File Number:

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

HER MAJESTY THE QUEEN

Applicant
(Respondent)

- and -

OSWALD OLIVER VILLAROMAN

Respondent
(Appellant)

APPLICATION FOR LEAVE TO APPEAL
HER MAJESTY THE QUEEN, APPLICANT

PURSUANT TO RULE 25 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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MEMORANDUM OF ARGUMENT

PART I – OVERVIEW AND FACTS

Overview

1. *R v Villaroman,* 2015 ABCA 104, is an erroneous judgment with escalating implications. It is a matter of public importance to correct its errors and stem its implications. This Court is the only clear forum in which to do so.

2. The judgment states that a circumstantial case can only result in conviction if the Crown has left no gaps and has disproved all innocent possibilities, even those with no foundation in evidence. To prove possession of child pornography on a computer, the Crown must disprove all possibility of access to the computer by anyone other than the accused. In effect, if the Crown cannot establish a complete history of potential access, a verdict of guilt would be unreasonable and the case should not go to a trier of fact.

3. The immediate implication of this judgment is that possession of digital child pornography is literally unprovable. No amount of investigation can reconstruct history in this detail or negative every alternate possibility.

4. The reasoning in the judgment may extend to other computer crimes, other possession cases, and other circumstantial cases. If taken at face value, it would create different fundamental rules for circumstantial cases. Normally, the Crown need not prove a case to a mathematical certainty and need not negative every conceivable defence position, no matter how speculative.

5. The court below felt that a conflict in the jurisprudence permits its "no gaps" interpretation of the circumstantial case rule. If true, that conflict requires clarification. If not true, the court below is simply in error. But the implications of its error are of public importance, and if cases of this kind cannot go to triers of fact, then they cannot reach another appellate court. A hearing in this Court is required.

6. The court below declined to consider Mr. Villaroman's *Charter*-based grounds of appeal, one of which was of public importance. He deserves to be heard on those issues, either in this Court or on remand to the court below.

Facts

Circumstances of the offence

7. On December 2, 2009, Mr. Villaroman took his laptop computer to a MyMacDealer shop for repairs to the power button and battery.[1] When he dropped it off, he provided his name, address, and telephone number.[2] Technician Alan Sopczak examined the computer (which was not password protected),[3] identified various problems, and telephoned Mr. Villaroman to authorize the work. Mr. Villaroman asked him to proceed.[4]

8. After completing some repair steps, Mr. Sopczak tested whether the computer's hardware and software were operating properly. He randomly checked some documents, music and picture files.[5] In his experience, "a lot of customers" find that the smooth operation of "music files, pictures, various other files of that sort" is "a big thing."[6] He emphasized that "people … with computers are quite concerned about music files."[7]

9. While checking the music files on Mr. Villaroman's computer, Mr. Sopczak discovered child pornography files in the "music" sub-folder of the "iTunes library" folder. He felt the number of files ruled out a random occurrence.[8] On December 11, 2009, he called the Calgary police and secured the computer in his office. Constable Morcom responded to the call later that day. He took a statement from Mr. Sopczak and seized Mr. Villaroman's computer.[9]

10. Days later, Mr. Villaroman called MyMac about his computer. He attended the shop and paid for the repairs. Mr. Sopczak then told him that police had seized it.[10]

11. Constable Morcom consulted with the Integrated Child Exploitation ("ICE") unit about the investigation. ICE is a joint unit of the Royal Canadian Mounted Police and municipal police

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[1] *R v Villaroman*, 2013 ABQB 279 at para 6 ["*Trial Reasons*"] [Tab C at p 61]; see also Copy of MyMacDealer Service Repair Order SRO S-289062, Exhibit 1 at Trial [Tab E at p. 114]
[2] *Trial Reasons* at paras 7-8, 82(f) and (g) [Tab C at pp 61-62, 76-77]; see also Copy of MyMacDealer Service Repair Order SRO S-289062 [Tab E at p 114]
[3] *Trial Reasons* at para 16 [Tab C at p 63]
[4] *Trial Reasons* at paras 6, 9 [Tab C at pp 61-62]
[5] *Trial Reasons* at paras 11-12 [Tab C at p 62]
[6] A.R. 368/11-13 (evidence of Alan Sopczak) [Tab E at p 145]
[7] A.R. 368/36-37 (evidence of Alan Sopczak) [Tab E at p 145]
[8] *Trial Reasons* at paras 14-15, 17, 20 [Tab C at p 63]
[9] *Trial Reasons* at paras 17-18 [Tab C at p 63]; *R v Villaroman*, 2012 ABQB 630 at paras 3-5, 7, 70-72 ["*Voir Dire Reasons*"] [Tab C at pp 12-13, 25-26]
[10] *Trial Reasons* at para 19 [Tab C at p 63]; A.R. 375/2-23 (evidence of Alan Sopczak) [Tab E at p 146]

forces specialising in the investigation of child pornography offences.[11] On the advice of the ICE unit, Constable Morcom obtained a general warrant authorizing a forensic examination of Mr. Villaroman's computer.[12]

Forensic evidence

12. The objectives of the forensic examiner, Mr. LaFontaine, were to locate the child pornography, to discover how it got on the computer, and to determine whether the user knew that it was there.[13] Mr. LaFontaine searched all the picture and video files, as well as compressed files. He found that the pornography files were associated with LimeWire, but not with internet browsing. He refrained from searching e-mails or "rebuild[ing] the Internet history" because there was no need to do so.[14] His forensic examination revealed the following evidence:

(a) The computer had only one user account. The user had created the account on July 1, 2007, and named it "*oswaldvillaroman*" by manually typing that name into the computer.[15]

(b) That same day, the user installed a file-sharing program on the computer called LimeWire.[16] LimeWire enables users to share their digital files across a network. Once the program is installed, users can access and download one another's digital files.[17]

(c) The computer was used almost daily between July 1, 2007, and November 29, 2009.[18]

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[11] *Voir Dire Reasons* at para 6 [Tab C at p 4]
[12] *Voir Dire Reasons* at paras 12, 160 [Tab C at pp 13-14, 47]; A.R. 18/11-24, 41/14-24 (evidence of Constable Morcom) [Tab E at pp 124,125]. Constable Morcom had a Crown prosecutor review the Information to Obtain and the General Warrant before making his application: *Voir Dire Reasons* at para 14 [Tab C at p 14]
[13] A.R. 64/15-17, 72/24-25, 74/32-35 (evidence of Allen LaFontaine) [Tab E at pp 126,131,132]
[14] A.R. 93/7-94/11 (evidence of Allen LaFontaine) [Tab E at pp 141-142]
[15] *Trial Reasons* at para 54 [Tab C at p 71]; *Voir Dire Reasons* at para 24 [Tab C at p 15-16]
[16] *Trial Reasons* at para 56 [Tab C at p 72]
[17] *Trial Reasons* at paras 57-60 [Tab C at p 72]; A.R. 72/23-74/10 (evidence of Allen LaFontaine) [Tab E at pp 131-132]; Allen LaFontaine's Computer Forensic Examination Report ["*Forensic Report*"] at 4, Exhibit 6 at Trial [Tab E at p 118]
[18] *Trial Reasons* at paras 54, 82(d) [Tab C at pp 71, 76]

(d) The computer's hard drive contained one picture and 35 videos showing posing children and sex acts involving children of various ages, some younger than five years.[19]

(e) The 36 child pornography files were downloaded between September 16, 2009, and November 23, 2009, with downloads occurring on both dates.[20] The LimeWire program was last "properly" shut down on November 23, 2009. The computer will not record the date and time of the shutdown if it experiences a sudden power loss or a forced shutdown.[21]

(f) All but two of the child pornography downloads occurred between the hours of midnight and 1:30 a.m.[22]

(g) Seventeen of the videos were complete downloads that were found in the computer's "music" folder, along with the one picture.[23] Some of these videos had been viewed using various software programs.[24]

(h) The other 18 videos were partial or incomplete downloads and were located in a folder labelled "Incomplete."[25]

(i) All downloads commenced in the "Incomplete" folder. The user had changed the default settings in LimeWire so that as soon as a file completed downloading, it automatically moved to the computer's "music" folder where it was then shared with other LimeWire users. LimeWire normally stores all complete downloads in a folder labelled "shared."[26]

(j) The LimeWire program was cued to download 67 files the next time it connected to the Internet. The names of the files were consistent with child pornography.

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[19] *Voir Dire Reasons* at para 25 [Tab C at p 16]; A.R. 64/17-20, 66/15-16, 67/3-8, 82/14-22 (evidence of Allen LaFontaine) [Tab E at pp 126, 127, 128, 136]; *Forensic Report* at 2-4 [Tab E at pp 116-118]

[20] *Trial Reasons* at para 55 [Tab C at p 71]; *Voir Dire Reasons* at para 25 [Tab C at p 16]; A.R. 72/17-20 (evidence of Allen LaFontaine) [Tab E at p 131]

[21] A.R. 84/2-18 (evidence of Allen LaFontaine) [Tab E at p 138]

[22] *Trial Reasons* at para 55 [Tab C at p 71]

[23] *Trial Reasons* at paras 50, 57 [Tab C at pp 71-72]; A.R. 68/13-14, 82/35-36, 83/2-14, 104/39-41 (evidence of Allen LaFontaine) [Tab E at pp 129,136,137,143]

[24] *Trial Reasons* at paras 61-66, 69-70 [Tab C at pp 72-74]

[25] *Trial Reasons* at para 57 [Tab C at p 72]; A.R. 83/2-14, 104/39-41 (evidence of Allen LaFontaine) [Tab E at pp 137,143]

[26] *Trial Reasons* at paras 57-59, 73 [Tab C at pp 72, 75]; A.R. 76/18-77/10, 79/35-38, 83/2-14, 84/28-29 (evidence of Allen LaFontaine) [Tab E at pp 133,135,138]

> Examples include "Dad fucks both (8yo & 11yo) underage daughters incest preteen illegal pthc(1).MPG", "PORNOFILM 12007, GROUP (pthc)11yo girl fucks man, 4yo boy with mom and sister, 12yo girl fucks dad and siste.mpgw", "Goicochea Vincent Pedofilia French Collection R@Ygold R@Ygold Hc-c4G - Fucking 5 - 8 - 13 Yo Girl And Older Man Vaginal And Anal Fuck (Pthc – 16m57S).mpg" and "(Pthc)(Webacm) Blonde&Bf 14 Yr Old Jacking Off To Preteen Lolita Pussy Then Cumin On Stomach Sex Rape Russian Incest Underage Dick Boy Girl Cum Mpg.mpg".[27] "Pthc" stands for "pre-teen hard core."[28]

13. The trial judge found that the user had downloaded all the child pornography files using LimeWire. He had taken positive steps to download the material by searching and double-clicking on search results displaying the names of the target files. The user knew that he was downloading child pornography.[29]

Admissions at trial

14. At trial, Mr. Villaroman conceded that the 36 picture and video files constituted "child pornography" within the meaning of the *Criminal Code*.[30] He formally admitted that he owned the computer, that he resided at the same address as Benigno and Maxima Villaroman, and that neither of them had put the child pornography on the computer.[31] He did not testify or call any evidence in his defence. There was no evidence of multiple computer users, nor evidence that anyone other than the Respondent had ever used his computer.

Reasons of the Alberta Court of Appeal

15. Mr. Villaroman was convicted for possession of child pornography. He appealed his conviction to the Alberta Court of Appeal, which identified two sets of issues:

(a) whether the search of the computer violated the *Charter* and whether evidence should be excluded as a result; and

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[27] A.R. 83/13-14, 85/33-86/19 [Tab E at pp 137,139-140]; *Forensic Report* at 5-8 [Tab E at pp 119-122]
[28] AR 70/12-17 (evidence of Allen LaFontaine) [Tab E at p 130]
[29] *Trial Reasons* at paras 50, 57-59, 67 [Tab C at pp 70-74]
[30] *Trial Reasons* at para 22 [Tab C at p 64]; *Criminal Code*, s 163.1(1)
[31] *Trial Reasons* at paras 5, 80 [Tab C at pp 61, 76]; A.R. 12/4-8, 356/32-38 (admissions) [Tab E at pp 123,144]

(b) "whether the Crown had proved that the accused put the pornography on the computer, or knew it was there."[32]

16. The court below addressed the second issue first. Since the Crown's evidence was circumstantial,[33] the "big legal dispute" was: "Can the accused rely upon an inference or hypothesis leading to an innocent explanation for the evidence, if it is not based on any evidence, or not based upon proven facts?"[34] The court found conflict in the authorities on this subject.[35] It concluded that circumstantial evidence cannot lead to a finding of guilt "where it leaves a reasonable (not remote) possibility that the event occurred in a way not involving the accused… It is not necessary that there be actual evidence of that innocent possibility; the onus is on the Crown to disprove it."[36]

17. Whether there is a gap in the circumstantial evidence on an element of the offence is "a factual question." Here, the trial judge "misstated the current law."[37] The guilty verdict was an unreasonable one, since a trier of fact "could not reasonably and judicially find that [Mr. Villaroman] put the child pornography on the computer or knew it was there."[38]

18. Mr. Villaroman's laptop was portable and was not password-protected. "Therefore, anyone who could get temporary physical access to [it]… could access or transmit the child pornography on it…. And anyone with such recurring physical access could have put all the child pornography on the computer."[39] The court below identified a long list of items the Crown had neither proven nor disproven:

(a) where the computer was kept[40]

(b) where the computer was used[41]

(c) the number of people living in the Villaroman residence[42]

(d) the number of people frequenting the Villaroman residence[43]

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[32] *R v Villaroman*, 2015 ABCA 104 ["*CA Reasons*"] at paras 2, 4, 39 [Tab C at pp 80, 84]
[33] *CA Reasons* at para 7 [Tab C at p 80]
[34] *CA Reasons* at para 10 [Tab C at p 81]
[35] *CA Reasons* at paras 8, 15, 20 [Tab C at pp 81-82]
[36] *CA Reasons* at para 19 [Tab C at p 82]
[37] *CA Reasons* at paras 19, 20 [Tab C at p 82]
[38] *CA Reasons* at para 38 [Tab C at p 84]
[39] *CA Reasons* at paras 23, 25 [Tab C at p 82-83]
[40] *CA Reasons* at para 26 [Tab C at p 83]
[41] *CA Reasons* at para 26
[42] *CA Reasons* at para 26
[43] *CA Reasons* at para 26

(e) whether the computer "stayed regularly in one place or moved about"[44]

(f) if it stayed in the house,

  (i) whether anyone had access to it

  (ii) whether any resident let friends use it

  (iii) whether non-residents would "hang around the area where the laptop was"[45]

(g) if it did not stay in the house,

  (i) whether it was in the custody of the accused or a family member

  (ii) where it went[46]

(h) wherever it was,

  (i) whether it was typically kept locked up or hidden

  (ii) how many other people had access to it.[47]

Thus the Crown had not disproven the possibility of access by others.

19. The court below also felt that the relative infrequency of downloading child pornography did not "make actions by another user impossible, nor even highly unlikely." It said there was no evidence of the source of the pornography, no evidence about whether an ordinary computer user would be "bound to notice" the pornography, "nor argument about the legal position if he did notice."[48] Further, it would be "incautious" for a user to "put so much child pornography" on a computer bearing his own name, and "very careless" for that person to take it in for repairs. This added doubt to the question of whether Mr. Villaroman knew the pornography was on his computer.[49]

20. Thus there was no basis on which to put the case to a trier of fact.[50]

21. The Court below did not discuss Mr. Villaroman's search-related grounds of appeal.[51]

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[44] *CA Reasons* at para 27 [Tab C at p 83]
[45] *CA Reasons* at para 28 [Tab C at p 83]
[46] *CA Reasons* at para 28 [Tab C at p 83]
[47] *CA Reasons* at para 28
[48] *CA Reasons* at paras 32, 35 [Tab C at p 83-84]
[49] *CA Reasons* at para 36 [Tab C at p 84]
[50] *CA Reasons* at paras 31, 38 [Tab C at p 83-84]
[51] *CA Reasons* at para 39 [Tab C at p 84]

PART II – QUESTIONS IN ISSUE

22. The issue on this application is whether the proposed appeal is of such public importance, nature or significance to warrant decision by this Court.[52] The reasons of the court below demonstrate errors of such significance and practical implications that a resolution in this Court is required.

23. The proposed appeal would raise the following issues:

A. Where the Crown's evidence is circumstantial, does the rule in *Hodge's Case* mandate an acquittal where there is an innocent possibility not based in any actual evidence? Put another way, must the Crown disprove all innocent possibilities, whether or not there is any evidence to support them?

B. Before a case of possession of child pornography can go to a trier of fact, must the Crown prove, beyond any hypothetical possibility, that the accused had exclusive access to the computer throughout the period over which the pornography was downloaded?

24. If leave is granted, and if the appeal is eventually allowed, Mr. Villaroman deserves an opportunity to challenge his conviction on his original search-related grounds. These issues could be heard by this Court or remanded back to the court below. One of the search grounds is of public importance:

C. What is the proper form of warrant to authorize the examination of data in a computer that is already in the lawful possession of the police – a general warrant[53] or a search warrant?[54]

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[52] *Supreme Court Act*, s 43(1)(a)
[53] *Criminal Code*, s 487.01
[54] *Criminal Code*, s 487

PART III – STATEMENT OF ARGUMENT

The judgment below requires this Court's attention

25. The position of the Crown Applicant is that the judgment below is irreconcilable with first principles of criminal law and cannot be followed literally. In this sense the Crown is asking this Court to engage in an unusual instance of error correction. It does so because this is the only forum in which to correct an error that cannot be allowed to stand.

26. The judgment below creates a checklist for proving digital child pornography possession that is unique to Alberta, creating inconsistency in the law across the country. More troublingly, the checklist places a standard of proof on the Crown that is literally unattainable. If the lower court's "unreasonable verdict" reasoning is followed, then the unattainable checklist means that cases of child pornography possession cannot even go to a trier of fact. In Alberta, the Crown would have no way to begin prosecuting possession of child pornography on computers.

27. Alternatively, if the court below is right in saying that there is conflict in the law on circumstantial evidence, then it is a matter of public importance to have the law clarified. According to the court below, conflicts in the jurisprudence permit the interpretation that an unreasonable verdict must result where a circumstantial case permits any innocent explanation, even if it has no foundation in the evidence. Any conflict on this point should be resolved for its own sake, and for the sake of its potential impact on related fundamental principles such as the "beyond a reasonable doubt" standard, the meaning of "air of reality", and the standard instruction to juries not to speculate. If the "no other possible explanation" test is available, it may have infinite applications, beginning with cases involving possession of other items in other receptacles, such as drugs in backpacks or guns in cars.

28. On either basis, a decision from this Court is required.

29. If the appeal proceeds, Mr. Villaroman deserves to be heard on his as-yet-unresolved grounds of appeal. One of those grounds is of public importance. It could be heard by this Court or remanded back to the court below.

The pornography prosecution problem

30. The immediate problem with this judgment is its impact on prosecutions for possession of child pornography. The message of the judgment is not that inferences are permissive or that some circumstantial cases may contain gaps that leave a trier of fact with a reasonable doubt. Its message is that in a case of possession by computer, the Crown must negative all possibility of access to the computer by anyone other than the accused *before a trier of fact can even hear the case.* The court set out a long and specific checklist for disproof, and thereby set a standard that is literally unattainable.

31. To have satisfied the checklist in the case at bar, the Crown would have needed to prove who had theoretical access to the computer for every minute of its existence from September 16 to November 23, 2009. That is, the police would have needed to know where the computer was, and how many people were nearby, in the three months before the police ever knew the computer existed. No one, likely not even the computer's owner, would be able to recreate such a detailed timeline.[55]

32. Once child pornography is in the hands of the police, they do not have the option of returning it to the owner. It is not possible to conduct surveillance to gather the checklist data on a prospective basis. If it were possible, such surveillance would cost the police incalculable resources, and would represent a significant intrusion on the owner's privacy.[56]

33. Making the problem worse, the court below did not reverse the trial verdict on the basis of a mere error in law or fact. It held that the guilty verdict was unreasonable: there was no basis even to put the evidence to a trier of fact.

34. Given the developing state of the law on circumstantial evidence for digital possession, the lower court's conclusion is problematic. It is also novel. Previously, the only mention of unreasonable verdict in similar circumstances was an *obiter* suggestion by the Saskatchewan Court of Appeal.[57]

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[55] Affidavit of Jennifer Rees at para 11 [Tab B at p 6]
[56] Affidavit of Jennifer Rees at para 11
[57] *R v Jacques*, 2013 SKCA 99 at para 50

35. The Crown Applicant is by no means suggesting that convictions are mandatory in cases of this kind. The Crown's position is that the inference of possession is a matter for a trial judge to assess, as has been done in countless cases on similar evidence.[58]

36. According to the court below, however, trial judges may not weigh this evidence or draw their own inferences, since there can be no reasonable basis for conviction in cases of this kind. In other words, it would be improper for the Crown even to bring such cases to trial. If followed literally, the lower court's judgment will mean that there can be no prosecutions for this type of child pornography possession in Alberta,[59] and no way to seek correction of the judgment through the Alberta courts.

37. Even on the Crown's view that the judgment cannot stand in the face of this Court's jurisprudence, it is fair to anticipate that the issue will be argued at length, on numerous occasions. The drain on justice system resources will likely be significant.

38. The errors in the judgment below cannot be permitted to stand. They leave Alberta out of step with the law in the rest of Canada, and a hearing at this Court is the only clear and expedient way to correct them.

The purported conflict on circumstantial evidence

39. The "big legal dispute" in this case, as framed by the court below, was: "Can the accused rely upon an inference or hypothesis leading to an innocent explanation for the evidence, if it is not based on any evidence, or not based upon proven facts?"[60] It concluded that there is no need for "actual evidence" of an innocent possibility:

> the onus is on the Crown to disprove it. The well-known *Lifchus* test confirms that. The trier of fact must find no evidence, and no gap in the evidence, which

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[58] For example, the trier of fact weighed similar (not identical) evidence of possession in the following cases: *R v Midwinter*, 2015 ONCA 150 [conviction]; *R v Bichsel*, 2014 BCCA 251 [conviction]; *R v Butters*, 2014 ONCJ 228 [conviction]; *R v Jacques*, 2013 SKCA 99 [conviction]; *R v Barwell*, [2013] O.J. No. 3743 (CJ) [conviction]; *R v Allart*, 2012 BCCA 100 [conviction]; *R v Benson*, 2012 SKCA 4 [conviction]; *R v Graham*, 2011 ONSC 4002 (SCJ) [acquittal on possession/conviction on accessing]; *R v Panko*, 2010 ONCA 660 [acquittal]; *R v Hopps*, 2010 BCSC 2015 [conviction]; *R v Gurr*, 2007 BCSC 982 [conviction]; *R v Missions*, 2005 NSCA 82 [conviction]. Similar factual scenarios can also be seen in the following *voir dire* and sentencing decisions: *R v McNeice*, 2013 BCCA 98; *R v Baribeau*, 2012 SKQB 542; *R v Winchester*, 2010 ONSC 652 (SCJ); *R c Piette*, 2009 QCCQ 14499; *R v Lane*, 2013 ONCJ 111; *R v Batshaw*, 2004 MBCA 117; *R v Jiggins*, 2003 ABPC 75

[59] Affidavit of Jennifer Rees at para 12 [Tab B at pp 6-7]

[60] *CA Reasons* at para 10 [Tab C at p 81]

> raises a reasonable doubt. Such gaps include a gap in the evidential support for an inference needed to prove an element of the offence. That is, of course, a factual question for the trier of fact.[61]

But the court felt that the jurisprudence on "the subject [of] how to use circumstantial evidence" is "not readily consistent."[62] Without citing examples, it concluded that "some case law may conflict, and seems to have changed in very recent years."[63]

40. It has never been easy to find all-purpose wording for the role of inference-drawing in a circumstantial case. In a 1965 judgment, the Ontario Court of Appeal made an ill-considered attempt to restate the historical rule in *Hodge's Case*:

> the case is to be decided on the facts, that is, the facts proved in evidence, and the conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from **proven facts**. No conclusion can be a rational conclusion that is not founded on evidence. Such a conclusion would be a speculative, imaginative conclusion, not a rational one.[64] (emphasis added)

41. The "proven facts" formulation is wrong, in that it suggests a sequential approach to fact-finding where specific facts must be proven before inferences may be drawn or reasonable doubt assessed. As this Court ruled in *R v Khela*, the error is patent if its effect is to require "the defence to 'prove' certain facts in order for the jury to draw an inference of innocence from them."[65] However, this Court had applied the "proven facts" formulation through the 1970s, and it has been quoted by some provincial appellate courts as recently as 2014.[66]

42. Other appellate courts have corrected the "proven facts" error. In the clear words of the British Columbia Court of Appeal, the law "does not require that inferences found to be inconsistent with guilt must arise from proven facts,"[67] and of the Ontario Court of Appeal, "the question of whether there exists a reasonable doubt concerning guilt is to be assessed on the totality of the evidence, not simply on the proven facts."[68]

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[61] *CA Reasons* at para 19 [Tab C at p 82]
[62] *CA Reasons* at paras 7-8 [Tab C at p 80-81]
[63] *CA Reasons* at para 20 [Tab C at p 82]
[64] *R v McIver*, [1965] 4 CCC 182 (ONCA) at para 7 [emphasis added]
[65] *R v Khela*, 2009 SCC 4 at para 58
[66] Eg *R v Bagshaw*, [1972] SCR 2 at pp 7-8; *R v Paul*, [1977] 1 SCR 181 at p 191; *R v Dubois*, [1979] 49 CCC (2d) 501(ABCA) at para 17 (per McGillivray CJA dissenting), rev'd on appeal to the SCC for the reasons of McGillivray CJA, [1980] 2 SCR 21; *R v Polley*, 2014 NSCA 71 at para 19; *R v Brodeur*, 2014 NBCA 44 at para 16.
[67] *R v Pryce*, 2014 BCCA 370 at para 10
[68] *R v Bui*, 2014 ONCA 614 at para 28

43. The correct formulation – focusing on *evidence* and *reasonable doubt* but not *proven fact* – is consistent with fundamental rules of criminal justice. An accused is entitled to an acquittal if there is a reasonable doubt on all the evidence. He may raise or point to a reasonable doubt, but is not required to prove anything. A reasonable doubt may arise from "explanation[s] which 'might reasonably be true'" or from "reasonable possibilities in the accused's favour."[69]

44. Of equal importance, the Crown is not required to prove anything to the impossibly high standard of absolute certainly.[70] Nor is it required to negative all conceivable defence positions no matter how fanciful or speculative they may be.[71] Juries are instructed that a reasonable doubt is one based in the evidence and that they must not speculate.[72] "Inferences" arise from evidence; "speculation" or "conjecture" does not.[73] Failure to recognize the distinction between the two is legal error.[74]

45. In the lower court's formulation, the Crown must disprove all innocent possibilities until "no gaps" remain, and the trier of fact may act without "actual evidence." This gives the trier of fact permission to speculate, creating a fundamental inconsistency between circumstantial cases and cases with some direct evidence. The "no possible innocent explanation" approach and its accompanying checklist creates a new standard of proof in cases involving possession of items in receptacles – data in a computer, or perhaps drugs in backpacks or guns in cars. These categorical inconsistencies are untenable.

46. Either way, there is conflict: as the lower court found, in the jurisprudence on circumstantial cases, or between the impugned judgment and fundamental principles of criminal law. Either way, the implications are significant. This Court's attention is required.

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[69] *R v Robert*, [2000] 143 CCC (3d) 330 at paras 21-23 (ONCA), citing *R v Campbell*, [1977] 38 CCC (2d) 6 (ONCA) at p 22, *Ungaro v The King* [1950] SCR 430 at p 436
[70] *R v Lifchus*, [1997] 3 SCR 320 at para 39
[71] *R v Gunning*, [2005] 1 SCR 627 at para 32; *R v Torrie* [1967] 3 CCC 303 (ONCA) at para 10
[72] Watt, David. *Watt's Manual of Criminal Jury Instruction.* Toronto: Thomson/Carswell, 2005
[73] *R v Wild*, [1971] SCR 101 at pp 114, 116-117; *R v B(G)*, [1990] 2 SCR 57 at pp 69-70; *R v Schuldt*, [1985] 2 SCR 592 at p 604; *R v Khela*, 2007 BCCA 50 at para 41, aff'd *R v Khela*, 2009 SCC 4 at para 57; *R v Paskimin*, 2012 SKCA 35 at para 13; *R v Nguyen*, 2010 ABCA 145 at para 15
[74] *R v Wild*, [1971] SCR 101 at paras 114, 116-117 (per Martland J) and 50 (per Ritchie J); *R v Dubois*, [1979] 49 CCC (2d) 501 (ABCA) at para 15

Resolving the unresolved issue

47. The lower court addressed only one of Mr. Villaroman's grounds of appeal, leaving his search-related grounds unresolved. If this application is denied, or if it is allowed but the appeal is dismissed, Mr. Villaroman will stand acquitted and there will be no need to consider his search issues. If leave is granted and if the ultimate appeal is allowed, then Mr. Villaroman deserves an opportunity to challenge his conviction on his original search grounds. The Crown Applicant proposes two possible mechanisms.

48. As the first option, this Court has the power to remand all or part of a case back to its originating court of appeal, either at the leave-to-appeal stage[75] or at the appeal stage.[76] Remanding back as part of this leave to appeal would be premature. It may be appropriate at the appeal stage. There is precedent for this Court sending back a single issue that was not addressed by the lower court and which this Court could not address on the record provided to it.[77]

49. The second option would be for this Court to agree to hear argument on all issues. If the Court pursues this option, the Crown will ensure that its record is sufficient to address all issues.

50. Below, Mr. Villaroman raised one search ground peculiar to the facts of his case[78] and one of general importance, plus the implicit issue of admissibility under s 24(2) of the *Charter.*[79] The issue of general application was: what is the proper form of warrant to authorize the examination of data in a computer that is already in the possession of the police?

51. Here, the police initially seized the computer from the repair shop under the implicit authority of s. 489(2) of the *Criminal Code.*[80] They then obtained a general warrant. At the time, this was the practice of the Crown and police in Alberta, but it later became a matter of some controversy. In similar circumstances, some justices would refuse to issue general warrants, while others would refuse to issue garden-variety search warrants.[81]

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[75] *Supreme Court Act*, s 43(1.1)
[76] *Supreme Court Act*, s 46.1
[77] *Galambos v Perez*, [2009] 3 SCR 247 at para 46. Other examples of remand at the appeal stage include *R v Hay*, [2013] 3 SCR 694 and *Singh et al v MEI*, [1985] 1 SCR 177
[78] Whether the police examination of the computer's data went beyond what was authorized by the general warrant.
[79] Appellant's Factum, filed in the Alberta Court of Appeal October 16, 2014, at p 5 [Tab E at p 147]
[80] *Criminal Code*, s 489(2)
[81] Affidavit of Jennifer Rees at paras 14-15 [Tab B at p 7]

52. To oversimplify the dispute, on the one hand it was felt that the examination of data is a technique, not a search of a place or a seizure of a thing, so a general warrant[82] would apply. On the other, it was felt that it made no sense to use a search warrant[83] to simultaneously authorize seizure and examination, but a general warrant to authorize examination alone. If search warrants may authorize examinations of data, general warrants cannot issue, since they can only be obtained where "no other provision" would authorize the police technique.[84]

53. In 2013, a mandamus application was brought in the Alberta Court of Queen's Bench case of *R v Z(K)*.[85] The court ruled in favour of using s. 487 search warrants. It relied on the then-recently released decision of this Court in *R v Vu,* which observed that a computer may sometimes be treated as a place to be searched. While examining the computer data, police are searching for things (such as data, images or video) that may provide evidence of an offence.[86]

54. *Z(K)* was decided after Mr. Villaroman's computer was seized and examined, but before his case was tried. The trial judge found that the police "did not breach [Mr. Villaroman's] right to be protected from a unreasonable search and seizure". Had there been a breach, he would have admitted the evidence.[87] Unfortunately, he did not make a clear ruling on the general-warrant-vs-search-warrant issue.[88] Of course, the Court of Appeal did not rule on any of the *Charter* issues. Thus, *Z(K)* remains the only decision on this issue in Alberta. There is no clear authority from a trial or appellate court.

55. The Crown in Alberta is now advising police to follow *Z(K)* and to obtain search warrants to examine computers in the possession of the police. *Z(K)* may continue to leave investigations from the general warrant era at the mercy of s 24(2) rulings. Should a trial court decide to depart from the non-binding judgment in *Z(K),* the Crown may need to reverse its position again, jeopardising another generation of investigations. It is a matter of public

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[82] *Criminal Code,* s 487.01
[83] *Criminal Code,* s 487
[84] *Criminal Code,* s 487.01(1)(c)
[85] *R v Z(K),* 2014 ABQB 235; Affidavit of Jennifer Rees at para 16 [Tab B at p]
[86] *R v Z(K),* 2014 ABQB 235 at para 32, 37, 47
[87] *Voir Dire Reasons* at para 52, 173 [Tab C at p 21, 50]
[88] See *Voir Dire Reasons* at para 113. The trial judge seems to have found that a search warrant was available and that therefore it was incorrect to state that "no other provision" could authorize the examination, yet he found that there was a basis to issue the general warrant [Tab C at p 35]

importance to have this question resolved, whether in this Court or on remand to the Court of Appeal.[89]

[89] Affidavit of Jennifer Rees at paras 17-18 [Tab B at pp 7-8]

PART IV – SUBMISSIONS CONCERNING COSTS

56. The Applicant does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

57. The Applicant asks that the Application for Leave to Appeal be granted.

58. If Leave is granted, the Applicant asks for direction as to whether or not the Court wishes to receive submissions and evidence on the search issues that were not resolved in the Court below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 15th day of May, 2015.

JOLAINE ANTONIO
COUNSEL FOR THE APPLICANT

JASON WUTTUNEE
COUNSEL FOR THE APPLICANT

JA/md

PART VI - TABLE OF AUTHORITIES

	Cited at Paragraph No.
1. *Galambos v Perez*, [2009] 3 SCR 247 at para 46	48
2. *R v Allart*, 2012 BCCA 100	35
3. *R v Bagshaw*, [1972] S.C.R. 2 at pp 7-8	41
4. *R v Baribeau*, 2012 SKQB 542	35
5. *R v Barwell*, [2013] O.J. No. 3743 (CJ)	35
6. *R v Batshaw*, 2004 MCA 117	35
7. *R v Benson*, 2012 SKCA 4	35
8. *R v B(G)*, [1990] 2 SCR 57 at pp 69-70	44
9. *R v Bichsel*, 2014 BCCA 251	35
10. *R v Brodeur*, 2014 NBCA 44 at para 16	41
11. *R v Bui*, 2014 ONCA 614 at para 28	42
12. *R v Butters*, 2014 ONCJ 228	35
13. *R v Campbell*, [1977] 38 CCC (2d) 6 (ONCA) at p 22	43
14. *R v Dubois*, [1979] 49 CCC (2d) 501 (ABCA) at para 15; appeal allowed [1980] 2 S.C.R. 21	41, 44
15. *R v Graham*, 2011 ONSC 4002	35
16. *R. v. Gunning*, [2005] 1 S.C.R. at para 32	44
17. *R v Gurr*, 2007 BCSC 982	35
18. *R v Hay*, [2013] 3 SCR 694	48
19. *R v Hopps*, 2010 BCSC 2015	35
20. *R v Jacques*, 2013 SKCA 99 at para 50	34, 35
21. *R v Jiggins*, 2003 ABPC 75	35

PART VII – STATUTE, REGULATION, RULES ETC.

***Criminal Code of Canada*, R.S.C., 1985, c. C-46., ss. 163.1(1), 487, 487.01, 487.01(1)(c), 489(2)**

163.1(1) Definition of "child pornography"
In this section, **"child pornography"** means

(a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;

(b) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;
(c) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or
(d) any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act.

487.
487(1) Information for search warrant
A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place

(a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
(b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,
(c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or
(c.1) any offence-related property,
may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant
(d) to search the building, receptacle or place for any such thing and to seize it, and
(e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

487(2) Endorsement of search warrant
If the building, receptacle or place is in another territorial division, the justice may issue the warrant with any modifications that the circumstances require, and it may be executed in the other territorial division after it has been endorsed, in Form 28, by a justice who has jurisdiction in that territorial division. The endorsement may be made on the original of the warrant or on a copy of the warrant transmitted by any means of telecommunication.

487(2.1) Operation of computer system and copying equipment
A person authorized under this section to search a computer system in a building or place for data may

(a) use or cause to be used any computer system at the building or place to search any data contained in or available to the computer system;
(b) reproduce or cause to be reproduced any data in the form of a print-out or other intelligible output;
(c) seize the print-out or other output for examination or copying; and
(d) use or cause to be used any copying equipment at the place to make copies of the data.

487(2.2) Duty of person in possession or control
Every person who is in possession or control of any building or place in respect of which a search is carried out under this section shall, on presentation of the warrant, permit the person carrying out the search

(a) to use or cause to be used any computer system at the building or place in order to search any data contained in or available to the computer system for data that the person is authorized by this section to search for;
(b) to obtain a hard copy of the data and to seize it; and
(c) to use or cause to be used any copying equipment at the place to make copies of the data.

487(3) Form
A search warrant issued under this section may be in the form set out as Form 5 in Part XXVIII, varied to suit the case.

487(4) Effect of endorsement
An endorsement that is made in accordance with subsection (2) is sufficient authority to the peace officers or public officers to whom the warrant was originally directed, and to all peace officers within the jurisdiction of the justice by whom it is endorsed, to execute the warrant and to deal with the things seized in accordance with section 489.1 or as otherwise provided by law.

487.01
487.01(1) Information for general warrant
A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, 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 if

(a) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;
(b) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and
(c) 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.

487.01(2) Limitation
Nothing in subsection (1) shall be construed as to permit interference with the bodily integrity of any person.

487.01(3) Search or seizure to be reasonable
A warrant issued under subsection (1) shall contain such terms and conditions as the judge considers advisable to ensure that any search or seizure authorized by the warrant is reasonable in the circumstances.

487.01(4) Video surveillance
A warrant issued under subsection (1) that authorizes a peace officer to observe, by means of a television camera or other similar electronic device, any person who is engaged in activity in circumstances in which the person has a reasonable expectation of privacy shall contain such terms and conditions as the judge considers advisable to ensure that the privacy of the person or of any other person is respected as much as possible.

487.01(5) Other provisions to apply
The definition "offence" in section 183 and sections 183.1, 184.2, 184.3 and 185 to 188.2, subsection 189(5), and sections 190, 193 and 194 to 196 apply, with such modifications as the circumstances require, to a warrant referred to in subsection (4) as though references in those provisions to interceptions of private communications were read as references to observations by peace officers by means of television cameras or similar electronic devices of activities in circumstances in which persons had reasonable expectations of privacy.

487.01(5.1) Notice after covert entry
A warrant issued under subsection (1) that authorizes a peace officer to enter and search a place covertly shall require, as part of the terms and conditions referred to in subsection (3), that notice of the entry and search be given within any time after the execution of the warrant that the judge considers reasonable in the circumstances.

487.01(5.2) Extension of period for giving notice
Where the judge who issues a warrant under subsection (1) or any other judge having jurisdiction to issue such a warrant is, on the basis of an affidavit submitted in support of an application to vary the period within which the notice referred to in subsection (5.1) is to be given, is satisfied that the interests of justice warrant the granting of the application, the judge may grant an extension, or a subsequent extension, of the period, but no extension may exceed three years.

487.01(6) Provisions to apply
Subsections **487**(2) and (4) apply, with such modifications as the circumstances require, to a warrant issued under subsection (1).

487.01(7) Telewarrant provisions to apply
Where a peace officer believes that it would be impracticable to appear personally before a judge to make an application for a warrant under this section, a warrant may be issued under this section on an information submitted by telephone or other means of telecommunication and, for that purpose, section **487**.1 applies, with such modifications as the circumstances require, to the warrant.

489(2) Seizure without warrant
Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds

(a) has been obtained by the commission of an offence against this or any Act of Parliament;
(b) has been used in the commission of an offence against this or any other Act of Parliament; or
(c) will afford evidence in respect of an offence against this or any other Act of Parliament.

***Supreme Court Act*, R.S.C., 1985, c. S-26, ss 43(1)(a), 43(1.1), 46.1.**

43(1) Notwithstanding any other Act of Parliament but subject to subsection (1.2), an application to the Supreme Court for leave to appeal shall be made to the Court in writing and the Court shall

(*a*) grant the application if it is clear from the written material that it does not warrant an oral hearing and that any question involved is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in the question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it;

43(1.1) Notwithstanding subsection (1), the Court may, in its discretion, remand the whole or any part of the case to the court appealed from or the court of original jurisdiction and order any further proceedings that would be just in the circumstances.

46.1 The Court may, in its discretion, remand any appeal or any part of an appeal to the court appealed from or the court of original jurisdiction and order any further proceedings that would be just in the circumstances.

***Code criminal*, L.R.C. (1985), ch. . C-46., ss. 163.1(1), 487, 487.01, 487.01(1)(c), 489(2)**

163.1(1) Définition de « pornographie juvénile »
Au présent article, « **pornographie juvénile** » s'entend, selon le cas :

a) de toute représentation photographique, filmée, vidéo ou autre, réalisée ou non par des moyens mécaniques ou électroniques :

(i) soit où figure une personne âgée de moins de dix-huit ans ou présentée comme telle et se livrant ou présentée comme se livrant à une activité sexuelle explicite,

(ii) soit dont la caractéristique dominante est la représentation, dans un but sexuel, d'organes sexuels ou de la région anale d'une personne âgée de moins de dix-huit ans;

b) de tout écrit, de toute représentation ou de tout enregistrement sonore qui préconise ou conseille une activité sexuelle avec une personne âgée de moins de dix-huit ans qui constituerait une infraction à la présente loi;

c) de tout écrit dont la caractéristique dominante est la description, dans un but sexuel, d'une activité sexuelle avec une personne âgée de moins de dix-huit ans qui constituerait une infraction à la présente loi;

d) de tout enregistrement sonore dont la caractéristique dominante est la description, la présentation ou la simulation, dans un but sexuel, d'une activité sexuelle avec une personne âgée de moins de dix-huit ans qui constituerait une infraction à la présente loi.

487.
487(1) Dénonciation pour mandat de perquisition
Un juge de paix qui est convaincu, à la suite d'une dénonciation faite sous serment suivant la formule 1, qu'il existe un motif raisonnable de croire que, dans un bâtiment, contenant ou lieu, se trouve, selon le cas :

a) une chose à l'égard de laquelle une infraction à la présente loi, ou à toute autre loi fédérale, a été commise ou est présumée avoir été commise;

b) une chose dont on a des motifs raisonnables de croire qu'elle fournira une preuve touchant la commission d'une infraction ou révélera l'endroit où se trouve la personne qui est présumée avoir commis une infraction à la présente loi, ou à toute autre loi fédérale;

c) une chose dont on a des motifs raisonnables de croire qu'elle est destinée à servir aux fins de la perpétration d'une infraction contre la personne, pour laquelle un individu peut être arrêté sans mandat;

c.1) un bien infractionnel,peut à tout moment décerner un mandat autorisant un agent de la paix ou, dans le cas d'un fonctionnaire public nommé ou désigné pour l'application ou l'exécution d'une loi fédérale ou provinciale et chargé notamment de faire observer la présente loi ou toute autre loi fédérale, celui qui y est nommé :

d) d'une part, à faire une perquisition dans ce bâtiment, contenant ou lieu, pour rechercher cette chose et la saisir;

e) d'autre part, sous réserve de toute autre loi fédérale, dans les plus brefs délais possible, à transporter la chose devant le juge de paix ou un autre juge de paix de la même circonscription territoriale ou en faire rapport, en conformité avec l'article 489.1.

487(2) Le mandat de perquisition doit être visé
Lorsque le bâtiment, contenant ou lieu est situé dans une autre circonscription territoriale, le juge

de paix peut délivrer son mandat dans la même forme, modifiée selon les circonstances, et celui-ci peut être exécuté dans l'autre circonscription territoriale après avoir été visé, selon la formule 28, par un juge de paix ayant juridiction dans cette circonscription; le visa est apposé sur l'original du mandat ou sur une copie transmise à l'aide d'un moyen de télécommunication.

487(2.1) Usage d'un système informatique
La personne autorisée à perquisitionner des données contenues dans un ordinateur se trouvant dans un lieu ou un bâtiment peut :

a) utiliser ou faire utiliser tout ordinateur s'y trouvant pour vérifier les données que celui-ci contient ou auxquelles il donne accès;
b) reproduire ou faire reproduire des données sous forme d'imprimé ou toute autre forme intelligible;
c) saisir tout imprimé ou sortie de données pour examen ou reproduction;
d) utiliser ou faire utiliser le matériel s'y trouvant pour reproduire des données.

487(2.2) Obligation de responsable du lieu
Sur présentation du mandat, le responsable du lieu qui fait l'objet de la perquisition doit faire en sorte que la personne qui procède à celle-ci puisse procéder aux opérations mentionnées au paragraphe (2.1).

487(3) Formule
Un mandat de perquisition décerné en vertu du présent article peut être rédigé selon la formule 5 à la partie XXVIII, ajustée selon les circonstances.

487(4) Effet du visa
Le visa apposé conformément au paragraphe (2) constitue une autorisation suffisante pour que les agents de la paix ou fonctionnaires publics à qui le mandat a été d'abord adressé, et tous les agents de la paix qui ressortissent au juge de paix qui l'a visé, puissent exécuter le mandat et s'occuper des choses saisies en conformité avec l'article 489.1 ou d'une autre façon prévue par la loi.

487.01
487.01(1) Dénonciation pour mandat général
Un juge de la cour provinciale, un juge de la cour supérieure de juridiction criminelle ou un juge au sens de l'article 552 peut décerner un mandat par écrit autorisant un agent de la paix, sous réserve du présent article, à utiliser un dispositif ou une technique ou une méthode d'enquête, ou à accomplir tout acte qui y est mentionné, qui constituerait sans cette autorisation une fouille, une perquisition ou une saisie abusive à l'égard d'une personne ou d'un bien :

a) si le juge est convaincu, à la suite d'une dénonciation par écrit faite sous serment, qu'il existe des motifs raisonnables de croire qu'une infraction à la présente loi ou à toute autre loi fédérale a été ou sera commise et que des renseignements relatifs à l'infraction seront obtenus grâce à une telle utilisation ou à l'accomplissement d'un tel acte;
b) s'il est convaincu que la délivrance du mandat servirait au mieux l'administration de la justice;

c) s'il n'y a aucune disposition dans la présente loi ou toute autre loi fédérale qui prévoie un mandat, une autorisation ou une ordonnance permettant une telle utilisation ou l'accomplissement d'un tel acte.

487.01(2) Limite
Le paragraphe (1) n'a pas pour effet de permettre de porter atteinte à l'intégrité physique d'une personne.

487.01(3) Fouilles, perquisitions ou saisies raisonnables
Le mandat doit énoncer les modalités que le juge estime opportunes pour que la fouille, la perquisition ou la saisie soit raisonnable dans les circonstances.

487.01(4) Surveillance vidéo
Le mandat qui autorise l'agent de la paix à observer, au moyen d'une caméra de télévision ou d'un autre dispositif électronique semblable, les activités d'une personne dans des circonstances telles que celle-ci peut raisonnablement s'attendre au respect de sa vie privée doit énoncer les modalités que le juge estime opportunes pour s'assurer de ce respect autant que possible.

487.01(5) Autres dispositions applicables
La définition de « **infraction** » à l'article 183 et les articles 183.1, 184.2, 184.3 et 185 à 188.2, le paragraphe 189(5) et les articles 190, 193 et 194 à 196 s'appliquent, avec les adaptations nécessaires, au mandat visé au paragraphe (4) comme si toute mention relative à l'interception d'une communication privée valait mention de la surveillance par un agent de la paix, au moyen d'une caméra de télévision ou d'un dispositif électronique semblable, des activités d'une personne dans des circonstances telles que celle-ci peut raisonnablement s'attendre au respect de sa vie privée.

487.01(5.1) Avis
Le mandat qui autorise l'agent de la paix à perquisitionner secrètement doit exiger, dans le cadre des modalités visées au paragraphe (3), qu'un avis de la perquisition soit donné dans le délai suivant son exécution que le juge estime indiqué dans les circonstances.

487.01(5.2) Prolongation
Le juge qui décerne un mandat dans le cadre du paragraphe (1) ou un juge compétent pour décerner un tel mandat peut accorder une prolongation — initiale ou ultérieure — du délai visé au paragraphe (5.1), d'une durée maximale de trois ans, s'il est convaincu par l'affidavit appuyant la demande de prolongation que les intérêts de la justice justifient la prolongation.

487.01(6) Dispositions applicables
Les paragraphes 487(2) et (4) s'appliquent, avec les adaptations nécessaires, au mandat décerné en vertu du paragraphe (1).

487.01(7) Télémandats
Un mandat peut être décerné sous le régime du présent article sur le fondement d'une dénonciation transmise par téléphone ou autre moyen de télécommunication lorsque l'agent de la

paix considère qu'il serait peu commode de se présenter en personne devant un juge; l'article 487.1 s'applique alors avec les adaptations nécessaires.

489(2) Saisie sans mandat
L'agent de la paix ou le fonctionnaire public nommé ou désigné pour l'application ou l'exécution d'une loi fédérale ou provinciale et chargé notamment de faire observer la présente loi ou toute autre loi fédérale qui se trouve légalement en un endroit en vertu d'un mandat ou pour l'accomplissement de ses fonctions peut, sans mandat, saisir toute chose qu'il croit, pour des motifs raisonnables :

a) avoir été obtenue au moyen d'une infraction à la présente loi ou à toute autre loi fédérale;

b) avoir été employée à la perpétration d'une infraction à la présente loi ou à toute autre loi fédérale;

c) pouvoir servir de preuve touchant la perpétration d'une infraction à la présente loi ou à toute autre loi fédérale.

***Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26, ss 43(1)(a), 43(1.1), 46.1.**

43. (1) Malgré toute autre loi fédérale et sous réserve du paragraphe (1.2), la demande d'autorisation d'appel est présentée par écrit à la Cour, qui, selon le cas :

a) l'accueille, s'il ressort des conclusions écrites qu'elle ne justifie pas la tenue d'une audience et, compte tenu de l'importance de l'affaire pour le public, ou de l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou de sa nature ou de son importance à tout autre égard, qu'elle devrait en être saisie;

43(1.1) Malgré le paragraphe (1), la Cour peut renvoyer une affaire en tout ou en partie à la juridiction inférieure ou à celle de première instance et ordonner les mesures qui lui semblent appropriées.

46.1 La Cour peut renvoyer une affaire en tout ou en partie à la juridiction inférieure ou à celle de première instance et ordonner les mesures qui lui semblent appropriées.