

**SUPREME COURT OF CANADA**

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| **Citation:** Wakeling *v.* United States of America, 2014 SCC 72, [2014] 3 S.C.R. 549 | **Date:** 20141114  **Docket:** 35072 |

Between:

Andrew Gordon Wakeling

Appellant

and

Attorney General of Canada on behalf of the United States of America and

Attorney General of British Columbia

Respondents

**And Between:**

Andrew Wakeling

Appellant

and

Attorney General of Canada on behalf of the Minister of Justice

Respondent

- and -

Attorney General of Ontario, Attorney General of Quebec, Canadian Civil Liberties Association, British Columbia Civil Liberties Association, Information and Privacy Commissioner of Ontario and Privacy Commissioner of Canada

Interveners

**Coram:** McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**  (paras. 1 to 82)  **Concurring Reasons:**  (paras. 83 to 101)  **Dissenting Reasons:**  (paras. 102 to 151) | Moldaver J. (LeBel and Rothstein JJ. concurring)  McLachlin C.J.  Karakatsanis J. (Abella and Cromwell JJ. concurring) |

wakeling *v.* united states of america, 2014 SCC 72, [2014] 3 S.C.R. 549

Andrew Gordon Wakeling Appellant

v.

Attorney General of Canada on behalf of

the United States of America and

Attorney General of British Columbia Respondents

and

Andrew Wakeling Appellant

v.

Attorney General of Canada on behalf of the Minister of Justice Respondent

and

Attorney General of Ontario,

Attorney General of Quebec,

Canadian Civil Liberties Association,

British Columbia Civil Liberties Association,

Information and Privacy Commissioner of Ontario and

Privacy Commissioner of Canada Interveners

**Indexed as: Wakeling *v.* United States of America**

2014 SCC 72

File No.: 35072.

2014: April 22; 2014: November 14.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the court of appeal for british columbia

*Constitutional law — Charter of Rights — Search and seizure — Fundamental justice — Interception of communications — Exemption from offence of disclosing intercepted private communication without consent — Provision of Criminal Code exempting disclosure of lawfully intercepted private communication to person or authority with responsibility in a foreign state for investigation or prosecution of offences if disclosure is intended to be in the interests of the administration of justice in Canada or elsewhere — Whether provision unjustifiably infringes s. 7 or 8 of the Canadian Charter of Rights and Freedoms — Criminal Code, R.S.C. 1985, c. C-46, s. 193(2)(e).*

*Criminal law — Interception of communications — Disclosure of information — Exemption from offence — Whether exemption provision which authorizes sharing of lawfully obtained wiretap information between Canadian and foreign law enforcement agencies is constitutional — Canadian Charter of Rights and Freedoms, ss. 7, 8 — Criminal Code, R.S.C. 1985, c. C-46, s. 193(2)(e).*

The RCMP lawfully intercepted private communications between W and others that revealed a plot to transport drugs into the United States of America. The wiretap information was disclosed to U.S. authorities, who used it to seize a large quantity of ecstasy pills at a border crossing. The U.S. requested W’s extradition. At the extradition hearing, W submitted that legislation authorizing the disclosure violates ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms*, and the intercepted communications should not be admitted as evidence. The extradition judge rejected W’s arguments and issued a committal order. The Court of Appeal dismissed the appeal.

*Held* (Abella, Cromwell and Karakatsanis JJ. dissenting): The appeal should be dismissed.

*Per* LeBel, Rothstein and Moldaver JJ.: The ability to share information between law enforcement agencies facilitates the effective investigation of domestic and multi-jurisdictional crime. Part VI of the *Criminal Code* sets out a comprehensive scheme intended by Parliament to exclusively govern the interception and use of private communications for law enforcement purposes. Therefore, there is no need to consider the constitutionality of s. 8(2)(*f*) of the *Privacy Act*. Section 193(2)(*e*) of the *Criminal Code* is the governing provision in this case. Although not structured as an explicit authorizing provision, it implicitly authorizes cross-border disclosure of lawfully intercepted wiretapinformation. Accordingly, the arguments raised by W properly go to the constitutionality of s. 193(2)(*e*).

Section 8 of the *Charter* is engaged. Although a disclosure is not a search within the meaning of s. 8, s. 8 protects wiretap targets at both the interception and disclosure stages under Part VI of the *Criminal Code*. Wiretap interceptions are highly invasive and pose heightened privacy concerns. There is a residual, albeit diminished, expectation of privacy in wiretap information after it has been lawfully collected. W’s s. 7 arguments need not be addressed. They are subsumed under the s. 8 analysis.

In order for a search to be reasonable under s. 8, it must be authorized by law, the law itself must be reasonable, and the search must be carried out in a reasonable manner. This same framework applies, *mutatis mutandis*, to disclosures made pursuant to s. 193(2)(*e*). Applying this framework to the facts at hand, there is no violation of s. 8. The disclosure in this case was lawfully authorized by s. 193(2)(*e*), and the legislation, taken as a whole, is reasonable. Furthermore, there is no evidence that the manner of disclosure was unreasonable.

With respect to the first step of the s. 8 framework, the disclosure in this case was authorized by law. A disclosure will be authorized by law where it is carried out in accordance with the procedural and substantive requirements the law provides. Section 193(2)(*e*) requires that the recipient must be a person or authority with responsibility in a foreign state for the investigation or prosecution of offences, and the disclosure must be intended to be in the interests of the administration of justice in Canada or elsewhere. The disclosure in this case was provided to U.S. law enforcement authorities for the purpose of foiling a cross-border drug smuggling operation. In making the disclosure, Canadian authorities intended to advance the administration of justice in Canada and the United States.

Turning to the second step, s. 193(2)(*e*) is a reasonable law. First, it is not unconstitutionally overbroad. It limits the type of information that may be disclosed, the purpose for which it may be disclosed, and the persons to whom it may be disclosed. Second, it is not unconstitutionally vague. While “the administration of justice” as used in s. 193(2)(*e*) is a broad concept, it is not one that so lacks in precision as to give insufficient guidance for legal debate. In this context, the phrase “the administration of justice” means that the disclosure must be for a legitimate law enforcement purpose.

Third, s. 193(2)(*e*) is not unconstitutional for lack of accountability or transparency mechanisms. Part VI of the *Criminal Code* contains numerous privacy safeguards. The judicial authorization relating to the initial interception requires privacy interests to be balanced with the interests of law enforcement. The interception of communications is also subject to notice and reporting requirements. Additionally, accountability has been built into the disclosure scheme itself. A disclosure that fails to comply with s. 193(2)(*e*) can lead to criminal charges against the disclosing party or result in the exclusion of improperly disclosed evidence at a subsequent proceeding. This provides a powerful incentive for Canadian authorities to comply with s. 193(2)(*e*). Finally, although not constitutionally mandated in every case, adherence to international protocols and the use of caveats or information-sharing agreements may be relevant in determining whether a disclosure was intended to advance the administration of justice, and therefore was authorized by s. 193(2)(*e*).

As regards the third step of the s. 8 framework, the use of protocols, caveats, or agreements may also be relevant to assessing whether the disclosure was carried out in a reasonable manner. The disclosure in this case was carried out in a reasonable manner. Nothing suggests that the police acted unreasonably. However, in different factual contexts, there may be significant potential dangers posed by the disclosure of intercepted communications to foreign authorities. Where a disclosing party knows or should have known that the information could be used in unfair trials, to facilitate discrimination or political intimidation, or to commit torture or other human rights violations, s. 8 requires that the disclosure, if permissible at all, be carried out in a reasonable manner. In the most serious cases, s. 8 will forbid disclosure. In other cases, information-sharing protocols or caveats may sufficiently mitigate the risks.

*Per* McLachlin C.J.: The only issue on this appeal is whether the disclosure of the intercepted communications violated s. 8 of the *Charter*, and, if so, whether the evidence should have been excluded under s. 24(2). It is not necessary to consider the constitutionality of s. 193(2)(*e*), s. 193(2)(*b*) or the *Privacy Act* to answer that question. W has not shown an infringement of his s. 8 rights. The individual whose communications are lawfully intercepted under a valid and reasonably executed warrant cannot complain that use of the information for law enforcement breaches his right to privacy. This principle is not confined to the use of information in Canada. Sharing the information for purposes of law enforcement does not violate s. 8. Sections 7 and 8 of the *Charter* protect against unreasonable uses of lawfully intercepted information but in this case, where the information was disclosed to U.S. authorities for law enforcement purposes, these residual concerns about unreasonable use do not arise. W’s rights were not violated.

Section 193(2)(*e*)does not change this. It is not an authorizing provision. It does not confer a power on Canadian authorities to share information with foreign counterparts. The provision operates by exempting officers from prosecution where they disclosed intercepted communications under their common law powers. Section 193(1) of the *Criminal Code* makes it an offence to disclose intercepted private communications without consent. Section 193(2)(*e*) is an exemption from that offence. It preserves the common law power of law enforcement authorities to share lawfully obtained information for purposes of law enforcement both domestically and abroad. The exception prevents law enforcement officers from being convicted for using information obtained under warrant for purposes of law enforcement. It is therefore unnecessary to opine on the constitutionality of s. 193(2)(*e*).

*Per* Abella, Cromwell and Karakatsanis JJ. (dissenting): Section 193(2)(*e*) violates s. 8 of the *Charter* in a manner that is not justified under s. 1. It permits disclosure of wiretapped information to foreign officials without safeguards or restrictions on how the information may be used and without accountability measures for this broad state power. Nothing restrains foreign law enforcement officials from using this highly personal information in unfair trials or in ways that violate human rights norms, from publicly disseminating the information, or from sharing it with other states. The torture of Maher Arar in Syria provides a chilling example of the dangers of unconditional information sharing. Section 8 requires that when a law authorizes intrusions on privacy, it must do so in a reasonable manner. A reasonable law must have adequate safeguards to prevent abuse. It must avoid intruding farther than necessary. It must strike an appropriate balance between privacy and other public interests. Section 193(2)(*e*) falls short on all three counts. The permitted disclosure to foreign officials without safeguards renders the Part VI wiretap regime of the *Criminal Code* unconstitutional. The appropriate remedy is to strike the words “or to a person or authority with responsibility in a foreign state” from s. 193(2)(*e*). It is unnecessary to consider the constitutionality of s. 8(2)(*f*) of the *Privacy Act* or arguments with respect to s. 7 of the *Charter*.

Balancing the state’s interest in a search and the public interest in protecting privacy involves asking what level of privacy protection we are entitled to expect. International cooperation and information sharing are essential to law enforcement. Canadian interests are served by appropriate information sharing with other jurisdictions. Timely disclosure will often be critical in the investigation of serious transnational crimes. However, when information is shared across jurisdictional lines, safeguards that apply in domestic investigations lose their force. Section 193(2)(*e*) does nothing to prevent the use of disclosed information in proceedings which fail to respect due process and human rights. The requirement of prior judicial authorization does not provide sufficient protection against inappropriate future use. The failure to require caveats on the use of disclosed information is unreasonable. Caveats or standing agreements would not undermine the objectives of the wiretap scheme. They are commonplace in international law enforcement cooperation and provide some assurance that disclosed information will only be used in accordance with respect for due process and human rights.

For a law to provide reasonable authority for a search or seizure, it must include some mechanism to permit oversight of state use of the power. Accountability mechanisms deter and identify inappropriate intrusions on privacy. None of the safeguards in Part VI apply to disclosure to foreign officials. Improper or hazardous information sharing is unlikely to come to light without record-keeping, reporting or notice obligations. It is for Parliament to decide what measures are most appropriate, but, at a minimum, the disclosing party should be required to create a written record and to make the sharing known to the target or to government.

The infringement of s. 8 of the *Charter* is not justified under s. 1. The objective of international cooperation in law enforcement is pressing and substantial, and disclosure of wiretap information is rationally connected to that objective. However, s. 193(2)(*e*) as it is presently drafted interferes with privacy to a greater extent than necessary. The inclusion of accountability mechanisms and limits on subsequent use would cure the constitutional deficiencies without undermining Parliament’s goals.

**Cases Cited**

By Moldaver J.

**Distinguished:** *R. v.* *Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531; **referred to:** *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *R. v. Duarte*, [1990] 1 S.C.R. 30; *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287; *R. v.* *Caslake*, [1998] 1 S.C.R. 51; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *R. v. Samson* (1982), 37 O.R. (2d) 237; *R. v. Finlay* (1985), 52 O.R. (2d) 632.

By McLachlin C.J.

**Referred to:** *R. v. Colarusso*, [1994] 1 S.C.R. 20; *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287.

By Karakatsanis J. (dissenting)

*R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390; *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *Brown v. The Queen*, 2013 FCA 111, 2013 D.T.C. 5094; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *R. v. Colarusso*, [1994] 1 S.C.R. 20; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Thompson*, [1990] 2 S.C.R. 1111; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *Corbiere* *v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

**Statutes and Regulations Cited**

*Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act*, S.C. 1993, c. 40.

*Canadian Charter of Rights and Freedoms*, ss. 1, 7, 8, 24.

*Criminal Code*, R.S.C. 1985, c. C-46, Part VI, ss. 183, 184.1, 184.2, 184.4, 185, 186, 193, 195, 196, 487.01(5).

*Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, s. 8(1).

*Privacy Act*, R.S.C. 1985, c. P-21, s. 8.

*Response to the Supreme Court of Canada Decision in R. v. Tse Act*, S.C. 2013, c. 8.

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APPEAL from a judgment of the British Columbia Court of Appeal (Low, Groberman and MacKenzie JJ.A.), 2012 BCCA 397, 328 B.C.A.C. 174, 558 W.A.C. 174, 293 C.C.C. (3d) 196, 267 C.R.R. (2d) 279, [2012] B.C.J. No. 2057 (QL), 2012 CarswellBC 3067, affirming a decision of Ross J., 2011 BCSC 165, 268 C.C.C. (3d) 295, 228 C.R.R. (2d) 239, [2011] B.C.J. No. 212 (QL), 2011 CarswellBC 1468. Appeal dismissed, Abella, Cromwell and Karakatsanis JJ. dissenting.

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*Michael A. Feder* and *Emily MacKinnon*, for the intervener the British Columbia Civil Liberties Association.

*David Goodis* and *Stephen McCammon*, for the intervener the Information and Privacy Commissioner of Ontario.

*Mahmud Jamal*, *Patricia Kosseim* and *Jennifer Seligy*, for the intervener the Privacy Commissioner of Canada.

The judgment of LeBel, Rothstein and Moldaver JJ. was delivered by

Moldaver J. —

1. Introduction
2. The ability to share information between law enforcement agencies, including lawfully intercepted wiretap information, facilitates the effective investigation of both domestic and multi-jurisdictional crime. But the effective investigation of crime must proceed in accordance with the rights guaranteed by the *Canadian Charter of Rights and Freedoms*. The main issue in this appeal is whether federal legislation which authorizes the sharing of lawfully obtained wiretap information between Canadian and foreign law enforcement agencies is constitutional — specifically, whether the legislation falls short of the constitutional standards mandated by the *Charter*.
3. Background
4. Andrew Gordon Wakeling was the subject of a Canadian drug investigation. Over the course of the investigation, the RCMP lawfully monitored and recorded communications between Mr. Wakeling and others. These communications revealed a plot to transport drugs across the Canada-U.S. border. Canadian authorities provided this information to U.S. authorities (the “Impugned Disclosure”), who used it to intercept and seize 46,000 ecstasy pills at the International Falls, Minnesota border crossing on April 5, 2006.
5. The U.S. sought Mr. Wakeling’s extradition from Canada for his involvement in the ecstasy shipment. At the extradition hearing, Mr. Wakeling submitted that the legislation authorizing the Impugned Disclosure was unconstitutional. Specifically, he argued that the provisions breach ss. 7 and 8 of the *Charter*, and that the wiretap information provided to U.S. law enforcement authorities should therefore not be admitted as evidence against him.
6. The extradition judge, Ross J., rejected Mr. Wakeling’s arguments and issued a committal order. That order was upheld by the British Columbia Court of Appeal. Before this Court, Mr. Wakeling requests that the committal order be quashed and that a new extradition hearing be held.
7. For the reasons that follow, I would dismiss Mr. Wakeling’s appeal.
8. Statutory Provisions
9. Section 193 of the *Criminal Code*, R.S.C. 1985, c. C-46, states:

**193.** (1) Where a private communication has been intercepted by means of an electro-magnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully

(*a*) uses or discloses the private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or

(*b*) discloses the existence thereof,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication

. . .

(*b*) in the course of or for the purpose of any criminal investigation if the private communication was lawfully intercepted;

. . .

(*e*) where disclosure is made to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences and is intended to be in the interests of the administration of justice in Canada or elsewhere; or

. . .

1. Section 8 of the *Privacy Act*, R.S.C. 1985, c. P-21, states:

**8.** (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

. . .

(*b*) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;

. . .

(*f*) under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, the council of the Westbank First Nation, the council of a participating First Nation — as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act* — , the government of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation;

. . .

1. Finally, ss. 7 and 8 of the *Charter* state:

**7.** 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.

**8.** Everyone has the right to be secure against unreasonable search or seizure.

1. Judicial History
   1. Supreme Court of British Columbia, 2011 BCSC 165, 268 C.C.C. (3d) 295 (Ross J.)
2. At his extradition hearing, Mr. Wakeling restricted his constitutional challenge to s. 193(2)(*e*) of the *Criminal* *Code* and s. 8(2)(*f*) of the *Privacy Act*. He made a variety of broad and sweeping submissions in support of his contention that the impugned provisions do not pass constitutional muster.
3. Mr. Wakeling submitted that transparency, accountability and the rule of law are principles of fundamental justice under s. 7 of the *Charter* and that the provisions in question are unconstitutional because the disclosure they authorize does not comply with these principles (trial judgment, at para. 42). He also argued that both provisions breach s. 7 of the *Charter* because they are vague and overbroad. With respect to s. 193(2)(*e*), he submitted that it “provides virtually unlimited discretion to law enforcement” to disclose wiretap communications and he criticized the subjective nature of the test it employs (*ibid.*, at para. 99). He further submitted that the phrase “the interests of the administration of justice . . . elsewhere” is “incapable of framing legal debate within Canada” and that it does not have a “constant and settled meaning” (*ibid.*). In his view, the effect of these uncertainties is that decision-makers are given “unrestricted latitude . . . to disclose intercepted private communications or the substance of the communications, and to be exempt from the application of the offence provisions of Part VI” (*ibid.*).
4. With respect to s. 8 of the *Charter*, Mr. Wakeling submitted that the Impugned Disclosure re-engaged s. 8 such that a *second* judicial authorization was needed before the disclosure could occur. In this regard, he submitted that his privacy interests at the disclosure stage were the same as those he enjoyed at the interception stage and deserved the same protection (trial judgment, at para. 68). Hence, he argued that a second judicial authorization should be required prior to disclosure, and that the provisions in question are unreasonable because they do not provide for this. He also submitted that the provisions are unreasonable because they do not contain sufficient accountability mechanisms such as a police record-keeping requirement, a requirement to report to Parliament about the disclosures, or an obligation to provide notice of the disclosure to the person whose communications were intercepted. Finally, he took issue with the fact that Canadian authorities have little control over the subsequent use of the disclosed information (para. 116).
5. The extradition judge considered and rejected all of Mr. Wakeling’s arguments. In her view, the constitutionality of s. 8(2)(*f*) of the *Privacy Act* did not need to be considered because s. 193(2)(*e*) of the *Criminal Code* “expressly governs disclosure of private communications intercepted under Part VI of the *Criminal Code* to foreign law enforcement authorities” and “[t]he more general information sharing rules in the *Privacy Act* are subject to the specific provisions of [the *Criminal Code*]” (para. 21).
6. Turning to Mr. Wakeling’s constitutional arguments, the extradition judge concluded that the Impugned Disclosure did not re-engage s. 8 of the *Charter*, as the Impugned Disclosure was “not conduct that interferes with a reasonable expectation of privacy in the circumstances” (para. 75). Thus, the disclosure did not amount to “a search or seizure that engages s. 8 of the *Charter*” (*ibid.*). In the alternative, she reasoned that *if* the Impugned Disclosure engaged s. 8, s. 193(2)(*e*) is a reasonable law.
7. The extradition judge also rejected Mr. Wakeling’s submission that transparency and accountability are principles of fundamental justice that apply to s. 193(2)(*e*). In her view, “[e]ven if these concepts could be characterized as principles of fundamental justice in some contexts, they could not realistically be applied to the manner in which police investigate criminal activity” (para. 48).
8. The extradition judge similarly rejected Mr. Wakeling’s submission that s. 193(2)(*e*) is vague and overbroad, noting that

in making the arguments on vagueness and overbreadth that he does, the applicant demands a level of drafting precision from Parliament that is neither constitutionally mandated, nor realistic. By necessity, the wording of s. 193(2)(e) had to be kept fairly broad to capture the myriad of ways in which a need to disclose “in the interests of the administration of justice” might arise. The law must retain flexibility since laws must of necessity govern a variety of different circumstances and situations. [para. 108]

1. Lastly, the extradition judge rejected Mr. Wakeling’s rule of law argument. Relying on this Court’s decision in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, she found Mr. Wakeling’s submissions to be “circular, since the measures are themselves embodied in the law” (para. 53).
2. Having rejected Mr. Wakeling’s legal arguments, the extradition judge considered the evidence and found that it was sufficient to warrant his committal.
   1. British Columbia Court of Appeal, 2012 BCCA 397, 328 B.C.A.C. 174 (Low, Groberman and MacKenzie JJ.A.)
3. On appeal, Mr. Wakeling reiterated his challenge to the constitutionality of s. 193(2)(*e*) of the *Criminal Code* and s. 8(2)(*f*) of the *Privacy Act*. The B.C. Court of Appeal, *per* Low J.A., agreed with the extradition judge that s. 193(2)(*e*) was the governing provision for the specific disclosure at issue. Hence, the court found it unnecessary to consider the constitutionality of s. 8(2)(*f*) of the *Privacy Act*.
4. In addressing Mr. Wakeling’s s. 8 claim, Low J.A. concluded that the state conduct did not interfere with any reasonable privacy expectation to which Mr. Wakeling could lay claim. The court thus rejected Mr. Wakeling’s s. 8 argument. As the Impugned Disclosure did not re-engage s. 8 of the *Charter*, no second judicial authorization was needed.
5. Low J.A. similarly concluded that Mr. Wakeling’s fundamental justice submissions pertaining to transparency and accountability were without merit:

The impugned provision does not have to be transparent by requiring prior notice and there is no need for a reporting requirement of some sort after the fact. The information gathered by lawful electronic interception becomes law enforcement intelligence. In my opinion, it is no different than information obtained from a police informer or information contained in documents that lawfully come into the hands of the police. If disclosure is in the interests of the administration of justice, there is no need for prior judicial approval or for notice or for reporting. Such requirements would formalize and hamper the inter-jurisdictional investigation of crime and sometimes the prevention of crime. Control of the use of lawfully-gathered police intelligence by foreign authorities is not practical and would be presumptuous. What is practical and necessary for both crime detection and crime prevention is the ability of police officers to lawfully inform their counterparts in other jurisdictions about impending criminal activity, as occurred in the present case, or past criminal activity. [para. 43]

1. Finally, the court rejected Mr. Wakeling’s vagueness and overbreadth arguments, noting that “[t]he administration of justice is a concept that is well understood and needs no clarification or narrowing” (para. 44). In the result, the court dismissed the appeal.
   1. Issues
2. On appeal to this Court, Mr. Wakeling renews his constitutional attack on s. 193(2)(*e*) of the *Criminal Code* and s. 8(2)(*f*) of the *Privacy Act*, relying on the same arguments he made below. He also raises for the first time, with leave of the Court, the constitutionality of s. 193(2)(*b*) of the *Code*. He maintains that all of these provisions infringe his rights under ss. 7 and 8 of the *Charter*, and that the infringements are not justified under s. 1.
3. Analysis
4. I propose initially to explain why this appeal turns on the constitutionality of s. 193(2)(*e*) of the *Criminal* *Code* and not s. 193(2)(*b*) of the *Code* or s. 8(2)(*f*) of the *Privacy Act*. I will then address Mr. Wakeling’s *Charter* arguments as they relate to s. 193(2)(*e*).
   1. The Privacy Act Does Not Apply
5. The Privacy Commissioner of Canada, an intervener, submits that contrary to the lower court decisions, the RCMP must comply with *both* the *Criminal Code* and the *Privacy Act* when disclosing intercepted private communications to a foreign state, as “[n]othing in the *Criminal Code* relieves the RCMP from their duty to comply with the *Privacy Act*” (factum, at para. 13). According to the Privacy Commissioner, s. 193(2)(*e*) of the *Criminal Code* “limits the breadth of the criminal prohibition” set out in s. 193, “[b]ut this exemption neither authorizes a disclosure under the *Privacy Act* nor is itself a source of police power” (para. 14).
6. With respect, I do not agree. The federal *Privacy Act* is a statute of general application. Section 8(2) of the Actsets out the circumstances in which personal information under the control of a government institution may be disclosed. That section explicitly states that it is “[s]ubject to any other Act of Parliament”. Therefore, prior to considering the disclosure contemplated by s. 8(2), it must first be determined whether another Act of Parliament addresses the particular disclosure in issue. In this case, the Impugned Disclosure (involving lawfully intercepted private communications) *is* specifically addressed by another Act of Parliament — the *Criminal Code*.
7. Part VI of the *Criminal Code* represents a comprehensive scheme dealing with the interception of private communications. The individual right to privacy stands in tension with our collective need for effective law enforcement, and the safeguards layered into the wiretap provisions show Parliament’s efforts to “reconcile these competing interests” (*R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 45). As noted by the extradition judge,

Part VI . . . creates a specific regime for the protection of privacy interests in relation to intercepted communications by creating specific offences, setting out procedures for authorized interception of private communications in the investigation of specific crimes, and delineating the circumstances under which intercepted communications may be disclosed. [para. 22]

This level of detail and specificity in Part VI indicates that Parliament intended this framework to be the exclusive regime governing the interception and use of private communications for law enforcement purposes.[[1]](#footnote-1)

1. Section 193(2)(*e*) deals directly with the issue at hand — namely, the cross-border disclosure of wiretapinformation. Admittedly, s. 193(2) is not structured as an explicit authorizing provision. Rather, it takes the form of a series of exemptions to the criminal offence identified in s. 193(1). Nonetheless, I am satisfied that it represents Parliament’s attempt to regulate the disclosure of intercepted communications and specify the circumstances in which such disclosures may lawfully be made. Succinctly put, s. 193(2)(*e*) implicitly authorizes the disclosure of wiretap information in accordance with the conditions prescribed therein.
2. For these reasons, s. 193(2)(*e*) of the *Criminal* *Code*, and not s. 8(2)(*f*) of the *Privacy Act*,is the governing provision in this case. Accordingly, I need not consider the constitutionality of s. 8(2)(*f*).
3. In concluding that s. 193(2)(*e*) is an authorizing provision, I do not quarrel with the Chief Justice that, in general, the police may look to the common law for authority to use the fruits of a lawful search for legitimate law enforcement purposes, including disclosures to foreign law enforcement agencies. However, adopting this analysis in the wiretap context poses a problem. Finding that s. 193(2)(*e*) is *not* an authorizing provision, but merely an exception to a criminal offence, implies that *none* of the subparts of s. 193(2) are authorizing provisions, and that authorization for all of the listed disclosures must come from some other source. This, however, does not accord with the Court’s recent decision in *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287, in which the majority held that the exemptions in s. 193(2) “give a person the right to disclose recordings that otherwise could not be disclosed” (para. 43).[[2]](#footnote-2) Therefore, in my view, s. 193(2)(*e*) is properly read as an authorizing provision.
   1. Section 193(2)(b) Need Not Be Considered
4. As noted, Mr. Wakeling was granted leave to challenge the constitutionality of s. 193(2)(*b*) of the *Criminal Code* before this Court. In contrast to s. 193(2)(*e*), which addresses the *cross-border* disclosure of wiretap communications, s. 193(2)(*b*) authorizes the disclosure of wiretap communications “in the course of or for the purpose of any criminal investigation”.
5. Mr. Wakeling made only cursory mention of s. 193(2)(*b*) in argument. As his complaint is specific to the issue of international, cross-border sharing of wiretap information for criminal law purposes, it is properly considered under s. 193(2)(*e*). For that reason — and the fact that Mr. Wakeling did not press s. 193(2)(*b*) in written or oral argument — I see no need to address its constitutionality.
   1. Does the Impugned Disclosure Violate Section 8 of the Charter?
      1. Is Section 8 Engaged?
6. Section 8 is typically invoked where police perform a search or seizure and thereby infringe upon an individual’s reasonable expectation of privacy. It is quite evident that the interception of wiretap communications constitutes a search. However, the disclosure of previously intercepted communications — which is what s. 193(2)(*e*) implicitly authorizes — is not, in my view, a “search” within the meaning of s. 8. Therefore, as a preliminary matter, it is important to clarify precisely how s. 8 is engaged in the present case. I now turn to that issue.
7. Mr. Wakeling submits that s. 8 is engaged because the disclosure of his intercepted communications pursuant to s. 193(2)(*e*) amounted to a second search, such that a second judicial authorization was necessary prior to the Impugned Disclosure. Absent such authorization, he argues that the police violated his s. 8 rights.
8. With respect, I disagree. As the intervener the British Columbia Civil Liberties Association (“BCCLA”) observes, the plain meaning of “search” does not include the disclosure of information by the state. A disclosure is simply the communication to a third party of previously acquired information.
9. In sum, there was only one search that engaged s. 8 of the *Charter* on the facts of this case — the original lawful interception of Mr. Wakeling’s private communications. For this reason, to invoke s. 8, the appellant must rely on some other analytical approach.
10. The BCCLA frames the s. 8 analysis in a different way. It submits that to the extent s. 193(2)(*e*) permits disclosure of the fruits of a search, it forms “part of the context in which courts must assess the reasonableness of the law authorizing the search” (factum, at para. 3).
11. This submission warrants brief elaboration. According to the BCCLA, s. 193(2)(*e*) is an integral part of a search regime for wiretap interceptions set out in Part VI of the *Criminal Code*. Like all laws authorizing searches, that regime — including any integral part of that regime — must be reasonable in order to comply with s. 8 of the *Charter*. Therefore, if s. 193(2)(*e*) is held to be unreasonable, this would taint the overall regime for s. 8 purposes and render it unconstitutional.
12. While I see some merit in the analytical approach proposed by the BCCLA, my conclusion that s. 8 protects targets at both the interception *and* disclosure stages under Part VI is more a function of the special dangers associated with wiretaps. Parliament has recognized that wiretaps pose heightened privacy concerns beyond those inherent in other searches and seizures. Justice Karakatsanis describes (at para. 116) the serious privacy implications of electronic surveillance, citing this Court’s caution that “one can scarcely imagine a state activity more dangerous to individual privacy” (*Duarte*, at p. 43). Given these implications, the protections that Parliament has seen fit to fold into the wiretap regime include s. 193 which provides that, other than for one of the delineated purposes, the disclosure of wiretap information is not only unauthorized, it is criminal.
13. The highly intrusive nature of electronic surveillance and the statutory limits on the disclosure of its fruits suggest a heightened reasonable expectation of privacy in the wiretap context. Once a lawful interception has taken place and the intercepted communications are in the possession of law enforcement, that expectation is diminished but not extinguished. This heightened and continuing expectation of privacy in the wiretap context is further indication that s. 8 ought to apply to disclosures under Part VI.
14. In sum, while I acknowledge the Chief Justice’s concern that s. 193(2)(*e*) does not engage s. 8 simply by virtue of its integral place in the search regime of Part VI, that is not the *sole* reason — or indeed the main one — why I conclude that s. 8 is engaged in this context. As I have emphasized, Parliament has recognized that wiretap interceptions are an exceptional and invasive form of search, and it is therefore perfectly appropriate, in my view, that s. 8 protections should extend to wiretap disclosures by law enforcement. Furthermore, there is a residual and continuing expectation of privacy in wiretap information that persists *even after it has been lawfully collected*. Indeed, the Chief Justice agrees that “residual privacy interests” remain at the time of disclosure and that s. 8 protects against unreasonable uses of the information by law enforcement (para. 95). I am therefore satisfied that s. 8 is properly engaged.
    * 1. The Analytical Framework Under Section 8 of the *Charter*
15. In order for a search to be reasonable under s. 8 of the *Charter*, “[it] must be authorized by law, the law itself must be reasonable, and the search must be carried out in a reasonable manner” (*R. v.* *Caslake*, [1998] 1 S.C.R. 51, at para. 10; see also *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278). I reiterate that a disclosure is not, standing alone, a “search” within the meaning of the *Charter*. However, for the reasons outlined above, s. 8 is engaged. Therefore, in my view, the s. 8 framework applies, *mutatis mutandis*, to disclosures made by law enforcement pursuant to s. 193(2)(*e*) of the *Criminal Code*.
16. Following the approach outlined above, I will address each step of the s. 8 framework independently: (1) whether the Impugned Disclosure was authorized by law; (2) whether the law authorizing the Impugned Disclosure is reasonable; and (3) whether the Impugned Disclosure was carried out in a reasonable manner.
    * 1. Was the Impugned Disclosure Authorized by Law?
17. For ease of reference, I repeat s. 193(2)(*e*):

(2) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication

. . .

(*e*) where disclosure is made to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences and is intended to be in the interests of the administration of justice in Canada or elsewhere . . .

1. A disclosure will be authorized by law where it is “carried out in accordance with the procedural and substantive requirements the law provides” (*Caslake*, at para. 12). Section 193(2)(*e*) imposes two essential requirements. First, with respect to cross-border disclosures, the recipient must be “a person or authority with responsibility in a foreign state for the investigation or prosecution of offences”. Second, the disclosure must be “intended to be in the interests of the administration of justice in Canada or elsewhere”.
2. Under the second requirement, the relevant intention is that of the disclosing party. For the disclosure to be authorized by law, that party must subjectively believe that the disclosure will advance the interests of the administration of justice in Canada and/or the foreign state. The belief must be honestly and genuinely held. The credibility of the disclosing party’s expressed intent can be tested against objective facts.
3. The disclosure in this case was authorized by law. No one contends otherwise. The intercepted communications were provided to U.S. authorities for the purpose of foiling a cross-border drug smuggling operation. When Canadian authorities shared information about the operation with their American counterparts, they intended to advance the administration of justice in Canada and the United States. The requirements under s. 193(2)(*e*) were therefore satisfied.
   * 1. Is Section 193(2)(*e*) a Reasonable Law?
4. The parties’ submissions focus on the second step of the s. 8 framework, that is the reasonableness of s. 193(2)(*e*). They argue, and Justice Karakatsanis agrees, that this provision is constitutionally deficient. I do not share that view. As I will explain, s. 193(2)(*e*) is a reasonable law.
   * + 1. Overview of the Parties’ Charter Challenges
5. Mr. Wakeling and the BCCLA raise a host of *Charter* arguments challenging the constitutionality of s. 193(2)(*e*). For the sake of clarity, these arguments can be broken down into three distinct (though somewhat overlapping) categories: (1) s. 193(2)(*e*) is unconstitutionally overbroad; (2) s. 193(2)(*e*) is unconstitutionally vague; and (3) s. 193(2)(*e*) is unconstitutional because it lacks accountability mechanisms. Viewed individually and collectively, these arguments challenge the reasonableness of the law authorizing the Impugned Disclosure. As such, they are properly considered under the second step of the s. 8 framework.
   * + - 1. Overbreadth
6. The BCCLA’s main line of attack on s. 193(2)(*e*) is that it creates an almost “limitless” scope for disclosure of private intercepted communications. In failing to place reasonable, or indeed any limits on disclosure, the provision effectively grants police untrammeled discretion and is ripe for abuse by both domestic and foreign authorities. This argument strikes me as very similar to Mr. Wakeling’s submission that s. 193(2)(*e*) is unconstitutionally overbroad and thus contravenes the principles of fundamental justice in violation of s. 7 of the *Charter*. I am of the view that both of these arguments can be dealt with together under the reasonableness framework of s. 8. To put it simply, a law that suffers from overbreadth will necessarily be unreasonable.
   * + - 1. Vagueness
7. Mr. Wakeling argues that the language of s. 193(2)(*e*) is so vague as to be unworkable. He makes this argument under s. 7 of the *Charter*, asserting that the phrase “in the interests of the administration of justice” does not have a constant and settled meaning. Like the argument on overbreadth, I believe that this argument can be disposed of under s. 8. A provision that is unconstitutionally vague will necessarily be unreasonable.
   * + - 1. Accountability Mechanisms
8. Mr. Wakeling and the BCCLA submit that s. 193(2)(*e*) is unconstitutional since it is devoid of mechanisms to hold authorities accountable for their disclosures of intercepted communications. In particular, they are concerned that the provision lacks sufficient safeguards, including judicial pre-authorization, notice and record-keeping requirements, Parliamentary reporting, as well as international protocols and caveats limiting the use of disclosed information.
9. Mr. Wakeling’s accountability argument goes somewhat further than that of the BCCLA. He claims that accountability — and the related value of transparency — are principles of fundamental justice under s. 7. I find it unnecessary to finally decide that issue. The accountability concerns identified by Mr. Wakeling and the BCCLA are best dealt with under s. 8. As this Court’s decision in *R. v.* *Tse*,2012 SCC 16, [2012] 1 S.C.R. 531, notes, accountability forms part of the reasonableness analysis under s. 8.
10. Having outlined the three categories of objections to s. 193(2)(*e*), I will now address each of them in greater depth.
    * + 1. Is the Scope of Disclosure Authorized by Section 193(2)(e) Unconstitutionally Overbroad?
11. Both Mr. Wakeling and the BCCLA take issue with the extent of disclosure that s. 193(2)(*e*) authorizes for substantially similar reasons. Both submit that s. 193(2)(*e*) permits “near-limitless disclosure of private communications intercepted by wiretap” (BCCLA factum, at para. 3; see also A.F., at paras. 129-30).
12. With respect, I believe that Mr. Wakeling and the BCCLA overstate the nature and extent of the disclosure contemplated by s. 193(2)(*e*). A law may be broad without suffering from overbreadth. While the provision authorizes a wide scope of disclosure, it does not permit “near-limitless” disclosure of lawfully intercepted communications. On the contrary, it limits the type of information that may be disclosed, the purpose for which it may be disclosed, and the persons to whom it may be disclosed.
13. Second, the BCCLA notes that the provision allows disclosure where it is intended to be “in the interests of the administration of justice in Canada or elsewhere” and submits that the use of the word “or” means that disclosure could be in the *sole* interests ofthe foreign state, and not Canada’s. According to the BCCLA, “it is never reasonable to disclose an intercepted private communication to a foreign state when to do so is only in the foreign state’s interests and not Canada’s” (factum, at para. 33).
14. With respect, I reject this line of thinking. Multi-jurisdictional cooperation between law enforcement authorities furthers the administration of justice in *all* of the jurisdictions involved. It must not be forgotten that Canada is often on the *receiving* end of valuable information from foreign law enforcement authorities. The language of s. 193(2)(*e*) appropriately captures the reciprocity inherent in this practice.
15. Third, the BCCLA submits that “on its face, s. 193(2)(*e*) permits disclosure even to support torture, or to prosecute an offence in a foreign state that violates Canadian constitutional norms or international law, provided only that *someone* intends that disclosure to be in the interests of the administration of justice *somewhere*” (factum, at para. 10 (emphasis in original)). It also contends that s. 193(2)(*e*) “opens the door to disclosures to foreign states that are motivated by Canadian authorities’ political, financial, personal, or other interests, as long as the *foreign state*’s intention relates to the interests of *its* administration of justice” (*ibid.*, at para. 13 (emphasis in original)).
16. Once again, I disagree. Under s. 193(2)(*e*), it is the *disclosing party*’s intention that matters. The provision requires that the disclosing party must subjectively believe that disclosure will further the interests of justice in Canada and/or the foreign state. The belief must be an honest one, genuinely held. If the disclosing party’s subjective belief is challenged, the reviewing judge may look at objective indicators in deciding whether the disclosing party is to be believed. Measuring the stated belief against objective facts is an accepted way of separating beliefs that are honestly and genuinely held from those that are not.
17. A disclosing party who knows little or nothing about the justice system in the foreign state or who does not know how or for what purpose the foreign state intends to use the information will have a hard time satisfying a court that he or she genuinely believed that disclosure would further the interests of the administration of justice. The same holds true for a disclosing party who knows or has reason to believe that the information will be used to commit torture or other human rights violations, or for someone who has sent the information for personal or partisan reasons. That a disclosing party may have his or her credibility tested against objective indicators incentivizes that person to proceed cautiously when disclosing information to a foreign state. Given these limitations inherent in s. 193(2)(*e*), I am not persuaded that the provision grants police a “limitless” power to disclose.
    * + 1. Is Section 193(2)(e) Unconstitutionally Vague?
18. I will now address Mr. Wakeling’s objection that s. 193(2)(*e*) is unconstitutionally vague. He contends that the phrase “where disclosure . . . is intended to be in the interests of the administration of justice in Canada or elsewhere” is “unworkable” because “the decision maker would be required to have a full appreciation and understanding of the laws of the country which will receive the disclosure” (A.F., at para. 126). He also argues that “the administration of justice” does not have a constant and settled meaning (para. 129).
19. Like the extradition judge and the Court of Appeal, I would not give effect to these submissions. This Court in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, stated that “a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate” (p. 643). Section 193(2)(*e*) does not offend in this regard. It sets out *who* must intend that the disclosure be in the interests of the administration of justice (the person disclosing the information) and *to whom* the information may be disclosed (to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences). Moreover, while “the administration of justice” is a broad concept, it is not one that so lacks in precision as to give insufficient guidance for legal debate. As Borins Co. Ct. J. in *R. v. Samson* (1982), 37 O.R. (2d) 237, explained:

. . . “administration of justice”, with particular reference to the criminal law, is a compendious term that stands for all the complexes of activity that operate to bring the substantive law of crime to bear, or to keep it from coming to bear, on persons who are suspected of having committed crimes. It refers to the rules of law that govern the detection, investigation, apprehension, interviewing and trial of persons suspected of crime and those persons whose responsibility it is to work within these rules. The administration of justice is not confined to the courts; it encompasses officers of the law and others whose duties are necessary to ensure that the courts function effectively. The concern of the administration of justice is the fair, just and impartial upholding of rights, and punishment of wrongs, according to the rule of law. [pp. 246-47]

In the context of s. 193(2)(*e*), the phrase “the administration of justice” means that disclosure must be for a legitimate law enforcement purpose, such as the prevention of cross-border drug trafficking. It is not unconstitutionally vague.

* + - 1. Is Section 193(2)(e) Unconstitutional for Lack of Accountability Mechanisms?

1. Mr. Wakeling and the BCCLA also make a variety of submissions pertaining to accountability and the related value of transparency. They take issue with the fact that s. 193(2)(*e*) contains no record-keeping requirement, nor any requirement that would “attempt to constrain the foreign state’s use and dissemination of the communications” (BCCLA factum, at para. 2). The essence of these arguments is that s. 193(2)(*e*) inadequately protects the privacy interests at stake and that, absent procedural requirements such as notice to the target of the disclosure, protocols or international agreements, police record keeping, and Parliamentary reporting, s. 193(2)(*e*) is unconstitutional.
2. In making these arguments, Mr. Wakeling and the BCCLA rely on *Tse*, where the constitutionality of s. 184.4 of the *Criminal Code* was in issue. That provision permitted peace officers to intercept certain private communications without judicial authorization if an officer believed, on reasonable grounds, that the interception was immediately necessary to prevent an unlawful act that would cause serious harm. In striking it down, this Court held that “s. 184.4 falls down on the matter of accountability because the legislative scheme does not provide any mechanism to permit oversight of the police use of this power” (para. 11 (emphasis added)).
3. In my opinion, *Tse* is distinguishable from the present case. First, the statutory scheme at issue in *Tse* contained *no* accountability measures. As I will explain, that is not the case with s. 193(2)(*e*).
4. Second, the impugned provision in *Tse* involved *warrantless* searches and seizures. Accountability measures, including after-the-fact notice and reporting requirements, are of particular importance in that context. The emergency wiretap provision, by its very nature, allows the police to conduct a warrantless search in exigent circumstances. No balancing of interests before a judge occurs. In contrast, Mr. Wakeling’s private communications were intercepted pursuant to a judicial authorization. Issuing the authorization required the judge to balance Mr. Wakeling’s privacy interests with the interests of law enforcement. A variety of procedural safeguards were adhered to. Unlike an emergency wiretap situation, Mr. Wakeling’s privacy interests were afforded significant protection at the interception stage.
5. Section 193(2)(*e*) must be considered in context. In my view, it is inappropriate “to seize upon individual sections of [the wiretap scheme] and to see if those sections, viewed in isolation, contravene the provisions of the *Charter*” (*R. v. Finlay* (1985), 52 O.R. (2d) 632 (C.A.), at p. 653). Rather, the proper approach is to consider the “provisions and the safeguards contained therein in their entirety” (*ibid.*). Section 193(2)(*e*) is part of a unique statutory scheme that contains numerous privacy safeguards, including notice and reporting requirements. Pursuant to s. 196(1) of the *Criminal Code*, an individual who has been wiretapped must be provided with written notification within three months of the time the authorization was given or renewed, subject to judicially authorized extensions. These extensions may be authorized, for instance, where providing notice to the suspect would derail an ongoing police investigation.
6. While Parliament could perhaps, as a matter of policy, require a *second* notice relating specifically to a s. 193(2)(*e*) disclosure, there are inherent difficulties with such a requirement. In order to decide whether to apply for an extension of time in providing notice of disclosure, Canadian authorities would have to keep abreast of all foreign investigations involving the disclosed information. Without such knowledge, it would be impossible for them to know whether providing notice of the disclosure to the suspect would derail or otherwise compromise a foreign investigation.
7. To require Canadian authorities to stay on top of all foreign investigations that involve the disclosed information is surely unreasonable. It would be highly burdensome, if not entirely impractical. In my view, the absence of a requirement to provide a second notice does not render the wiretap regime unconstitutional.
8. As noted, the existing notice requirements contained in Part VI of the *Criminal Code* ensure that all individuals who have been wiretapped are provided with notice of this fact. Once notified, individuals may wish to know whether their intercepted communications have been disclosed to a foreign authority. An individual may make a request pursuant to the applicable access to information statute in an effort to obtain this information. Justice Karakatsanis correctly notes that such efforts may not always be successful, depending on the details of the applicable access to information regime and the individual’s circumstances. I express no view on whether a guaranteed right of access to this information would be advisable — only that it is not constitutionally required.
9. As for Parliamentary reporting, the Minister of Public Safety and Emergency Preparedness must prepare an annual report to Parliament on the use of electronic surveillance pursuant to s. 195 of the *Criminal Code*. Once again, Parliament could require that disclosures made under s. 193(2)(*e*) be included in an annual report. But that is a policy decision, and it is important that this Court separate policy matters from constitutional imperatives — especially in this context where international relations are involved. As this Court stated in *Tse*, a reporting requirement to Parliament is not a constitutional imperative (para. 89).
10. Contrary to the submissions of Mr. Wakeling and the BCCLA, s. 193(2)(*e*) is not devoid of accountability measures. Rather, accountability has been built into the scheme for the disclosure of wiretap communications. Section 193(1) provides a powerful incentive for Canadian authorities to comply with the dictates of s. 193(2)(*e*). The failure to do so can lead to criminal charges against the disclosing party or result in the exclusion of the improperly disclosed evidence at a subsequent proceeding in Canada. The possibility of criminal sanction or the loss of important evidence creates an incentive to maintain records about what information was disclosed, to whom, and for what purpose. Indeed, according to the evidence of the Deputy Commissioner of Canada West, Gary David Bass, who testified with respect to certain RCMP practices and procedures, the RCMP have a number of internal record-keeping policies that apply to the cross-border sharing of information.
11. While police record keeping is not, in my view, constitutionally required for disclosures made under s. 193(2)(*e*), I should not be taken as discouraging the practice. Likewise, these reasons are not intended to discourage Parliament from instituting reporting requirements or establishing international agreements between Canada and foreign states to address cross-border disclosure of wiretap communications. The record at hand indicates that many agreements are in place between law enforcement agencies. The record also shows that information is often disclosed with caveats as to its subsequent use.
12. Although not constitutionally mandated, adherence to international protocols and the use of caveats or information-sharing agreements may be highly relevant in determining whether a given disclosure was authorized by law under s. 193(2)(*e*). These objective indicators may assist a court in assessing whether disclosure was genuinely intended to advance the interests of the administration of justice. Moreover, as I discuss below in reference to the third step of the s. 8 framework, they will also impact on whether the manner of disclosure is found to be reasonable.
13. In considering the possible accountability and transparency mechanisms that Parliament could enact, certain realities cannot be ignored. Even where the information is disclosed to a foreign state with a legal system much like our own, once the information is in the hands of the foreign state, its use will, for the most part, be beyond our purview. Such is a defining feature of state sovereignty. Caveats on disclosure and information-sharing protocols may be desirable, and they may be relevant to evaluating whether a disclosure is intended to be in the interest of the administration of justice (as required at the first step of the s. 8 analysis) or is carried out reasonably (as required at the third step). However, they are not constitutionally required in every case, nor would they be a panacea if they were — certainly not standard-form agreements or caveats accompanying every disclosure, as Justice Karakatsanis’s proposal would likely generate. There is *always* a risk that a foreign law enforcement agency may misuse the information disclosed to it under s. 193(2)(*e*). This risk can never be entirely eliminated, regardless of the nature and extent of the procedural safeguards in place in Canada, and it must not be allowed to undermine the vital interests served by the detection and prosecution of multi-jurisdictional crime. In this regard, I re-emphasize that Canada is frequently on the *receiving* end of such disclosures — and Canadians are safer for it.
14. I do not gainsay the possibility that a foreign law enforcement agency could misuse the information provided to it by Canadian authorities. In such cases, there are certain avenues Canada may pursue where the subsequent use of information disclosed to a foreign state offends our own notions of justice. For example, where the disclosed information is being used to seek the extradition of an individual who faces a realistic prospect of torture or other human rights violations in a foreign country, Canada can refuse the extradition request to avoid a manifest violation of the *Charter*. Likewise, if the information in question is found to have been unlawfully obtained, its use in an extradition proceeding — or in any other legal venue — could be challenged. In other contexts, Canada could exert pressure through diplomatic channels. There are various ways that Canada pursues its objectives on the international stage — founded on the principles of comity and state sovereignty — which may have application in a particular case.
15. It bears emphasizing that this Court’s task is not to determine whether there may be better or additional accountability measures or stricter language that could be put in place with respect to the cross-border disclosure of wiretap communications. Any attempt to micromanage Parliament in this context must be approached with great care. The task at hand is to determine whether s. 193(2)(*e*) passes constitutional muster. As discussed, there are a number of accountability measures contained within Part VI and within s. 193(2)(*e*) itself, and the scope of the disclosure contemplated by s. 193(2)(*e*) is, in my view, entirely reasonable. For these reasons, I conclude that the impugned legislation does not fall short of the constitutional standards mandated by s. 8 of the *Charter*.
    * 1. Was the Impugned Disclosure Carried Out in a Reasonable Manner?
16. Having determined that s. 193(2)(*e*) is a reasonable law and that it was complied with in this case, the remaining inquiry is whether the *manner* of the Impugned Disclosure was unreasonable, and therefore violates s. 8 of the *Charter*. Nothing in the record suggests that the police acted unreasonably in disclosing Mr. Wakeling’s intercepted communications to U.S. authorities. Neither the Chief Justice nor Justice Karakatsanis suggest otherwise. Common sense would suggest that similarly unremarkable and entirely reasonable instances of law enforcement cooperation to combat cross-border criminal activity occur on a daily basis between Canadian and U.S. authorities. Saddling police with the obligation of imposing boilerplate caveats on even the most routine disclosures poses an unnecessary burden. It would do little to safeguard the interests protected by s. 8 while impeding legitimate law enforcement operations.
17. Nothing further is needed to dispose of the instant case. However, in different factual contexts, there may be significant potential dangers posed by the disclosure of intercepted communications to foreign authorities. Given these dangers, a broader discussion of the third step of the s. 8 framework is warranted.
18. Where a disclosing party knows or should have known that the information could be used in unfair trials, to facilitate discrimination or political intimidation, or to commit torture or other human rights violations — concerns rightly expressed by Justice Karakatsanis — s. 8 requires that the disclosure, if permissible at all, be carried out in a reasonable manner. In the most serious examples, where there are no steps that could be taken to mitigate the danger, s. 8 forbids disclosure entirely. I should emphasize that this inquiry as to the manner of disclosure is distinct from whether disclosure would be authorized by law pursuant to s. 193(2)(*e*) — although, as a practical matter, the two inquiries may overlap. For example, where the risks are so great that there is *no* manner of disclosure that would be objectively reasonable, a disclosing party would find it difficult to prove that he or she believed that the disclosure was “in the interests of the administration of justice” under any plausible meaning of that term.
19. In other cases, a disclosure could be reasonably carried out where the use of information-sharing protocols or the imposition of caveats would sufficiently mitigate the risks. An example may be useful to illustrate this point. Suppose that Canadian authorities know or ought to know that a foreign government, to which they are contemplating a disclosure, may pass on the information to a third country that could exploit it to harm a Canadian citizen. In that context, the failure to include a caveat limiting subsequent use of the disclosed information, even where the disclosing party intended to further the administration of justice, might render the disclosure unreasonable under s. 8. In such cases, therefore, the existence of appropriate safeguards will play a crucial role in determining the constitutionality of a challenged disclosure. It is by mandating appropriate safeguards on a case-by-case basis, rather than inflexibly requiring them in all situations, that a proper balance is struck between protecting against unreasonable disclosures of private communications and facilitating the effective investigation of domestic and multi-jurisdictional crime.
20. Conclusion
21. Inter-agency cooperation is critical to the prevention, detection, and punishment of cross-border crime. Recognizing this, Parliament has authorized the cross-border sharing of wiretap communications under s. 193(2)(*e*) of the *Criminal Code*. The disclosure in this case was lawfully authorized by that provision, and the legislation, taken as a whole, does not violate s. 8 of the *Charter*. Furthermore, there is no evidence that the manner of disclosure was unreasonable. Accordingly, I would dismiss the appeal.

The following are the reasons delivered by

1. The Chief Justice — I have read the reasons of my colleagues Moldaver J. and Karakatsanis J., who come to different conclusions about the constitutionality of s. 193(2)(*e*) of the *Criminal Code*, R.S.C. 1985, c. C-46,and the measures that should be in place to govern sharing information obtained under warrant with law enforcement agencies in other countries.
2. I approach the matter differently. In my view, the question on this appeal is whether Mr. Wakeling’s rights under s. 8 of the *Canadian Charter of Rights and Freedoms* were violated. The constitutionality of s. 193(2)(*e*) becomes an issue only if Mr. Wakeling can show that s. 193(2)(*e*) infringed his s. 8 rights. In my view, he has not shown this. Accordingly, I would dismiss the appeal.
3. Background
4. Moldaver J. has set out the facts and judicial history of the case. Briefly put, Mr. Wakeling was the subject of a Canadian drug investigation. In the course of the investigation, the RCMP obtained a warrant to monitor communications between Mr. Wakeling and others. The communications revealed a plot to transport drugs across the Canada-U.S. border. The RCMP shared information obtained from the communications with U.S. authorities, who used it to intercept and seize 46,000 ecstasy pills at the International Falls, Minnesota border crossing.
5. The U.S. sought Mr. Wakeling’s extradition from Canada to face charges arising from the seizure of the ecstasy pills. At the hearing, Mr. Wakeling argued that the RCMP’s disclosure of the information obtained from the intercepted communications violated his rights under s. 8 of the *Charter* and that the evidence should not be admitted against him.
6. The extradition judge held that there was no violation of Mr. Wakeling’s s. 8 rights, admitted the evidence, and issued a committal order for extradition. The British Columbia Court of Appeal dismissed Mr. Wakeling’s appeal.
7. The Issue
8. The main — and in my view the only — issue on this appeal is whether the RCMP’s disclosure of the intercepted communications to U.S. authorities violated Mr. Wakeling’s s. 8 rights and, if so, whether the evidence should have been excluded under s. 24(2) of the *Charter*.
9. In my view, it is not necessary to consider the constitutionality of s. 193(2)(*e*) of the *Criminal Code* to answer that question. I agree with my colleagues that it is unnecessary to consider the *Privacy Act*, R.S.C. 1985, c. P-21, or s. 193(2)(*b*) of the *Criminal Code*.
10. Analysis
11. Section 8 of the *Charter* protects individuals against unreasonable search and seizure. It provides:

Everyone has the right to be secure against unreasonable search or seizure.

1. Section 8 protects the individual’s privacy interest against unreasonable state intrusion. Here, Mr. Wakeling has a reasonable expectation of privacy in his communications with others. In order to obtain private information by intercepting communications, the state must obtain a judicial warrant, which requires the state to demonstrate that there are reasonable grounds to believe the interception will show evidence of a crime. (Circumstances where the state can intercept *without* a warrant are not relevant here, e.g., s. 184.4 of the *Criminal Code*.) Where such grounds exist, the individual’s privacy interest in the intercepted communication gives way to the state’s interest in law enforcement.
2. The warrant allows the police to obtain the information and to use it for purposes of law enforcement. The individual whose communications are lawfully intercepted under a valid warrant cannot complain that this unreasonably breaches his privacy. To put it metaphorically, a valid warrant sanitizes the state intrusion on privacy, as long as the execution of the warrant is reasonable and the information is used for purposes of law enforcement.
3. It has never been suggested that this principle is confined to the use of information in Canada. The reality is that crime does not stop at national borders, and police routinely share information that they have lawfully obtained under warrant with their counterparts in other countries. Provided information is shared for purposes of law enforcement, the individual cannot complain that the sharing violates his s. 8 right to privacy.
4. This Court has found that s. 8 is violated in cases where the information was seized in a context *outside* law enforcement and then passed along for the purpose of law enforcement: *R. v. Colarusso*, [1994] 1 S.C.R. 20; *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227; and *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34. In those cases, the “sanitizing” effect of the warrant (or similar authorization process) was absent; the individual’s privacy interest had not been balanced against the state’s interest in law enforcement through judicial pre-authorization. Where, as here, that process has taken place, disclosure for law enforcement purposes does not violate s. 8.
5. Once information is obtained under warrant, s. 8 protects against unreasonable uses of that information. For example, information obtained under warrant cannot be used for rendition to a foreign country (the Maher Arar case discussed by Karakatsanis J.) or public titillation. Section 7 of the *Charter* may also be engaged where disclosure gives rise to a concern that the recipient country will use the information to kill, torture or mistreat the target. These concerns do not arise on the facts of this case. Where these residual privacy interests are infringed, remedies may include prosecution of the disclosing officer under s. 193(1) of the *Criminal Code* and remedies under s. 24(1) of the *Charter*.
6. It follows that sharing information obtained under warrant for law enforcement purposes with foreign law officers does not violate s. 8, absent the residual concerns just discussed. Here, the information was disclosed to the U.S. authorities for law enforcement purposes, and none of the residual concerns arise. It follows that Mr. Wakeling’s rights were not violated, and his appeal must fail.
7. The question is whether s. 193(2)(*e*) of the *Criminal* *Code* changes this. I do not think it does. As I state in *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287, at para. 89, I am of the view that s. 193(2) is not an authorizing provision. Section 193(2)(*e*) does not confer a power on Canadian authorities to share information obtained under warrant with foreign counterparts. Rather, it operates by exempting officers from prosecution where they disclose intercepted private communications under their common law powers. Section 193(1), the offence provision, is intended to guard against the disclosure of intercepted private communications by making it an offence to do so without the consent of the individual concerned. Section 193(2) then lists a number of exemptions from what otherwise would be an offence by virtue of s. 193(1). The exception in s. 193(2)(*e*) demonstrates that the common law power to use information obtained under warrant for law enforcement purposes is one of the categories of disclosure protected from liability as an offence under s. 193(1). I agree with my colleague Moldaver J. when he says that “the administration of justice” in s. 193(2)(*e*) refers only to use for legitimate law enforcement purposes. The provision therefore preserves the common law power of law enforcement authorities to share lawfully obtained information for purposes of law enforcement both domestically and abroad. In a nutshell, the exception prevents law enforcement officers from being convicted for doing their job — using information obtained under warrant for purposes of law enforcement.
8. It is therefore unnecessary to opine on the constitutionality of s. 193(2)(*e*) of the *Criminal Code*. To do so invites speculation, as the eloquent reasons of my colleagues demonstrate: one says the current legislative scheme provision is unconstitutional, the other says it is eminently reasonable. We should not send Parliament back to the legislative drawing board on the basis of hypothetical speculation, where it is not established that the law infringes anyone’s s. 8 rights.
9. For the same reasons, I find it unnecessary to consider the constitutionality of the *Privacy Act*. Assuming without deciding that the *Privacy Act* applies, it permits the disclosure of personal information for the purposes of law enforcement. It is specifically permitted under s. 8(2)(*f*)[[3]](#footnote-3) and more generally as a use consistent with the purpose for which the information was obtained under s. 8(2)(*a*).[[4]](#footnote-4) As discussed, this alone does not violate ss. 7 or 8.
10. Much is made of the need — or the absence of need — for measures to address the risk that information shared with law enforcement agencies in other countries will be abused. Mr. Wakeling and supporting interveners argue that the exclusion in s. 193(2)(*e*) from the offence for improper disclosure is too broad to provide adequate protection. The Crown and supporting Attorneys General, on the other hand, emphasize the risks associated with bureaucratic restrictions on the international sharing of information and argue that it would be unrealistic and unworkable in today’s interconnected world. These are difficult questions more redolent of policy than of law. Parliament has considered them and answered with the offence provisions and exemptions of s. 193. In the absence of a demonstrated breach of s. 8 rights flowing from those provisions, Parliament’s choice must be allowed to stand, in my respectful opinion.
11. Conclusion
12. I would dismiss the appeal and confirm the order for committal of Mr. Wakeling.

The reasons of Abella, Cromwell and Karakatsanis JJ. were delivered by

1. Karakatsanis J. (dissenting) — Does the legislation permitting Canadian law enforcement agencies to disclose wiretapped information to foreign law enforcement officials violate s. 8 of the *Canadian Charter of Rights and Freedoms*? I conclude that it does.
2. When police intercept an individual’s private communications without consent, the information they obtain is of an extremely private and personal nature. Officers must obtain prior judicial authorization before conducting these intrusive searches, except in exigent circumstances: *Criminal Code*, R.S.C. 1985, c. C-46, ss. 184.2, 185, 186 and 487.01(5); *R. v. Duarte*, [1990] 1 S.C.R. 30. Once the information is obtained, there are strict limits on how officers can use the information and to which Canadian officials it may be disclosed.
3. By contrast, s. 193(2)(*e*) of the *Criminal Code* permits Canadian law enforcement officers to disclose wiretapped information to foreign law enforcement officials without any restrictions on how the information may be used and without any measures to permit oversight of when and how this broad state power is used. Nothing in the provision restrains recipients from using the information outside Canada in unfair trials or in ways that violate human rights norms. Similarly, recipient officials are not prevented from publicly disseminating the information or sharing it with officials in other states, many of which do not share our legal and democratic values. The torture of Maher Arar in Syria provides a particularly chilling example of the dangers of unconditional information sharing.
4. I would hold that the wiretap scheme set out in Part VI of the *Criminal Code* violates the *Charter* “right to be secure against unreasonable search or seizure” because s. 193(2)(*e*) permits the sharing of intercepted information with foreign officials without meaningful safeguards. To render the scheme constitutional, Parliament must require the disclosing party to impose conditions on how foreign officials can use the information they receive, and must implement accountability measures to deter inappropriate disclosure and permit oversight.
5. The Legislation
6. Part VI of the *Criminal Code* is the legislative scheme that governs wiretap interceptions and the use of intercepted information. In recognition of the profound invasion of privacy associated with the interception of private communications, Part VI imposes strict preconditions on such interceptions. With narrow exceptions for exigent circumstances (ss. 184.1 and 184.4), law enforcement officers may generally only use wiretaps in the course of investigating enumerated crimes (s. 183), must obtain prior judicial authorization (ss. 184(2)(*b*) and 184.2), and must comply with notice and reporting requirements (ss. 195 and 196). A number of the safeguards contained in Part VI have been added to ensure the constitutionality of this wiretapping regime: *An Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act*, S.C. 1993, c. 40; *Response to the Supreme Court of Canada Decision in R. v. Tse Act*, S.C. 2013, c. 8.
7. While the basic scheme of Part VI has been found to strike the balance between privacy and law enforcement interests required under s. 8 of the *Charter* (*Duarte*, at p. 45), this is the first time that this Court has considered the effect of the disclosure provisions on its constitutionality. Section 193 of the *Criminal Code* makes it an indictable offence to disclose intercepted information without consent, except where the disclosure falls into a permitted category such as disclosure for the purpose of a criminal investigation. Since 1988, the *Criminal Code* has permitted disclosure

(*e*) where disclosure is made to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences and is intended to be in the interests of the administration of justice in Canada or elsewhere . . .

(*Criminal Code*, s. 193(2)(*e*))

1. Section 8 of the *Charter*
2. Section 8 of the *Charter* protects against “unreasonable search or seizure”. A search or seizure is reasonable “if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable” (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278). In this case, the interception of the appellant’s communications was a search authorized by law. A warrant was obtained authorizing the wiretap. The communications were shared with U.S. police pursuant to s. 193(2)(*e*) without any conditions or written record.
3. I agree with my colleague Moldaver J. that we need not consider the constitutionality of s. 8(2)(*f*) of the *Privacy Act*, R.S.C. 1985, c. P-21. For the reasons set out by my colleague, I also find it unnecessary to address the arguments with respect to s. 7 of the *Charter.* The issue in this case is whether the foreign disclosure contemplated by s. 193(2)(*e*) of the *Criminal Code* is reasonable. In particular, does s. 193(2)(*e*) render the wiretap scheme set out in Part VI unreasonable by permitting essentially unrestricted and unsupervised disclosure of the fruits of wiretap interceptions to foreign law enforcement officials?
4. Whether a law provides reasonable authority for a search is a contextual inquiry: *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 26. The question here is whether the wiretap provisions “strik[e] an appropriate balance” between the state’s interest in the search and the public interest in protecting privacy: *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 10.
5. The assessment of this balance must be connected to the underlying purposes of s. 8 itself. Just as the expectation of privacy analysis asks what we, as a society, should be able to expect will be kept private (*R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 44), the assessment of whether a law provides reasonable authority for a search involves asking what level of privacy protection we are entitled to expect, given the state’s objective in seeking the information.
6. In order to determine whether s. 193(2)(*e*) of Part VI of the *Criminal Code* permits an “unreasonable search or seizure”, it is first necessary to consider the interests that the disclosure regime was meant to serve and its impact on the privacy rights of affected persons. With those interests in mind, I will then turn to the particular aspects of s. 193(2)(*e*) that, in my view, render Part VI unconstitutional.
7. The Interests at Stake
8. There is no question that international cooperation and information sharing are essential to law enforcement: *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292. Crime does not stop at state borders, nor should efforts to combat it. Just as electronic surveillance “plays an indispensable role in the detection of sophisticated criminal enterprises” (*Duarte*, at p. 44), international dissemination of the fruits of that surveillance is increasingly important for law enforcement.
9. When Canadian officials share information with foreign officials, the foreign state is not the only beneficiary; the importance of comity cannot be ignored. Canadian interests are served when our law enforcement agencies build appropriate information-sharing relationships with law enforcement officials in other jurisdictions, and the disclosure of wiretapped information in individual cases contributes to these relationships. Further, timely disclosure will often be critical in the investigation of serious transnational crimes such as drug smuggling, human trafficking and terrorism. Often, the circumstances will require immediate police action to protect public safety and prevent crimes. This case is one such example.
10. The state’s interest in law enforcement and comity must be balanced against the significant privacy and other interests engaged by disclosure. Wiretap interceptions gather private information that is likely “to reveal intimate details of the lifestyle and personal choices of the individual” (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; and *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 25). This can include information about an individual’s political and religious affiliations, personal finances, intimate relationships, family problems, physical and mental health, substance use, and encounters with police.
11. This Court recognized the invasiveness of wiretapping in *Duarte*, where La Forest J. stated that “one can scarcely imagine a state activity more dangerous to individual privacy than electronic surveillance” (p. 43). He warned that

[i]f 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. [p. 44]

1. Law enforcement officers in Canada are therefore subject to strict limits on the use of wiretapped information. Section 193 of the *Criminal Code* makes it an indictable offence to disclose intercepted information, subject to limited exceptions such as giving evidence in civil or criminal proceedings (s. 193(2)(*a*)) or disclosing information for the purpose of a criminal investigation (s. 193(2)(*b*)). By contrast, courts have held that information obtained by the state in other kinds of searches and seizures may be shared with regulatory agencies for purposes outside of criminal investigations and existing proceedings (see, for example, *Brown v. The Queen*, 2013 FCA 111, 2013 D.T.C. 5094).
2. When information is shared across jurisdictional lines, the safeguards that apply in domestic investigations lose their force. This can create serious risks to individual privacy, liberty and security of the person interests. As Commissioner O’Connor observed, when information is shared with foreign authorities, “respect for human rights cannot always be taken for granted”: Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006) (“O’Connor Report”), at p. 321.
3. Wiretap information that is shared with foreign officials may ultimately be used in unfair trials or to prosecute offences that are not crimes in Canada. Information obtained from wiretaps can lead to discrimination on the basis of political or religious affiliation. In the wrong hands, wiretap information may even be used to intimidate or smear political figures and members of civil society: see, e.g., B. A. Franklin, “Wiretaps reveal Dr. King feared rebuff on nonviolence”, *The New York Times*, September 15, 1985; J. Sanchez, “Wiretapping’s true danger”, *Los Angeles Times*, March 16, 2008. Further, s. 193(2)(*e*) permits the disclosure to foreign officials of both intercepted personal information that may be completely unrelated to the criminal investigation or to its target and information resulting from wiretaps that are later found to be unlawful.
4. Professor Kent Roach writes that the expansion in international information sharing since 2001 has exacerbated a number of problems:

. . . law enforcement agencies are now more likely to undertake enforcement actions based on shared information that is unreliable, and there is now a greater risk that information shared by intelligence services will be disclosed in subsequent legal proceedings. Individuals are also at greater risk of having their rights, especially their right to privacy, infringed. Individuals will rarely have the opportunity to challenge the accuracy of shared information because they will often be unaware that information about them has been shared and will not have access to the shared information.

(K. Roach, “Overseeing Information Sharing”, in H. Born and A. Wills, eds., *Overseeing Intelligence Services: A Toolkit* (2012), 129, at p. 131)

1. The respondent the Attorney General of Canada submits that the expectation of privacy in communications is diminished after they have been lawfully intercepted. Indeed, people should expect that police will “share lawfully gathered information with other law enforcement officials, provided the use is consistent with the purposes for which it was gathered” (*Quesnelle*, at para. 39).
2. However, that does not mean that there is *no* privacy interest in wiretap information; to the contrary, people have the right to expect that such information will only be disclosed appropriately. In a well-known passage in *R. v. Mills*, [1999] 3 S.C.R. 668, McLachlin and Iacobucci JJ. stated:

Privacy is not an all or nothing right. It does not follow from the fact that the Crown has possession of the records that any reasonable expectation of privacy disappears. Privacy interests in modern society include the reasonable expectation that private information will remain confidential to the persons to whom and restricted to the purposes for which it was divulged. [para. 108]

1. This Court, *per* Charron J., also confirmed in *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, that “any number of persons and entities may have a residual privacy interest in material gathered in the course of a criminal investigation” (at para. 19; see also paras. 12 and 39). The “protective mantle of s. 8” shields information seized by the state “so long as the seizure continues” (*R. v. Colarusso*, [1994] 1 S.C.R. 20, at p. 63).
2. Nor is the privacy interest in wiretap information reduced simply because a subject of a wiretap might anticipate that law enforcement agencies may share it pursuant to s. 193 of the *Criminal Code*. A focus on subjective expectations, which Professor L. M. Austin has described as the “what did you expect” approach to privacy, would protect “an interest in being unfairly surprised by state intrusions”, but would fail to guard against “expected, though nonetheless problematic, invasionsofprivacy” (“Information Sharing and the ‘Reasonable’ Ambiguities of Section 8 of the Charter” (2007), 57 *U.T.L.J.* 499, at p. 507 (emphasis added)). As this Court held in *Tessling*, a diminished subjective expectation of privacy does not necessarily result in reduced constitutional protections: the “[e]xpectation of privacy is a normative rather than a descriptive standard” (para. 42).
3. In light of the intrusive nature of wiretapping, the highly personal nature of the information in question, and the very real risks that may be created by disclosure to foreign officials, it is clear that a substantial privacy interest remains in wiretapped information. This restricts how the information may be divulged and used.
4. Challenges to Section 193(2)(*e*)
5. The appellant and interveners challenge a number of aspects of s. 193(2)(*e*), including the breadth, alleged vagueness and subjective nature of the test for disclosure. They also point to a number of deficiencies: of a warrant requirement for the disclosure; of restrictions on how information may be used once it is shared; and of accountability mechanisms such as record-keeping and notice or reporting requirements. I agree with my colleague Justice Moldaver’s rejection of many of these challenges. However, in my view, the last two objections ― concerning the lack of restrictions on disclosed information and the absence of any accountability measures ― each identify serious constitutional problems. For the reasons set out below, I conclude that to the extent s. 193(2)(*e*) permits disclosure of wiretap information to foreign authorities without restrictions on recipients’ use and without accountability measures, it is unreasonable and contrary to s. 8 of the *Charter*.
   1. Limits on Use of Disclosed Information
6. The first failure is that s. 193(2)(*e*) does not impose any limits on how the shared information will be used or further disclosed. It simply permits disclosure of wiretapped information as long as the disclosure “is intended to be in the interests of the administration of justice in Canada or elsewhere”. In my view, it is not an answer to say that because police officers can only share information that they genuinely believe would further the interests of the administration of justice, in the context of law enforcement, it is unlikely that s. 193(2)(*e*) would result in sharing with foreign states that engage in torture or other human rights violations. While Canadian law enforcement officials are constrained in their use of wiretapped information by the *Charter* and s. 193 of the *Criminal Code*, these restrictions do not apply to foreign officials.
7. Of course, many foreign jurisdictions impose some form of legal oversight on the use of wiretapped information or criminal intelligence generally. But s. 193(2)(*e*) itself does nothing to prevent those who receive the information from using it in proceedings which fail to respect due process and human rights, which may involve unjustified detention or torture, or in which the accused has no access to counsel. Even if the direct recipients of the information respect human and fair trial rights, s. 193(2)(*e*) does not stop them from disclosing the information to others who do not. As my colleague LeBel J. has observed, “[i]f the process is irretrievably flawed, no amount of trust in the future good behaviour and restraint of prosecutors and police will save it”:  *Lavallee, Rackel & Heintz v. Canada (Attorney General)*,2002 SCC 61, [2002] 3 S.C.R. 209, at para. 69 (dissenting in part).
8. One need only look to the case of Maher Arar to understand what is at stake. Although in that case the information provided was not obtained by way of wiretap, Commissioner O’Connor found that “[t]he fact that [the RCMP] did not attach written caveats to the information about Mr. Arar provided to American agencies increased the risk that those agencies would use the information for purposes unacceptable to the RCMP, such as removing him to Syria” (O’Connor Report, at p. 23). Although disclosure by the state that compromises an individual’s life, liberty or security of the person interests may well give rise to a remedy under s. 7 of the *Charter*, s. 8 must be construed to prevent unreasonable intrusions on privacy and their potential consequences before they occur: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 160.
9. The failure to require any caveats on the use of disclosed information is, in my view, unreasonable. To the extent that s. 193(2)(*e*) permits law enforcement officers to intercept private communications and then share the results with foreign officials without any restrictions on what they may do with them, Part VI does not achieve the balancing of interests required to satisfy the demands of s. 8 of the *Charter*.
10. Further, the requirement of prior judicial authorization for the wiretap itself does not provide sufficient protection against inappropriate future disclosure of the information. Authorizations to intercept communications are granted with respect to specified times, places and persons in the context of Canadian laws and protections. At the time an authorization is granted, the judge generally does not weigh the targeted individual’s privacy interests (let alone those of third parties whose communications are also intercepted) against a future hypothetical state interest in disclosing the information to foreign law enforcement officials. Restrictions on the use of disclosed material would provide some protection of individuals’ privacy and security interests.
11. Imposing restrictions on foreign use of Canadian wiretap information would not undermine the objectives of the wiretap scheme. Caveats on information sharing are commonplace in international law enforcement and intelligence cooperation: O’Connor Report,at p. 150; U.K. Intelligence and Security Committee, *Rendition* (2007), at p. 53. Indeed, according to the affidavit of RCMP Deputy Commissioner of Canada West, Gary David Bass, such caveats are “normally” attached to wiretap disclosures as a matter of course. Further, the need for written caveats need not hinder timely information sharing. For example, police forces could have standing agreements with certain foreign forces with whom they regularly cooperate, or they could complete a standardized form each time information is shared.
12. I do not propose any particular form for such caveats or agreements. The key is that a wiretap scheme which authorizes deep intrusions on privacy with potentially life-changing consequences cannot permit the unconditional disclosure of information to foreign authorities. Written caveats must provide some assurance to our law enforcement agencies that disclosed information will only be used to advance legitimate law enforcement objectives, in accordance with respect for due process and human rights, and will not be shared further except as agreed to by the disclosing party.
13. My colleague Justice Moldaver suggests that where a particular disclosure is challenged (as here, in an extradition proceeding), the existence of caveats or protocols may be relevant to determining the disclosing officer’s subjective intent ― whether the disclosing officer intended that the disclosure be “in the interests of the administration of justice in Canada or elsewhere”. Thus, he says, caveats and protocols may be relevant to whether the disclosure was authorized by s. 193(2)(*e*) or whether the disclosure is carried out in a reasonable manner. This, of course, rests upon the uncertain assumption that an individual would have knowledge of the disclosure and the opportunity to challenge it in a Canadian proceeding. Further, such an approach leaves the assessment and balancing of interests in the hands of the disclosing officer. Given the significant risks involved in the international dissemination of such information, and the limited ability of an individual whose rights have been violated to seek redress, such an approach does not provide sufficient protections for the important privacy interests engaged. As noted above, for s. 193(2)(*e*) to be reasonable, the law itself must strike the appropriate balance of interests.
    1. Oversight and Accountability
14. In addition, for a law to provide reasonable authority for a search or seizure, it must include some mechanism to permit oversight of state use of the power: see *Tse*, at paras. 11 and 82. In my view, this need for accountability applies not only to the search itself but also to the subsequent use of the resulting information. Written caveats alone generally do not provide sufficient protection. Without some accountability mechanism, no information is available on what is being shared, with whom, for what purpose and what subsequent use is made of the information. The need for such accountability is made even greater where information is being shared across borders, putting it beyond the reach of Canadian legal protections.
15. The purpose of accountability mechanisms is to deter and identify inappropriate intrusions on privacy. None of the safeguards included in the broader Part VI wiretap regime, such as judicial pre-authorization, after-the-fact notification, record-keeping or reporting requirements, apply to the disclosure of wiretap information to foreign officials. Ensuring that the wiretapping itself is appropriate does not guarantee that subsequent disclosures will be.
16. Justice Moldaver finds that because s. 193(2)(*e*) is an exemption to the criminal offence set out at s. 193(1), law enforcement officers will have ample incentive to comply with the terms of the exemption in order to avoid criminal liability. With respect, I am not convinced that the presence of the criminal offence is ― on its own ― an adequate accountability mechanism. My chief concern is not that Canadian officers will intentionally disclose the information for purposes unrelated to “the interests of the administration of justice in Canada or elsewhere”. Rather, it is the potential use by foreign officials ― who do not face the risk of prosecution under s. 193(1) ― that raises concerns about *Charter* interests.
17. Canadian law enforcement officers may subjectively intend to serve justice by sharing information. However, improper or hazardous sharing is unlikely to come to light without record-keeping, reporting or notice obligations. Moreover, accountability is not only about fostering compliance with the letter of the law; it is about giving oversight bodies, legislators and the public the information that they need to ensure that statutory powers are necessary and are used appropriately.
18. Justice Moldaver’s suggestion that individuals subject to disclosure of wiretapped information might find out through an access to information request is far from adequate in achieving accountability, particularly since the various privacy laws governing law enforcement across Canada generally include an exception for records relating to law enforcement matters: see, for example, *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, s. 8(1). Without any requirement that law enforcement agencies maintain records, even a successful applicant may find there is little or no record to obtain.
19. The case before us was likely an appropriate sharing of information. It related to drug crimes that spanned the Canada-United States border, was shared with U.S. law enforcement, and was used to stop such a crime and to apprehend the offender. However, given the breadth of s. 193(2)(*e*) and of the personal information that may be contained in a wiretap, it is not difficult to imagine situations where disclosure would be inappropriate, even if it was subjectively “intended to be in the interests of the administration of justice”, as required by s. 193(2)(*e*). Accountability mechanisms are required to safeguard against disclosure in such cases.
20. Just as the reasonableness of a search power depends on context (*Rodgers*), the exact accountability mechanism that will be required varies with the circumstances. In general, serious intrusions on a reasonable expectation of privacy ― such as a search of a dwelling or interception of private communications ― require prior judicial authorization: *R. v. Thompson*, [1990] 2 S.C.R. 1111. In emergencies, after-the-fact notice can serve as a substitute: *Tse*. Some kinds of searches, like searches incident to arrest, may be immediately apparent to their targets, such that no formal notice mechanism is required.
21. Notice of cross-border disclosure would permit individuals ― or the executive branch of government ― to know which countries have information and perhaps how it may be used. After-the-fact reporting to the legislature would create transparency, telling Canadians how often information is disclosed to identified foreign law enforcement officials and for what purposes. I recognize that these choices involve practical and policy considerations. It is for Parliament to decide what measures are most appropriate and how they should be implemented. The *Charter* does not mandate a specific protocol; it requires only that the legislation authorizing a search be reasonable. Reasonableness, in this case, demands accountability mechanisms that ensure an appropriate balance between privacy and the state interest in the search. At a minimum, the disclosing party should be required to create a written record of what information is shared with whom, with some obligation to make the sharing ultimately known to the target or to government.
22. To conclude, while the sharing of wiretapped information is an important tool for law enforcement agencies, it must nonetheless be balanced against adequate protections for the privacy interests at stake in order to pass *Charter* muster. This balance requires that the disclosing party obtain assurances that information will not be improperly used by foreign officials. It also requires the implementation of accountability measures to facilitate oversight and to deter inappropriate disclosures. Absent such protections, I find that s. 193(2)(*e*) is contrary to s. 8 of the *Charter*.
23. Section 1
24. In my view, s. 193(2)(*e*) infringes s. 8 of the *Charter* in a manner that is not justified under s. 1.
25. To be upheld under s. 1, legislation that limits a *Charter* right must meet the criteria set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. First, the legislation must serve a pressing and substantial objective. Second, the means chosen must be proportionate: there must be a rational connection between the legislation and the objective, the legislation must limit the right as little as possible, and there must be proportionality between the effects of the *Charter* limitation and its objectives.
26. In this case, the objective of international cooperation in law enforcement is pressing and substantial, and disclosure of wiretap information is rationally connected to that objective. However, s. 193(2)(*e*) as it is presently drafted interferes with privacy to a greater extent than necessary. The inclusion of accountability mechanisms and limits on subsequent use would cure the constitutional deficiencies without undermining Parliament’s goals. Accordingly, I conclude that the disclosure to foreign officials permitted without safeguards under s. 193(2)(*e*) renders the Part VI regime unconstitutional.
27. Conclusion
28. Section 8 requires that when a law authorizes intrusions on privacy, it must do so in a manner that is reasonable. A reasonable law must have adequate safeguards to prevent abuse. It must avoid intruding farther than necessary. It must strike an appropriate balance between privacy and other public interests. I conclude that s. 193(2)(*e*) falls short on all three counts.
29. In my view, the appropriate remedy in this case is to strike the words “or to a person or authority with responsibility in a foreign state” from s. 193(2)(*e*) of the *Criminal Code*. Such a remedy respects Parliament’s intention to allow law enforcement officials to collaborate within Canada, while invalidating those aspects of the legislation that are inconsistent with the *Charter*. Severing the unconstitutional elements of this provision is also consistent with this Court’s view that “when only a part of a statute or provision violates the Constitution, it is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared”: *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 696. I would suspend the effect of this order for 12 months to allow Parliament to amend Part VI to comply with the *Charter*.
30. The Crown submitted that if this Court were to suspend a declaration of invalidity, a new hearing should be ordered at which the admissibility of the evidence under s. 24(2) of the *Charter* can be addressed. This Court has recognized that, where a suspended declaration of invalidity is ordered, a constitutional exemption may be awarded “to relieve the claimant of the continued burden of the unconstitutional law during the period that the striking out remedy is suspended”: *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 46; see also *Corbiere* *v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 22. I would accordingly exempt the appellant from the suspension of the declaration of invalidity.
31. I would answer the relevant constitutional questions as follows:

Does s. 193(2)(*e*) of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 8 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

1. Thus, in the circumstances of this case, I would allow the appeal and order a new hearing.

*Appeal dismissed,* Abella*,* Cromwell *and* Karakatsanis JJ. *dissenting.*

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1. Even if Part VI was not intended by Parliament to be the exclusive regime governing wiretaps, the *Privacy Act* would still have no application here. Section 8(2)(*b*) of the Act permits disclosure of personal information “for any purpose in accordance with any Act of Parliament . . . that authorizes its disclosure”. Given my conclusion that the *Criminal* *Code* implicitly authorizes the Impugned Disclosure, even under the terms of the *Privacy Act*, the *Code* is the applicable statute in this case. [↑](#footnote-ref-1)
2. As observed by LeBel and Wagner JJ. in *Imperial Oil*, s. 193(2) merely authorizes the *disclosure* of intercepted communications in a number of prescribed circumstances. It does not create a right of access to intercepted communications, nor a procedure for seeking and obtaining disclosure of such communications by persons who are not otherwise in lawful possession of the information. [↑](#footnote-ref-2)
3. “under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, the council of the Westbank First Nation, the council of a participating First Nation — as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act* —, the government of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation;” [↑](#footnote-ref-3)
4. “(*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;” [↑](#footnote-ref-4)