.C. 1985, c. C-46; *DNA Identification Act*, S.C. 1998, c. 37, as am. S.C. 2000, c. 10, ss. 4-12 and amended further.

### **5. Allow a Judge Issuing a Wiretap Authorization to Order Anything That Will Assist in Giving Effect to That Authorization**

Currently, wiretap authorizations are exceptionally complex. This is, in part, related to the fact that the issuing judge must make multiple orders to assist in giving effect to the authorization. By way of example, DNR orders always attach to a wiretap authorization as it is important to receive information about numbers dialled and received simultaneous to the interception of communications. As well, tracking warrants usually accompany a wiretap authorization, permitting vehicles that have a probe installed to be tracked simultaneously with communications being intercepted. General warrants and the like are also, often, part of the package. While an omnibus order often results from the application, it still requires the issuing judge to have regard to the specific legislative criteria attaching to each form of authorization.

This should be simplified for purposes of Part VI of the *Criminal Code*.<sup>135</sup> Any judge allowing for an authorization under Part VI should be granted the power, pursuant to that Part, to order anything that will assist in giving effect to the authorization. There are no constitutional concerns with such an approach, given that the strong requirements for a wiretap authorization must first be met before any ancillary activity may be ordered. This is a simple and practical manner in which to address these often complex and difficult judicial exercises.

### **6. Allow a Superior Court Judge to Issue Any Warrant or Authorization**

Regardless of how many warrant provisions result from a consolidated approach, it is important that superior court judges be provided with the jurisdiction to grant all warrants and authorizations under the Code. Right now, the fact that a superior court judge cannot grant a DNA warrant, by way of example, is troublesome. It means that the same judge who grants a wiretap authorization which leads to sufficient grounds to get a DNA warrant, cannot issue the latter warrant. This leads to unacceptable inefficiencies and should be remedied. There is no constitutional reason for the exclusion of judges of the superior court.

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<sup>135</sup> R.S.C. 1985, c. C-46.

## XII. CONCLUSION

A lot has happened in the last quarter-century. While scientific and technological aspects of investigations have taken off, section 8 of the Charter has taken root. This has had a rather profound impact on the *Criminal Code*<sup>136</sup> and Parliament's attempt to keep stride with the Court's approach to privacy interests. Parliament cannot be faulted for enacting provisions to ensure that the police community has the tools available to it to advance important investigative work. Nonetheless, this approach has resulted in some unnecessary inconsistencies and complexities. It is important, at this quarter-century mark, to take stock and see how we can go forward in a more coherent manner.

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<sup>136</sup> R.S.C. 1985, c. C-46.



