THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

March 4, 2013

Via email: just@parl.gc.ca

Mike Wallace, M.P.
Chair, Justice and Human Rights Committee
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Wallace:

**Re: Bill C-55: *Response to the Supreme Court of Canada Decision in R. v. Tse Act***

The Canadian Bar Association's National Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill C-55, amending the *Criminal Code* in response to the Supreme Court of Canada decision in *R. v. Tse.*

The CBA is a national association representing 37,000 jurists across Canada. Among the Association's primary objectives are seeking improvement in the law and the administration of justice. The CBA Section consists of criminal law experts, including a balance of prosecutors and defence lawyers, from across Canada.

Protecting and preserving the rights and freedoms integral to Canadian democracy requires that the state not interfere with or restrict individual rights and freedoms without articulating a valid government objective.[1] If there is compelling evidence of that objective, the law or other action of the state must be tailored so that interference with individual rights is no greater than absolutely necessary to accomplish the objective.

Bill C-55 replicates some but not all of the amendments to Part VI of the *Criminal Code* proposed by the much larger Bill C-30, the so-called *Protecting Children from Internet Predators Act*. We support the government's decision to withdraw Bill C-30.

[1] Justice LaForest writing in *R. v. Dyment*, [1988] 2 S.C.R. 417 at para. 17 "privacy is at the heart of liberty in a modern state. Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state."

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Bill C-55 is limited to amendments required or recommended by the Supreme Court of Canada in *R. v. Tse*, 2012 SCC 16. The Court found unconstitutional *Criminal Code* s. 184.4, providing for "interceptions in exceptional circumstances." Section 184.4 currently permits:

> *any "peace officer' to intercept private communications without prior judicial authorization, if he or she believes that interception is immediately necessary to prevent an "unlawful act" that would cause serious harm to any person or property, provided that judicial authorization could not be obtained with reasonable diligence.*

While the provision generally is invoked in exigent circumstances such as kidnappings and hostage-takings, the Supreme Court commented (at [11]) that "the legislative scheme does not provide any mechanism to permit oversight of police use of this power".

The CBA Section supports the proposed changes in Bill C-55 to comply with *R. v. Tse,* but recommends further limits on s. 184.4 interceptions. Section 184.4 interceptions are unique. They are intrusive and initiated at the discretion of police officers without judicial authorization or the consent of a communicating party.

The proposed amendments to s. 184.4 do not fully remedy the constitutional shortcomings argued in *R. v. Tse*, or those raised in *R. v. Riley* (2008 Can LII 36773 (ON S.C.). Notably, the proposed amendments impose no limit on the use of evidence obtained from these interceptions, despite the legislative intent of limiting the provision to "exceptional circumstances."

**RESPONSES TO SECTIONS OF BILL C-55**

**A. Definitions**

Bill C-55 will amend S. 183 of the *Criminal Code* by adding a definition of "police officer". While responsive to concerns raised in litigation, this simply assigns unauthorized interceptions to those who in practice make such interceptions – police officers. The CBA Section recommends that the exceptional discretion to initiate s. 184.4 interceptions be further limited to a class of designated superior officers (a limitation which already exists in practice in some provinces). Special training and oversight are necessary for police officers who have such potentially intrusive powers.

The CBA Section supports the proposed limitation of s. 184.4 interceptions to cases involving the prevention of an "offence" as defined in s. 183, rather than the present class of cases with the likelihood of an "unlawful act."

**B. Ministerial Reports**

The CBA Section supports the requirement to report s. 184.4 interceptions and in particular the requirement to report the duration of s. 184.4 interceptions.

The amendments, however, only require reporting interceptions that appear justified by subsequent investigations, arrests, charges or convictions. We believe that use of s. 184.4 "wiretap" provisions requires scrutiny of the number of persons whose communications were intercepted but were not subsequently arrested or charged. Otherwise, the reporting requirement appears to provide justification after the fact of exceptional intrusions on individual privacy.

The CBA Section recommends that the reports of Ministers and Attorneys General include the number of persons whose communications were intercepted under s. 184.4, but not subsequently charged with any offence.

## C. Notices of Interceptions

The Supreme Court found that the existing s. 184.4 violates s. 8 of the *Canadian Charter of Rights and Freedoms* because there is no provision for subsequent notice to persons whose private communications have been intercepted in "exceptional circumstances." The CBA Section supports the proposed notice provision that parallels the existing s. 196 provision for notice of s. 186 interceptions.

## D. Use of intercepted communications in evidence

The limits on s. 184.4 interceptions may be contrasted with limits on judicial authorizations under s. 188 of the *Criminal Code* (obtained by so-called "emergency" application to a specially-appointed judge). Under s. 188(5), evidence gathered under subsequently-obtained s. 186 "regular" authorizations may be inadmissible if the s. 186 authorization was obtained on the same grounds as the s. 188 "emergency" authorization (that is, if it appears there was actually no time-limited emergency).

Given that judicial wiretap authorizations are circumscribed in that manner, we suggest that s. 184.4 interceptions at the discretion of police officers must be subject to similar controls. Indeed, the Supreme Court commented in *R. v. Tse* at [93] that "While a statutory restriction on the use that can be made of the interception is not necessary for constitutional purposes, we make no comment on the admissibility of intercepted communications relating to matters that would not have justified the use of s. 184.4."

The CBA Section recommends that a police officer's justification of s. 184.4 interception must be recorded or memorialized, and that if subsequent judicial authorizations are obtained on the same grounds, evidence obtained by the s. 184.4 interception may be ruled inadmissible.

## CONCLUSION

The CBA Section recommends that:

- the exceptional discretion to initiate s. 184.4 interceptions be limited to a class of designated superior officers;
- a requirement be added to publicly report the number of persons whose communications were intercepted under s. 184.4, but not subsequently charged with any offence;
- a police officer's justification of s. 184.4 interception be recorded or memorialized;
- if subsequent judicial authorizations are obtained on the same grounds as a s. 184.4 interception, evidence obtained by the s. 184.4 interception may be ruled inadmissible.

Thank you for considering the views of the CBA Section.

Yours truly,

*(original signed by Tamra L. Thomson for Dan MacRury)*

Daniel A. MacRury
Chair, National Criminal Justice Section