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LEGISLATIVE SUMMARY

Bill C-55:

An Act to amend the Criminal Code (Response to the Supreme Court of Canada Decision in R. v. Tse Act)

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Legislative Summary of Bill C-55

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Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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1 BACKGROUND

Bill C-55: An Act to amend the Criminal Code (alternative title: Response to the Supreme Court of Canada Decision in R. v. Tse Act) was introduced in the House of Commons by the Minister of Justice, the Honourable Rob Nicholson, and received first reading on 11 February 2013.

1.1 PURPOSE OF THE BILL

Bill C-55 was introduced in response to the ruling handed down by the Supreme Court of Canada on 13 April 2012 in *R. v. Tse*,[1] which held that section 184.4 of the *Criminal Code*[2] (the Code) is unconstitutional.

Section 184.4, which deals with emergency wiretaps, reads as follows:

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

However, the Court suspended its declaration of invalidity for one year – until 13 April 2013 – to give Parliament enough time to replace the current section 184.4 with legislation that is consistent with the *Canadian Charter of Rights and Freedoms*[3] (the Charter).

1.2 PRINCIPAL AMENDMENTS

Bill C-55 essentially replicates the provisions related to section 184.4 found in Bill C-30 of this Parliament, introduced in February 2012, and in former bills C-31 and C-50.[4] However, unlike the three other bills, Bill C-55 restricts the use of section 184.4 of the Code by providing that only a “police officer” (as defined in clause 2 of Bill C-55) may make the interception in question (clause 3).

The principal amendment brought by Bill C-55 concerns the fatal flaw identified by the Supreme Court, namely the lack of accountability measures in section 184.4. The bill therefore provides that, as is the case for other forms of interception,[5] after-the-fact notice is to be sent to the person who has been the object of an interception under section 184.4 (clause 6).

As noted by the Court, "[a]fter-the-fact notice, such as that currently found at s. 196(1), is one way of correcting this deficiency; it may not be the only one."[6] The bill therefore goes further by making the following amendments:

- it limits interceptions made under section 184.4 to the "offences" listed in section 183, Part VI, of the Code (clause 3); and
- it requires that an annual report on interceptions made under section 184.4 be presented to Parliament (clause 5).

1.3 Overview of Part VI of the Code

Part VI of the Code ("Invasion of Privacy," sections 183 to 196) is the centrepiece of federal legislation on electronic surveillance by law enforcement agencies. Governing the interception of the contents of oral communications and video footage and often characterized as involving a significant invasion of privacy, Part VI sets out stricter conditions for the issuance of a judicial authorization to intercept private communications than those that apply to the granting of a search warrant or a production order.

Although these provisions in the Code were amended in the 1980s and 1990s by explicitly including computers and in the 2000s by providing special rules with respect to terrorism and organized crime, most of Part VI dates back to 1974.

The Court summarized the current "scheme" of Part VI of the Code:

> Part VI of the *Code* makes it an offence under s. 184(1) to intercept private communications. Sections 185 and 186 set out the general provisions governing the application and the granting of judicial authorizations for the interception of private communications. Section 188 permits temporary authorizations (for up to 36 hours) by specially appointed judges, on the application of specially designated peace officers, if the urgency of the situation requires interception of private communications before an authorization could, with reasonable diligence, be obtained under s. 186. … In addition, s. 184.2 provides for judicial authorization with consent of one of the persons being intercepted for up to 60 days.[7]

In 1993, Parliament added two provisions to permit interceptions without judicial authorization in two exceptional cases: section 184.1 permits interception with a person's consent in order to prevent bodily harm to that person; and section 184.4 provides the power to intercept private communications in an emergency for the purpose of preventing serious harm.[8] Both sections allow for "extreme measures in extreme circumstances,"[9] but neither of them is subject to the requirement to report to Parliament or to provide after-the-fact notice to the person who has been the object of an interception.

1.4 Overview of *R. v. Tse*

On 13 April 2012, the Supreme Court of Canada handed down its ruling in *R. v. Tse* concerning the constitutionality of section 184.4 of the Code. The primary constitutional argument was that section 184.4 contravenes the right to be free from unreasonable search or seizure under section 8 of the Charter,[10] because it does not contain any of the constitutional safeguards found in other provisions of Part IV of the Code.

The Court first reviewed some of its earlier decisions which held that warrantless searches may be permissible where there is potential for serious and immediate harm, despite the fact that searches conducted without prior judicial authorization are presumed to be unreasonable under section 8 of the Charter. Although section 184.4 is the only wiretapping provision that does not require either consent of a party or prior authorization, the Court noted that each interception undertaken under this section "is limited to urgent situations where there is an immediate necessity to prevent serious harm and judicial pre-authorization is not available with reasonable diligence."[11]

The Court then examined the text of section 184.4 closely, with particular attention to phrases that limit its scope. The Court concluded that Parliament had incorporated objective standards and strict conditions into the provision, and that the onus would remain on the Crown to show, in any particular case, that the conditions for the use of this section had been met. The Court also stated that "once s. 184.4 has been invoked, the police must, where possible, move with all reasonable dispatch to obtain a judicial authorization" under related provisions of the Code.[12]

Nonetheless, the Court was concerned that there was no requirement that authorities notify individuals after the fact that their private communications had been intercepted. While individuals who are physically searched will be immediately aware of the invasion of their privacy, the Court stated that "[u]nless a criminal prosecution results, the targets of the wiretapping may never learn of the interceptions and will be unable to challenge police use of this power."[13] It concluded that requiring notice after the fact would not interfere with police powers to act in emergencies, but would "enhance the ability of targeted individuals to identify and challenge invasions to their privacy and seek meaningful remedies."[14]

The Court also considered whether a report to Parliament – to advise of the frequency with which authorities intercept private communications and the circumstances under which such interceptions are made – was constitutionally required. In the Court's view, the lack of a *notice* requirement renders section 184.4 constitutionally infirm, but a *reporting* requirement was not a constitutional imperative. The Court did state, however, that "[a]dded safeguards, such as the preparation of reports for Parliament would certainly be welcome," and that "[a]s a matter of policy, a reporting regime that keeps Parliament abreast of the situation on the ground would seem to make good sense."[15]

In terms of a constitutional remedy, the Court considered adding a notice requirement, but determined that this would not be appropriate given the Court's additional concern about the breadth of the term "peace officer." In particular, it felt that, because of the definition of "peace officer" found in section 2 of the Code, a

wide range of people would be able to invoke the measures permitted under section 184.4, "including mayors and reeves, bailiffs engaged in the execution of civil process, guards and any other officers or permanent employees of a prison, and so on."[16] As a result, the Court concluded that it was more appropriate to declare section 184.4 unconstitutional, and to suspend the declaration of invalidity for a period of 12 months in order to allow Parliament time to redraft a constitutionally compliant provision.

2 DESCRIPTION AND ANALYSIS

2.1 "POLICE OFFICER" INSTEAD OF "PEACE OFFICER" (CLAUSES 2, 3 AND 4)

Currently, a "peace officer" may, under section 184.4 of the Code, intercept private communications without judicial authorization under certain conditions. Given that the term "peace officer," as defined in section 2 of the Code, covers a wide variety of individuals, the Supreme Court did not rule out the possibility that section 184.4 may be constitutionally vulnerable for this reason.[17]

Consequently, the bill restricts the use of section 184.4 by providing that the interception in question may be made only by a "police officer," meaning "any officer, constable or other person employed for the preservation and maintenance of the public peace" (clause 2). This amendment does not apply to section 184.1 of the Code (consensual interception to prevent bodily harm, without judicial authorization), meaning that a peace officer or person acting in cooperation with such an officer may continue to make such interceptions.

2.2 "OFFENCE" INSTEAD OF "UNLAWFUL ACT" (CLAUSE 3)

Currently, an interception under section 184.4 may be carried out when

(a) there are reasonable grounds to believe that the urgency of the situation is such that judicial authorization could not be obtained with reasonable diligence;

(b) interception is immediately necessary to prevent the commission of an *unlawful act* that would cause serious harm to any person or to property; and

(c) one of the parties to the communication is the potential victim or perpetrator of the *unlawful act*.

The expression "unlawful act" is not defined in the Code. However, according to the Supreme Court, this expression is limited by its context to acts that would cause serious harm to persons or property and "[n]o meaningful additional protection of privacy"[18] would be gained by listing such unlawful acts in legislation.

The government has decided nonetheless to replace "unlawful act" with "offence," which is defined in section 183 of the Code for the purposes of wiretaps (new sections 184.4(*b*) and 184.4(*c*) of the Code).[19] As a result, the unauthorized

interception of communications in the exceptional circumstances set out in section 184.4 will only be able to occur with regard to the offences listed in section 183, as is the case for most other types of interception mentioned in Part VI.[20]

2.3 Annual Report (Clauses 5 and 7)

Electronic surveillance under the Code is an effective investigation technique used especially by law enforcement agencies, such as the Royal Canadian Mounted Police, provincial and municipal police forces, and the Competition Bureau.

Section 195 of the Code currently requires the federal Minister of Public Safety and the Attorney General of each province to prepare an annual report on law enforcement's use of warrants for video surveillance and certain authorizations to intercept private communications pursuant to Part VI: authorizations to intercept communications without the consent of the parties to the communication (sections 185 and 186 of the Code) and emergency authorizations valid for a maximum period of 36 hours (section 188 of the Code). Section 195 of the Code also lists the specific types of information that must be included in this report.[21]

Clause 5 of the bill extends the requirement to present a public report to include interceptions without judicial authorization made under the exceptional circumstances set out in section 184.4 of the Code. This clause also sets out the information to be included in the report.

However, other types of interception and electronic surveillance set out in the Code are still not subject to the requirement for governments to present a public report on their use: interception with consent, but without judicial authorization, to prevent bodily harm (section 184.1) and interception with consent and with judicial authorization (section 184.2).

This annual reporting requirement will come into force six months after the day on which Bill C-55 receives Royal Assent (clause 7).

2.4 Notification (Clause 6)

As with interception without consent but with judicial authorization (sections 185 and 186 of the Code), clause 6 of the bill provides that, in the case of an interception without judicial authorization in exceptional circumstances set out in section 184.4 of the Code, the federal Minister of Public Safety or the Attorney General of a province must notify in writing the person who was the object of the interception, generally within 90 days of the interception. On application to a judge, this period may be extended to three years if the police investigation is continuing (new section 196.1(3) of the Code). This extension may be obtained more readily if the investigation relates to a terrorism or organized crime offence (new section 196.1(5) of the Code), as is currently the case with interception without consent but with judicial authorization.

Other types of interception and electronic surveillance provided for in the Code will still not be subject to the requirement for written notification: interception, with

consent but without judicial authorization, to prevent bodily harm (section 184.1), interception with consent and with judicial authorization (section 184.2), and temporary interception with special judicial authorization (section 188).

NOTES

1. *R. v. Tse*, [2012] 1 S.C.R. 531, 2012 SCC 16. As the Court noted in paragraph 1 of its decision, the Crown appealed the declaration of unconstitutionality directly to the Supreme Court, so there is no decision from the Court of Appeal. The decision of the British Columbia Supreme Court is available as *R. v. Tse*, 2008 BCSC 211.
2. *Criminal Code* (the Code), R.S.C., 1985, c. C-46.
3. *Canadian Charter of Rights and Freedoms* (the Charter), Part I of the *Constitution Act, 1982*, c. 11 (U.K.), Schedule B.
4. The Minister of Justice announced that the government would not proceed with Bill C-30, An Act to enact the Investigating and Preventing Criminal Electronic Communications Act and to amend the Criminal Code and other Acts. Introduced in 2009 and 2010, Bill C-31, An Act to amend the Criminal Code, the Corruption of Foreign Public Officials Act and the Identification of Criminals Act and to make a consequential amendment to another Act and Bill C-50, An Act to amend the Criminal Code (interception of private communications and related warrants and orders) died on the *Order Paper* in December 2009 and March 2011, respectively.
5. See sections 196 and 487.01(5.1) of the Code.
6. *R. v.Tse*, para. 86.
7. Ibid., paras. 22 and 25.
8. An Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act, S.C. 1993, c. 40.
9. *R. v. Tse*, para. 94.
10. Under section 8 of the Charter, “Everyone has the right to be secure against unreasonable search or seizure.” As the Court noted at paragraph 9 of *R. v. Tse*, the respondents also argued that section 184.4 violates section 7 of the Charter (“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”) because of its vagueness and excessive reach, but the primary issue was section 8.
11. *R. v.Tse*, para. 27.
12. Ibid., para. 61.
13. Ibid., para. 85.
14. Ibid., para. 98.
15. Ibid., para. 89.
16. Ibid., para. 56.
17. Ibid., para. 101. The Court did not pronounce on this particular point, however, because of the insufficiency of the record on this issue.
18. *R. v.Tse*, para. 46.
19. The current list of offences in section 183 is rather lengthy and constantly growing as new criminal law legislation adds offences to the Code.

20. See sections 184.2, 185, 186 and 188 of the Code. Section 184.1 applies where there is a risk of “bodily harm” (as defined in section 2 of the Code).

21. The most recent annual report is available on the Public Safety Canada website: Annual report on the use of electronic surveillance – 2011.