2014 Grand Moot – Video Transcription

Jenifer: Hello, if I can have your attention I'd like to welcome you all to the 2014 U of T grand moot, thank you very much for coming it looks like we have a fantastic turn out here. This moot is entitled tracking data, privacy and the charter. We hope you will enjoy it. I would just want to I think we have an esteemed panel, we were very lucky enough to have them here today.

Madame Justice Rosalie Abella of the Supreme Court of Canada, the honorable Madame justice Gloria Epstein of the Court of Appeal for Ontario and the honorable Madame justice Bonnie Croll of the Ontario superior court of justice. We also have our speakers, our fantastic leaders today, Danny Urquhart, Lauren Harper, Kathleen Elhatton-Lake and Sam Greene. I am going to turn the microphone over to our dean Jutta Brunnee but just a couple of house keeping issues.

If you could just make sure that your phones are turned off, we'd really appreciate that so they don't go off in the middle of the moot. If you do need to leave for any reason, if you could kindly wait until one of the mooters has seated after they have spoken we'd really appreciate that. If you do need to leave in the middle please do so as quietly as possible. I am going to hand over the microphone to dean Brunnee now.

Brunnee: Thank you Jenifer, I just want to join in welcoming you all it is really great to see such a crowd here for this event and Jenifer has already introduced our really illustrious bench today. I will simply add to that but we have on the bench not just wonderful judges but also great supporters of the law school and by way of just a little bit of additional information. Justice Abella is, this is her 7th time judging the grand moot.

Justice Epstein I think it's her third time and justice Croll who by the way is our judge in residence this year, it is her second time. There is a great enthusiasm about this event, not just here in the room but also among the justices who generously give their time to participate. I also wanted to take a moment to thank the perhaps unsung heroes of the grand moot, the two co chief justices, Jennifer Bates and Christophe Shammas.

Who've done so much work in preparing for this and coming up with the problem, writing the bench memo which by the way I have had judges say a moment ago they want to keep because it is so excellent and planning all of this. Thank you very much and also I understand that professor Austin, Professor Hamish Stewart is here and Professor

Simon Stern have been very engaged in the preparation of the problem so thanks to them as well. Here we are.

Male: Thank you very much Dean Brunnee, I am going to take five minutes to summarize the problem for those of you who haven't had the chance to read it online or read it in the programs today. I will then set out the issues that are going to be argued and introduce the mooters who will be arguing those issues. Stern, Austin and Stewart are three cities located within Falconer, a commonwealth province in the country of Flavelle.

Flavelle and Falconer have a constitution, system of government, judicial system and common law identical to that of Canada and Ontario respectively. Between May and August of 2013, the cities of Stern, Austin and Stewart saw an unprecedented rise in gun crime. This was largely attributed to an increase in gun smuggling that was been undertaken by the criminal organization known as Carnegie.

The Flavelle national and policing authority known as the FNPA conducted an investigation to indentify Carnegie's mastermind known to associates and law enforcements only by his alias of Victorious. The only information that the FNPA had about Victorious was that he or she constantly travelled between Stern, Austin and Stewart on a very regular schedule in order to monitor Carnegie's operations.

Victorious moved from city to city each week spending seven days in each city before moving on to the next. Now in August 2013, the FNPA received a reliable tip that Victorious had passed through Austin airport on august 15th 2013. Hoping to use this information along with what they knew about Victorious' travel schedule, they decided to collect the tracking data of all the cell phones that had passed through Austin airport on that same day.

Using a complex computer algorithm, they hoped to match the patterns of movement over the last three months for those cell phones to what they knew about Victorious' movements. The FNPA applied for an order for the local cell phone provider Hammerstein Inc to produce tracking data between May 15th and August 15th for all the phone numbers that passed through Austin airport on the same day as Victorious.

This amounted to 20,000 independent cell phones tracking data. This type of investigative technique was made possible through a recently added section 400 of the Flavelle criminal code. I believe its page 22 of the program you can look at the language of the provision, it says right at the end. Now section 400 of the criminal code allows all

enforcement agencies to apply to a just system of the piece for an order that a person produced a document containing tracking data.

This order can be granted on a showing of reasonable suspicion that an offence has or will be committed and that the data will assist in the investigation. According to the minister of justice, this new addition to the criminal code was intended to allow police investigations to keep up with modern technology. Now tracking data is defined in the criminal code as data that relates to the data of a transaction, individual or thing.

Tracking data, for our purposes, tracking data from cell phone towers is able to triangulate a cell phones location to within 50 meters. In this case the order for tracking data was granted but before the FNPA had the opportunity to analyze the data, information was leaked to the Austin daily mail that the FNPA was undertaking a bulky surveillance of its citizens.

This caused public outrage among the people of the Flavelle and in light of these revelations the Flavelle privacy advocacy center which will be referred to from now as FPAC bought this application to declare section 400 unconstitutional. FPAC is a well established organization devoted to advocacy research and raising awareness about privacy rights in Flavelle. FPAC submits that they are the appropriate party to bring this claim because those who were directly affected could not have known that their data was collected.

While the leak revealed that the collection had taken place at Austin airport the FNPA did not say on which day the collection had occurred. At trial Justice Bessemer for the Falconer superior court of justice held that section 400 did violate section eight of the charter, she found there was a reasonable expectation in cell phone tracking data and so law enforcement had to obtain a warrant on the highest standard of reasonable and probable grounds in order to obtain such information.

Moreover Justice Bessemer added that she was unwilling to save section 400 under section one of the charter. Now the Falconer Court of Appeal overturned justice Bessemer's decision, Justice Keith writing for the majority held that there was no section eight breach in this case because there was no expectation of privacy in cell phone tracking data. Justice Neal in a concurring judgment held that FPAC did not have standing to bring this application.

He found that FPAC did not have a direct stake in the matter as its members were not directly affected b y the FNPA conducts. FPAC has been granted leave to appeal the

court of appeal's decisions to this court, the Supreme Court of Flavelle. The issues on appeal which can be seen on page 21 of the program as follows. Firstly, does FPAC have standing to challenge the constitutionality of section 400 of the criminal code?

Second, pursuant to section eight of the charter do individuals have a reasonable expectation of privacy in their tracking data? Third if a reasonable expectation is found are the search powers that are created by section 400 reasonable and lastly if a breach of section eight is found, is section 400 nevertheless upheld under section one of the charter. It's now my pleasure to introduce the mooters today, to me these are the most talented advocates that we have in the law school and I am sure you will all enjoy hearing from them.

For the appellants for FPAC we have Danny Urquhart and Lauren Harper and for the respondents her majesty the queen, we have Kathleen Elhatton-Lake and Samuel Greene. Thank you very much everyone and please enjoy the show.

Male: All rise.

Female: See what happens when you have women judges and I can't even figure out where to sit.

Female: It is all about protocol, we are very fussy about this.

Female: Welcome everybody, this is the grand moot, the case is Flavelle advocacy center versus her majesty the queen, are the appellants ready to proceed?

Danny: Good evening my name is Danny Urquhart counsel for the appellant, Flavelle privacy and advocacy center along with my colleague Ms. Lauren Harper. In August 15th of last year the Flavelle national policing authority conducted a dragnet which has no precedent in this nations' history. The police collected a data base of information which included the locations of more that 20,000 people for the course of three months. This litigation is a challenge to the law that authorized that search.

A law which allowed the police to access and study a map of our lives and discover all that we reveal about ourselves through the locations that we choose to make a presence. A law which allowed the police to access deeply personal information for more than 20,000 people from the basis of a suspicion that one of them had committed a crime. My submissions will proceed in two parts. First the FPAC has public interests standing to pursue this claim.

Secondly I will begin the section eight analysis that the collection of this information was a search within the terms of section eight. My colleague will continue the submissions arguing thirdly that the search was unreasonable and finally that section 400 of the criminal code cannot be saved by the operation of section one of the charter. Moving first, the standing issue, this begins at paragraph 25 the appellant factum.

I am comfortable relying on my witness submissions for the first two elements, the SWUAV test. The Downtown Eastside sex workers test, is the first two elements being that there is an ingenious issue being brought, secondly that FPAC has a genuine interest in the issues being brought. I would like to focus on whether or not FPAC is a competent party to bring this claim because this is a reasonable and effective means, the third branch of the suave test to bring this issue before the courts.

Two arguments under this branch of the test, first is that any private individual couldn't have known that their privacy interests were implicated prior to the discovery process which ran its course after this litigation had started. It is not reasonable to expect an individual with a speculative idea that they may have been part of this database to risk thousands of dollars potentially in charter litigation to protect that interest.

Female: Is it possible that this issue could be considered in the context of a class proceeding and when I was thinking about that, I don't know whether there are any impediments to that but I am sure you will help me and from a procedural perspective, you could imagine finding an employee who was a regular worker, asking the employee to represent the class and then through discovery process find out, identify members of the class through travel documentation or employment status.

That would potentially address the procedural part in terms of what the submission you just made about the difficulty of an individual. Secondly may have the advantage of having evidence available for the court about subjective expectation like privacy and that type of thing.

Danny: Tricky issue with a potential class actions' proceedings is that the entire development of the class actions procedure is focused around an equitable distribution of damages and that is really the core of the certification process. Whereas when the remedy being sought is a clashing of the statue or at least a clashing of this particular search and that class actions isn't an effective process to that particular remedy.

In terms of the evidentiary issue that FPAC as the trial judge found is perfectly able to submit a wide range of affidavit evidence for instance on behalf of the individuals that

turned out to likely be within this database. There is an evidentiary issue with FPAC bringing the claim that would go for instance to subjective expectation of privacy, a factor that chief justice McLachlin described as a low bar in gambok.

Yes it was the decent but dissenting not on that issue. [Crosstalk 00:16:59] beyond that the second argument here on the standing issue is that, I suppose this continues along as the same issue would come up in class action procedure or as a potential remedy. There is a wide array of interests at stake here and that there is 20,000 people that were potentially affected if the collection is the search, which I will get into under the section eight arguments.

This is a wide array of individuals that are affected with different interests, to have individual parties attempt to represent that array of interests rather than an aggregate group like FPAC that has had a deep saturation with privacy interests over a long history of time and with a wide array of individuals. That the efficient way to bring this claim which has always been an aspect to the public interests standing tasks.

Going back to the [inaudible 00:17:53] is that an adequate use of judicial resources is for a group like FPAC to represent the diversity of really the poll of these interests which were affected by the states collection of this information.

Female: How does that court [crosstalk 00:18:14].

Female: I just wanted to ask you and you see in your factum at paragraph 44 that the effective cell users don't have unique insights into how the collection of this tracking data violated their privacy. How do you reconcile that with the subjective expectation of privacy, I am struggling with that statement and your section eight subjective expectation argument.

Danny: The issue with why they don't have a unique insight into the invasion of their privacy as compared to FPAC's insight, it primarily comes down to the fact that they don't know what this information will be used for, has been used for. Their view as to how revealing it is or how revealing it could be, their epistemic position is the same as FPAC that their proximity to a particular cell phone transmission tower didn't make them any more proximate to the technicalities of what tracking data reveals.

The potential abuses that could come out of that, the power of that information and the necessary oversight when the police have access to that information.

Female: My question falls along that but it is really much more focused on FPAC itself, how does a court decide whether or not a party which presents itself to the court as being an expert in the particular area and having an interest in under the new broader standing rules that we have in the Downtown Eastside case. What does a court look at about an organization beyond the fact that the organization says look we have been in court twice on these kinds of issues as you say in your factum.

We have an interest, we have academics, we have philanthropists, that is all very well and good but does that make it a reasonable vehicle for bringing these issues before the court.

Danny: I think the court is going to look at, in my view at least three very important elements, they've got to look at the capacity of a group to bring a claim whether it'd be financial, whether it'd be in terms of expertise. They've got to look at a potential conflict in terms of whether or not they can represent the interests of those attempting to represent, we are looking at that SWUAV the Downtown Eastside case.

In that case you have 100 years of heated debate on what level of prohibition over sex work is actually in women's interests and that may give rise to a potential for a, like an interest that may not align. The court didn't find that a concern in that case and that is not at all the concern in this case but the court has got to look at that as well.

Female: Here we are dealing with privacy which is an area in which many people have an interests, everyone has an interests. Many organizations are engaged in pursuing the implications to these issues, is it your position that any one of them could be standing in your shoes today and representing these parties, how does a court know since one of the interests we are looking at is the effective use of judicial resources. How do we know that we are not wasting everybody's time in this particular party having standing?

Danny: I think the primary tool that the court looks at there is what this organization has done in the past, does that record disclose concerns about their capacity to bring this in this instance. That will be the primary analysis is just what have they done, how similar is it and were there any issues when they did it in the past. In this case FPAC has a long history of legal interaction and privacy issues and interaction with individuals and privacy issues.

The analysis has got to fall on the FPAC side on the public interest standing in this case. I would like to move now to the section eight analysis, the core of the case.

Female: I think there it would be helpful if you rest justice Croll's concern because the fact that 20,000 people didn't know that they were being monitored really may go to the question of a subjective expectation of privacy.

Danny: Right, in order to assuage that concern is that in any section eight analysis when, the paradigm when the police have entered my home for instance. Is that the individual trying to establish that their privacy had been infringed is never in the position of proving exactly what the police saw, what particular item disclosed something about their biographical core. There is a level of imprints that we are level to draw based on what the police had available.

Female: What is the available imprints here?

Danny: The available imprints is that at the time the police collected this information, they had at their feet and before their eyes a great deal of information about a great mass of people that attaches very closely to who those individuals are and what's important to them and what they do.

Female: Here is the problem I have with that submission that I have thinking about as my team of people prepared me for today's case. I have a team [crosstalk 00:24:06] we now have a team, since you left we have a team. That is this, we are talking in a sense about the privacy interests, one way of looking at this, privacy interests of a machine and your submission is based on the fact, almost equating the machine with the individual.

Now I'll just have to confess something, I am never sure where my cell phone is, the last time I saw it was when I left it at a blue jacking. The person walking around with my cell phone may have been in the airport at that time who had nothing to do with my personal data. How do you necessarily link the travels of a machine with my personal data?

Danny: Right, certainly there are cases like yours where the cell phone was lost, it's not in the person's pocket, the majority of us do carry our cell phones around, every where we go, at all hours of the day.

Female: Are you suggesting that I am not normal?

Female: Don't answer that question, relevance?

Danny: I will take Justice Abello's advise and not answer that question, more particularly if the court looks at what it previously has done with GPS tracking data going all the way back to Waze, this is a GPS that was placed on a car which is far less revealing of what an individual is doing and where they are than their cell phone, the cell phone in their pockets. The court found a reasonable expectation of privacy in that case …

Female: It was the breach, it wasn't clear was it, what the breach was, was it location, was it the machine, what was it in your view?

Danny: The court in Waze refused to split the two, it was the placing of the item within the vehicle and the subsequent information that was revealed about the individual and the court said that you can't divide those and that there were two elements of the same search. Certainly in so far as we have got to look at your biographical core, what can be revealed and the information that GPS tracker disclosed was very much private.

This was what was held very explicitly in the United States in 2011 with the United States and Jones Supreme Court United States case. The court came to a similar finding that GPS tracker which had a similar range of accuracy in that case the court said you could locate them to within 50 to 100 feet in this case we have a 15 meter range of accuracy.

Female: This tracking devise doesn't tell us anything about what the person might be engaged in or even whether or not that as in Justice Epstein case has the phone, where does this tracking go to that core biographical information that is clearly subject to the expectation.

Danny: First is that on one of the locations that we entered, revealed a lot about what we are doing there a church for instance …

Female: I understand that but again all this is telling us is that this phone serial number xyz was here, to get to that other piece does require …

Danny: The anonymity element which my friends make a big deal out of, let's talk about that for a bit. This database discloses a series of locations that attaches to the cell phone numbers apart from a name. Your cell phone number is insufficiently confidential information to prevent the police from identifying who you are. In fact in some cases necessarily they have your cell phone number in their memory from necessarily identifying the individual on the database.

If the police, for many of us, our cell phone numbers public knowledge, it is on our Facebook page, it is on our LinkedIn page, on a resume that we have uploaded online. It's not at all difficult to link those pieces of information even if one was careful …

Female: Like by putting your cell phone number on your Facebook page and out there, doesn't that suggest a highly diminished expectation of privacy?

Danny: I don't think that when most people disclose their cell phone numbers to their friends on the Facebook page that they are cognizant of the fact that by doing so, it can be attached to every location that they have been for three months.

Female: See this is the part of the problem of giving standing to an organization because we are dealing now with the subjective expectation of privacy, I think these arguments go more to the objective expectation of privacy, how do we asses the subjective expectation of privacy from the point of view of your organization?

Danny: First at the trial the court had no difficulty by doing this, the use of affidavit evidence and that finding being primarily a factual. The subjective expectation of privacy is owed some depths.

Female: It was a finding that because it was such a human cry in the newspapers there must have been a subjective expectation of privacy.

Female: We like difference to the trial judges.

Female: Yes we do.

Female: We do like difference.

Female: Not so much to the court of appeal.

Female: Difference is good.

Danny: In the absence of that being a palpable error, that finding is our difference and my understanding is that the sole factual finding wasn't based on the public outcry and the court had more material before them when they were making that decision.

Female: You are inviting us to conclude based centrally on instinct and common sense, that people have reasonable expectation of privacy in their cell phone and the physical fact of their cell phone.

Danny: In the fact that their physical location or their cell phone physical location which they like to correspond to theirs is recorded every three seconds for three months. That gives rise, it is very different from an example of ordinary physical surveillance and you can assess a record of habitual behavior, exactly where this person has been, what they have done and how long they have been there.

Female: If somebody had been following them for three months instead of tracking them on their cell phone what would you say about that?

Danny: Well, first is that I'm not aware of where the police had the resources to do that and their practical barriers are not just resources but …

Female:That's the argument on the other side.

Danny: Right, an indication which that has occurred or an invisible police officer, somebody that couldn't be seen which is important here because people can defend themselves in a sense against privacy breaches if someone is following them to an extent they are physically following them they can be discovered.

If there was a case where an invisible police officer could track my location every three seconds that may very well over three months may very well give rise to section eight claim. This is again no difference from holding in wise or not terribly different than holding from holding in wise or holding the United States and Jones when it comes to GPS trackers.

In my remaining minutes I would like to draw a story here about the potential for abuse. You can imagine a situation where an individual, the police obtained a cell phone by a suspected criminal, they were looking for accomplices. They took those cell phone numbers from the cell phone, from the criminal they have collected looked to see if they are there in the data, tracked their locations to see if they are a bit of a suspicious character. Maybe, I see the amount of time.

Female: Finish your sentence, we are not like the American speaker in court, we are nicer, aren't we?

Danny: I am very happy about that.

Female: You've just used up your time.

Danny: Anyways, to see where they have been, to see if they fit a suspicious character and place inquiry scrutiny on that person. If that person is innocent, the court would never subsequently have oversight of it because it would never result in prosecution. My

colleague will continue his submissions coincided. I thank the court for its time and for its thought.

Female:Thank you, Miss. Harper.

Lauren: Good evening justices. My name is Lauren Harper, council for the appellant and I have two submissions for the court today. First I will continue this submission of my co-council Mr. Urquhart that section 400 permits unreasonable searches which violate section eight of the charter, second that section 400 cannot be upheld under section one of the charter.

Because the infringement of constitutionally protected privacy rights is not rationally connected to the objective, it is not minimally impairing nor is the incarceration of privacy rights proportionate to the public policy objective. I will begin with the constitutionality of section 400 which begins at paragraph 76 of our factum. The search powers created by section 400, violates section eight of the charter for three reasons.

First section 400 allows for the production of documents without meeting the baseline constitutional standard of reasonable and probable grounds to believe that an offence has been committed and that evidence will be found in the place to be searched.

Female: How do we know that's the constitutional baseline when we have jurisprudence saying that reasonable suspicion can in certain circumstances constitute a legitimate constitution baseline? I mean it is no longer the case that reasonable probably ground in every circumstance is required. What is there about this search that requires the higher threshold?

Lauren: Justice it is true that in some cases the reasonable suspicious standard has been considered acceptable. However Hunter and Southam still establishes the baseline standard and cases that allow for searches to occur on a reasonable suspicion are exception to this baseline rule. In Hunter and Southam the court determines that there were three requirements for a search to be reasonable.

These requirements are first prior authorization, second that authorization must be issued by an impartial party and third it must be issued on a sworn showing a reasonable and probably ground to believe an offence has been committed and the evidence is to be found in the place to be searched. We can see in the first two requirements of this test have been met however section 400 does allow for the production of tracking data.

The fall below the reasonable and probably ground standards that in Hunter and allow the production of data on a reasonable ground to suspect.

Female: Going back to justice Abella question though, what's put against you is you acknowledge that is an appropriate case of the lower standard to apply. In your submission why is it not?

Lauren: First we would point out that the court has been very clear that the reasonable and probable ground is a safe guard of privacy rights. That departs from the standard that will be considered reasonable will be exceedingly rare. The majority in Kang Brown held that the reasonable substandard is only appropriate where achieved the right balance between protecting individuals from arbitrary privacy invasion and the reasonable needs of law enforcement.

We would argue that this balance is not met by using a reasonable suspicious standard for the search of tracking data.

Female: If you require reasonable and probably grounds wouldn't that make this whole investigative technique speculates, I mean it wouldn't make any sense would it?

Lauren: It is the reasonable and probable ground standard would allow the police to obtain tracking data when they have reasonable and probable ground and without a suspicion. Well that would certainly narrow the use of the section 400 provision the rights under section eight at a certain point will override the needs of law enforcement.

That is why we need to determine where we come to an appropriate balance between these two needs. In Kang Brown the majority held the dog sniff searches could be conducted on a reasonable suspicion standard because that struck the right balance for a dog sniff search for three reasons. First, dog sniffs searches are minimally impairing, second they are contraband specific and third they are [inaudible 00:37:09] for inaccuracy.

None of these doctors are present in this case. Dog sniff searches are uniquely useful to the police because they signal a yes or no answer to one specific question with a high degree of accuracy. Section 400 allows for the search of tracking data which revealed much more than a simple yes or no answer.

Female: In Kang Brown you were dealing with do searches, dog sniffing searches as you say. In section 400 you do have prior judicial authorization, isn’t that a sufficient constitutional safeguard?

Lauren: No justice, we would argue that prior judicial authorization is not a sufficient safeguard primarily because in this case prior judicial authorization can be obtained only on a suspicion that using that data might assist with the investigation, therefore the actual content that must be achieved before getting prior judicial authorization.

Such a low standard but it is little comfort to individual's section eight rights that a warrant has been achieved before their tracking data is accessed.

Female: Given the balancing that in your submission is at the core of this analysis and that is what this standard is used how would you apply that obligation of the courts to balance which is our obligation in most cases? In this one in particular these types of issues balancing the interest of privacy interests, public against the difficult job police have, particularly in a more complex technological ever changing environment to investigate crimes.

We have evidence about communities being affected by the increasing number of guns that the police believe were brought in through this various locations. Who do you balance those interests in a case like this?

Lauren: First we don't deny that the investigative tools given to the police will help them to find criminals and direct criminals. We don't deny that there are public policy benefits of this law. However investigative tools that are so intrusive to individual's privacy rights that it creates an unreasonable search and seizure under section eight cannot be upheld even if they do improve law enforcement techniques.

The reason that the balance isn't struck in this case is that tracking data reveals so much about an individual's life. Tracking data can reveal and individual's religion, their political views, their consumption habits, their sexual orientation based on a pattern of where they have been. In this case the data that was attained painted a picture of where each individual H 20,000 of those individuals had been every three seconds for three months.

Female: No but this is what we asked your colleagues, it's painting a picture of where that cell phone has been. If you want further information we lead him to where that person has been, you need to get a warrant.

Lauren: Justice, you do need to get a warrant if you want to go back to the phone company to get that person's name. We don’t deny that they would be able to ask camera scene for a name attached that cell phone number. They would need a warrant to do so. However many individuals have their phone numbers publically available in a phone book or online.

Or if you simply tracked where a specific cell phone has been every three seconds for three months you may be able to attach it to an address, to where an individual works or lives. That technique could easily be used to associate a number with a name. Finally if it was my cell phone number that the police were tracking they could simply call it and my voicemail would tell them exactly who I was.

There are many ways that the police without obtaining another warrant could find out exactly who these individuals are and once they know the names then they know every aspect of that individual's life.

Female: I'm having a bit of trouble understanding what this has to do with a constitutional requirement for reasonable and probable grounds. Which goes to generally what reasonable and probable grounds that a crime has been committed and that a search of the evidence would be found in the location. This is a very different kind of situation; this is reasonable grounds to believe that it will assist in the investigation.

Why is that an inappropriate constitution standard for amount of data which is your knowledge largely anonymous? Particularly when as justice Croll says you need a warrant to get further information.

Lauren: First I would clarify that we do not categorize amount of data as being anonymous because even though you would have to go to the cell phone company to obtain the name in that manner there are many ways for the police to associate these numbers with names without obtaining a warrant. Therefore by the time they have this tracking data it is not anonymous because if they wish to look into it further they can associate most of these phone numbers with names.

Moreover the reasonable suspicion standard applied in Kang Brown and Chehil as you mentioned was a reasonable suspicion that contraband would be present or that evidence would be found. In this case this is a reasonable suspicion that the search will assist with the investigation and because of the wording in section 400 what we actually see is an even lower standard than the standard that has been applied in the dog sniff cases.

Female: What would you have it say? If it said reasonable suspicion, reasonable and probable grounds that it will assist would that be okay?

Lauren: That would be preferred but what the appellant is asking for is reasonable and probable grounds that evidence will be found. Because we believe that a presumed standard is that [inaudible 00:43:20] and Hunter and Southam in the third part of the Hunter and

Southam test. Only when the appellant can justify using a lower standard because there are some diminished expectations of privacy is inappropriate to use a lower standard.

Female: Given the technology we are dealing with can you really ever say that reasonable and probably grounds that evidence will be revealed when you are looking at 20,000 cell phones, is that a realistic standard?

Lauren: We would argue that that is precisely, what is a big issue with this legislation. It allows of the search of 20,000 people when there is no reasonable and probable grounds that each of those cell phones would provide evidence.

Female: It's going to be such a high test that's so difficult to meet and it seems to be that you have acknowledged that and how do you take that acknowledgement and balance it against the interest of these communities and having the police there to assist them and have the tools necessary to investigate crimes that are very serious and causing serious harm? How do you balance the fact that they will have a tool they can rarely use in that context?

Lauren: There are some tools that given the standards in section eight for individuals privacy rights should not be used and cannot be used. This is one of those cases. Given that there is such a high privacy interest in tracking data because of how much it revealed about an individual biographical core it is not appropriate for police to be able to look at the tracking data of 20,000 individuals only on the suspicion that that search might assist with their investigation.

The case law and sniff dog searches suggested that the reasonable suspicion standard was appropriate because in those cases the search was so minimal and it only answered one question. Here we don't have a minimally and basis search, we have a search that reveals many aspects of an individual of life and not only that but section 400 applies and even lower standards and reasonable suspicion by combining that phrasing with reasonable suspicion that the search will assist.

Therefore it is allowing dragnets searches of thousands of people, the vast majority of who are innocently traveling through the airport on a particular day. The wording is so broad that is descends to what justice [inaudible 00:45:57] described as a generalized suspicion which is the search that attaches not to a particular individual or a targeted individual that the police believe have committed a crime.

Only to a particular location or activity where law enforcement suspects the crime may have occurred. The court warned us in Chehil that the generalized suspicion standard is

lower and it was unreasonable for dg sniff searches. Therefore it is certainly unreasonable for tracking data which reveals so much more.

Female: If we find section 400 not to be an infringement can it be justified under section one or why isn't it justified under section one? Assuming you can never justify something under section one, if it is a breach of section?

Lauren: Our submissions on section one begins up here about 95 of our factum and we would argue that these authorizing laws cannot be upheld under section one in the charter for three reasons. First section 400 is not rationally connected to the objectives that are in the act, second the provision is not minimally impairing and third the invasion of privacy rights is disproportionate to the legislative objective.

Female: You are saying it's not rationally connected because the preamble to the act talks about cyber crime. Is that good basis for that submission?

Lauren: Correct, we would argue that the law is not rationally connected because parliament has attempted to use an act titled protecting civilians from online crime act to use it as a guide to include laws which really in effect broaden lawful access for all crimes.

Female: All right, you are just getting hung up on what the legislation is called and really it's just another [inaudible 00:47:49] arsenal a fighting crime. I mean why is this title so serious?

Lauren: The preamble and the title set out exactly what that act is supposed to do and it alerts civilians and also those and everyone who is reading that act as to what the real purpose is behind that act. Therefore we would argue that trying to include this broad lawful search powers within a predicting civilians from online crime act is inappropriate.

Female: I share the concern expressed by my colleague justice Croll, now we are always taught not to judge a book by its cover and I don't know why we would judge the stature by its title and preamble.

Female: Well said.

Female: Thank you. It seems to me that it may be more helpful to look at the corner of the legislation, what the intent is and then feed into your section one argument and help us as to why it should not save this legislation as opposed to being overly concerned with the title, with respect.

Lauren: We continue to hold that, an act that was created because of a need for an anti cyber bullying, it is not the appropriate place to include broad lawful access provisions. However in the interest of time if there are no further questions on the connections, I'm

well aware that is often not where claimants win their section one arguments and I would like to proceed to the proportionality analysis. Section 400 is not minimally impaired. It authorizes dragnet searches on merely suspicion that the data will assist in the investigation.

Female: Would you help us here because it's always the most interesting part of the analysis under section one. What do you say is a less intrusive form of intrusion that would get to the same objective?

Lauren: We have three ways in which section 400 could be more carefully tailored and aligned the section eight rights. First this section as I previously mentioned failed to meet the Hunter and Southam standard and applied an even lower standard of reasonable suspicion that the data will assist. Justice Abella as you mentioned earlier this could be more carefully tailored by requiring reasonable and probably ground that the data will assist or at least a reasonable suspicion that evidence will be found.

Furthermore section 400 contains no internal constrains on a number of people who can be searched or the amount of data that can be searched from each individual. Finally section 400 is void for accountability. There are no requirements to keep records of whose data was searched and there are no requirements to report after the fact the individual that their data was searched and provide them with an opportunity to identify and challenge invasions of their section eight rights.

Female: The only time I think we have ever required that was in C and that was an emergency provision where there was no judicial authorization. Wasn't there in advance …?

Female: It was wire taps wasn't it, it was arguably more invasive than this kind of anonymous. I know you don't agree with that but mitigate, so it was wire taps on emergency basis, very different scenarios.

Lauren: We would argue that the content of conversation does of course reveal a great deal of information. Given the analysis that can be done on locational data of thousands of individuals there needs to be accountability provisions for tracking data as well. Because the cell phone that operated as the GPS and tells the police your location every three seconds for three months is also something that citizens need to know about.

Unlike a wire tap this is the type of search that individuals don't know it’s occurring. It's not like a dog sniff search or a strip search where you know you are being searched at that moment. These searches are done without knowledge and therefore after the fact reporting would provide individuals with an opportunity to bring challenges to the court.

Female: Then on the final level, the proportionality, what do you say? Why is it more harmful than beneficial?

Lauren: The deleterious effects of section 400 outweigh the salutary effects. There are a few things as important to our way of life as the powers that are given to police to invade our privacy. Individuals must be able to live their lives without fear of unreasonable search and seizure by law enforcement in order to maintain a sense of autonomy, dignity and integrity.

As Laforest stated in diriment the restraints imposed on government to pry into the lives of citizens goes to the very essence of the democratic state. The claimants do not deny that there are salutary effects providing police broad powers to apprehend criminals. However given the significant effect for individuals in society for expanding police power in this manner, the citatory effects do not justify the deleterious effects. Thank you.

Female:Thank you, respondent, Ms. Lake?

Kathleen: Good evening justices. My name is Kathleen Elhatton-Lak. I will be addressing the first issue in this appeal at the Flavelle Privacy Advocacy Centre FPAC does not stand in to bring this claim and the second issue that there was no reasonable expectation of privacy over this data and hence no search. My co-counsel Samuel Greene will be addressing the third issue, that if there was a search it was compliant with section eight of the civilian charter.

If this court finds the search to not be compliant with section eight that it is still justified pursuant to section one. I would like to begin with the first issue of standing, the section begins at paragraph 16 of the respondent factum. Before any of the data collected was touched FPAC brought a claim challenging the validity of section 400, a mainly theoretical claim with a spar specula record.

They asked this court to grant them standing to represent a wide SWOT of the civilian population.

Female:Why was it theoretical?

Kathleen: Theoretical based on that no search had happened yet. The data hadn't been analyzed, we don't know what the police would actually do and we don't know if we have apprehended this very dangerous criminal yet?

Female:We have obtained the data?

Kathleen: The police have obtained the data but it has not been reviewed in any way.

Female: You don't get standing unless the data you have arguably unconstitutionally obtained has actually been used to do what it was obtained to do? Why isn't the getting of the data enough to trigger the proceedings?

Kathleen: We have to submit their section eight submission acts, the collection of the data was not the search. Even at that there is no one who has been directly affected on this part yet. No one's data has been reviewed in any meaningful sense and FPAC may prematurely be bringing this claim and we see it directly affect the individuals who would actually be interested in bringing this claim.

Or in fact even victorious had he been charged or she, had he/she been charge would bring the exact same concerns before this court.

Female: Is it your submission that in order to challenge the legislation there has some harm, somebody must and as you say and I think paragraph 23 somebody has to have been directly affected by the provision?

Kathleen: Yes justice because the power to just bring a reference question before this court is a power reserved for parchments, not for concerned citizens.

Female: You are saying that the people whose data was gathered, has been gathered have not been affected? I know you are saying in terms of there's been no impact on them yet because it hasn't been analyzed. You are saying that the actual gathering of information about them has the potential, your friends described puts them in a category so that at the moment anyway they have not been affected by the legislation?

Kathleen: This court may find they have been affected by the legislation. What is missing is the factual background necessary to make the determination on the section eight claims. As your questions have gone to a section eight claim is very fact specific driven by this subjective expectation of privacy of the individual and how objectively reasonable that is.

Female: If one individual rather than the impact had brought the claim before the data had been analyzed, would you making the same argument?

Kathleen: Well, I wouldn't be making a standing argument but I would still be making my submissions regarding whether or not any direct impact happened to that individual yet.

Female: How would that go to the scrutiny of the constitutionality of the section 400? Would you say they don’t have a claim yet because it hasn't been used in a way that is a

violation of the constitution? I guess I'm having a little trouble figuring out why the claim can't be brought once knowledge is out there that the information was obtained?

Kathleen: They could bring that claim in this discussion one we would be having that directly affected an individual before court. We would still argue that their section eight rights have not been impacted in any way.

Female: If so many individuals even if not all the 20,000, would it narrow down to be of interest, but there's so many individuals just on first principles, isn't this judicially efficient to have a group with that expertise bringing that claim instead of hearing from thousands of people potentially?

Kathleen: No.

Female: Okay.

Kathleen: For two reasons. I promise there will be justification for that. First that aspect is not heavy. Genuine interest in this claim in the way we have seen in previous public interest [inaudible 00:58:32] cases, and second that we don't see this as a reasonable and effective way given there are directly affected groups that lower courts have said are well placed to bring the claim.

Female: You know that the law has changed in downtown eastside and that you don't have to be the most effective way to bring the case before the court. You just have to be a reasonable way to bring the case before the court. Why isn't FPAK a reasonable way to raise the constitutionality of section 400 before the court?

Kathleen: Although the law has been clarified as your court said, in downtown eastside.

Female: By definition, we said it, it's clarified. Isn't that right?

Kathleen: We would still submit that FPAK is not a reasonable and effective way to bring the claim. FPAK doesn't bring a distinct interest. In fact, in [inaudible 00:59:28] we saw that this group had deep connection to the individuals it sought to represent. FPAK is a general advocacy and privacy group. To open up sending such a broad group would be to bring so many claims for the court that it would undermine any concept of judicial efficiency.

Female: This [interorum 00:59:48] argument is something we hear all the time, the thin edge of the wedge and all that [crosstalk 00:59:54]. It sometimes has an impact, but the reality is some of these claims otherwise might not be brought before the court, and a lot of

them are very important and can't be overlooked as we struggle to find ways not to allow groups like the appellant to advance an argument that they may be quite important.

Kathleen: I agree to you at the principle of legality, its fundamental to this justice system but this isn't a case where the claim will not come before courts in other manners. We see many directly effective groups, airline employees, airport workers, business travelers all identified as well placed. The question then comes, if we see these well placed groups as Justice Abele mentioned, who do not undermine FPAK's claim that if we then allow a broad generalist group to attempt to bring this claim so early without deep respect of those groups that it would open up standing in such a way that would bring so many of these claims before court.

Female: It's open. It's already been opened. The question is, is this an organization that can come through the door? We are not talking about Green Peace, we are talking about an organization devoted to dealing with the very issues that are engaged in this case. Very hard for me to see how it doesn't have the potential to raise the appropriate factual basis in front of the court to decide the constitutionality of section 400.

Kathleen: You have two responses to that, first that FPAK unlike downtown eastside which opened up standing does not have the same sort of connection that we saw with the population involved there, but it sought to represent, its representing a much broader group than we see coming out of the opening up of standing case. Second, that section eight claims do require a very specific factual background, that they are very individually based. In that, we do really need to see directly effective groups bringing us forward. If there's no further questions on standing I will move to the second issue. There is no reasonable expectation of privacy over the tracking data and hence there has not been a search. This begins section 29 of the respondent factum.

Female: [Inaudible 01:02:19] would be helpful here to begin if you would tell us why the 1992 decision of Wise dealing with GPS tracking isn't determinative of this issue.

Kathleen: There are many factors that distinguish this from Wise. First, Wise also involved a trespass onto an individual's car. Second Wise allowed for real time tracking. The police could literally follow a person as they got this signal and tracked them. This version only allows for historical data to be tracked. Lastly Wise attached to a specific individual, whereas this data is anonymous. It's about nine numbers, not about a specific person's activities.

Female: It's about 20,000 people's activities. The fact that it's about 20,000 and not one doesn't change the fact that we are intruding into arguably 20,000 people's personal space.

Kathleen: Those 20,000 people are anonymous. They are not being viewed on their individual level. As such, this information doesn't touch on their biographical core because it's not about a specific person. It's about a general individual in society who may be moving in certain ways but that person's name isn't connected to them.

Female: I thought there was an ability thought to be able to identify the individual through this information at some point, through the triangulation that is available through the computer and then at that point you go to a judge. It can be brought down to the level of discerning individuals, cant it?

Kathleen: We know that there is a …

Female: Theoretically

Kathleen: Theoretically there is a specific 4168273852 maybe visiting a Starbucks on a particular day, but we don't know who that individual is. In so far as we don't know who that individual is and would require a warrant on reasonable probable ground to attach that subscriber information to those movements, there is no interest in this data because it can't tell the police or the government anything about you.

Female: What is your response though to the argument that your friends pressed, and that is, that connecting a phone number these days to an individual is easy? You just go onto the internet and it's on facebook, it's on LinkedIn, all kinds of different ways where people just have their numbers out there. What's your response to that?

Kathleen: Though perhaps in some cases you may be able to connect a number with diligent searching, in many cases we will see people go for a warrant on reasonable or probable grounds. Not everyone has their number publically available, and if that number is publically available that may go to their subjective expectation of privacy around it as you mentioned.

Female: How do you … you keep talking about the fact that its anonymous in the first level and they have to take further steps to be able to make this identification, but yet the exact objective of this tracking data is at the end of the day to track a specific person and determine their identity. That's what this tracking data is all about, isn't that something that the individual is entitled to protect?

Kathleen: The tracking data is about showing someone who is meeting a criminal pattern and then going back to the court and asking for that information. Similar to what we see in Spencer where you need a warrant to get the subscriber information associated with an IP address, the court can supervise that process of attaching an individual's name and subscriber information to an anonymous but specific piece of information that tells you various information. Further, even if we accept that there are some, perhaps numbers that can be linked to their individuals, there is no significant interest over the metadata because the information was innocuous, similar to what can be gathered via physical surveillance. This begins at paragraph 36 of the respondent factum. The information can't give rise to a strong immediate and direct inference about an individual.

Female: Except location.

Kathleen: The location within 50 meters of a device, which in some cases perhaps just as [inaudible 01:07:03] case, may not attach to an individual.

Female: Let's assume that most phones don't walk around on their own, just for the sake of argument. How do we … how can we really say that this is not something that is very personal to the individual? Where the individual is, where the individual goes, the numbers … I am assuming from the metadata that they can track not only that person's number but the conversations and the person they are having conversations with as well. It invokes other people's privacy interests as well arguably.

Kathleen: This particular provision only allows for tracking data, which only deals with location, though there are, perhaps in a future case the court will deal with metadata that deals with conversations between numbers. This only deals with a specific person who would be involved in this search.

Female: Would we have to conclude to agree with you that people generally do not feel that their location is something to which they are entitled to a minimum of privacy from the State, where they go? Would we agree that that's the case?

Kathleen: Yes Justice.

Female: If that's the case, doesn't that take care of the fact that the cellphone, which they carry with them and which identifies where they are, is something that intrudes on their expectation of privacy?

Kathleen: The cellphone, sorry Justice, in so far as this information, which perhaps that we are dealing with cellphones at their users fingertips, in that case the information of which buildings you've chosen to enter recognizing the data is still at a 50 meter radius, we may not even be able to specify which house which building which side of the street you are on …

Female: Which doctor, which religious institution …

Kathleen: All of that information is information the police can gather from physical surveillance. Your entrance into and out of buildings is not something you have a reasonable expectation of privacy over when it can be observed by police and your activities in a much more detailed way in physical surveillance. The locational data doesn't tell us what you are doing in that place. It doesn't necessarily tell us who you are with. The digital collection doesn't fundamentally change the nature of the information. The nature of the information is such that we don't have a reasonable expectation of privacy over it. Moreover we need to take many steps to turn this information into anything resembling an inference. The location of 45 north and 75 west is meaningless. It could be any number of places.

Female: Why do they need it?

Kathleen: The police would presumably find the coordinates of the Austin airport and use a way of identifying people who had met this very specific travel pattern filtering out anyone, and not even viewing anyone who had been involved.

Female: I just want to follow up on something in your factum and that justice Abele just touched on, because paragraph 38 you say, the typical behavior of internet users and cellphone users demonstrates that they are not concerned about the information that can be attached to a unique identification number. Where does that come from, how do you come to that statement?

Kathleen: For example, we see in Spencer that internet users when downloading child pornography or the newest album have their unique identifying IP address that is publically available to anyone not just the State. The behavior of internet users on their locational data in terms of posting on the internet of their constant whereabouts, that sort of behavior doesn't give rise to a reasonable expectation of privacy.

Female: Is there anything more personal than where you are and who you are seeing and who you are visiting?

Kathleen: Yeah.

Female: Let's not go there!

Female: You made a submission about how in this case the police eliminated a lot of the information because it just didn't fit any pattern and they were zeroing in, all they want to know is the numbers where there is a pattern consistent with the suspect's travel, the information they have about the travel. Is that relevant to our analysis of the constitutionality, the use that the police are making and not making of the vast amount of data they are collecting?

Kathleen: This is about the computer search which I think is actually a critical component of a search, and what we began to get into on standing as begins at paragraph 38. Most of this information although has not been touched yet was intended to only be reviewed by a computer, a computer with no distinct awareness but like every computer that is analyzing your data on a daily basis use it in terms of zeros and ones. There's no judgment there and no concern about your personal behaviors. We need to consider when a search happens because it's important that in the digital age we don't define searches narrowly or broadly.

In this, what we see is that a broad search such as this one could actually result in very few people having their data viewed by human eyes, a narrow search that perhaps only caught 100 people's data but every hundred was viewed by humans would be seen as smaller. We need to consider when people actually view the data as being when we've perhaps crossed the threshold of section eight. Here, nothing has been viewed by human eyes. The principles of privacy don't go to computers with no distinct awareness of this information. Individual's concerns about privacy relate to other individuals viewing and judging this information. FPAK has asked for standing in a case that is based on section eight claims which require a factual background to make these sort of determinations. If I may have a moment.

Female: Yes.

Kathleen: The data collected is anonymous and innocuous. This case is not one for public interest standing or to find a reasonable expectation of privacy. I [inaudible 01:13:36]

Female: Thank you. Mr. Greene

Greene: Good evening Justices. My name is Samuel Greene. My submissions will proceed in two parts. First, that if this court finds that there is a reasonable expectation of privacy in cellphone tracking data, that the search in this case was never the less reasonable and therefore compliant with section eight, and in the alternative that if this court finds a breach of section eight that that breach can be justified pursuant to section one. My first submission begins at paragraph 43 of the respondent's factum. This law is a reasonable law and the search conducted in this case was reasonable. My friends assert that section 400 of the criminal code is an unreasonable law because it departs from what they have characterized as the constitutional baseline set out in [inaudible 01:14:51]. They also concede that the court has departed from that standard in cases like [Kang 01:14:58] Brown, Simmons, Money, MMR and Cahill where in the words of Justice Benny in Kang Brown, a balance is struck between the legitimate needs of law enforcement and the privacy interests of citizens. In our submission, section 400 strikes the right balance.

Female: You are talking about sniffing dog cases and borders, where the standard has been reduced. This would be a reduction of a standard in technology, where as far as I know we have not yet reduced it. Why would it be reduced in this case?

Greene: For a number of reasons Justice. First, because in our respectful submission there is, even if there is a reasonable expectation of privacy in this case, it is a diminished one. Second off, the legitimate needs of law enforcement justify the use of this power and lastly because there are adequate tape guards in the law. I will deal with those in turn. First off in this case, there is a diminished expectation of privacy. If this court finds that there is a reasonable expectation of privacy in tracking data we would submit then that that would make this case analogous to a case like the [inaudible 01:16:10] Wise where the court held that a GPS tracking device was found to violate a reasonable expectation of privacy but where the court held that it was a severely diminished expectation of privacy.

If we look at the cases where reasonable suspicion has been allowed in the past such as [bed pan visuals 01:16:32] where the law enforcement agents are capable of looking at someone's excrement, where in sniffer dog searches someone's personal effects will be examined by a police officer. All of those cases are cases that are more intrusive than this one, where the State is gaining evidence or information about individuals which is analogous to that which they could gain through physical surveillance. Even if this court finds that there is some kind of reasonable expectation of privacy that distinguishes this type of surveillance from ordinary physical surveillance, it is still a diminished

expectation and one that should weigh less heavily in the balance that was described by Justice Benny in Kang Brown.

Female: Is there a difference between an expectation of privacy being diminished because of the nature of what that information is and a diminished expectation of privacy in the object itself? I guess what I find a little confusing is, diminished expectation of privacy flows from being at the airport, being at the border, the sniffer Brown cases in the bus stations. Wouldn't we have to conclude that there is a diminished expectation of privacy in cellphones generally to be able to conclude that there is therefore a diminished expectation of privacy in the information you can get from the cellphones?

Greene: No Justice. The reason for that is, there would be a series of concerns about, say, saying that there is a diminished expectation of privacy in cellphones because that statement would permit a diminished expectation of privacy to be found say in the content of communications found on cellphones.

Female: Do you accept that cellphones create or have attached to them an expectation of privacy that is not diminished on their own?

Greene: Cellphones, it depends … the reasonable expectation of privacy goes through the information that you are seeking, not the particular device. The fact that a cellphone has been in a particular place is very different from the content of communication that is to be found on that cellphone. If the police in our submission want to get the content, it most certainly has to be on reasonable and probable grounds. Where the individual's locations are determined by virtue of historical tracking data, that expectation is very different because that information is the type of information that can be gained, as my co-counsel mentioned, from physical surveillance. These are two very different types of information. I would urge the court not to look necessarily at the device but the purpose towards which the search is being instantiated.

Female: We didn't do that with computers though, did we? Why would we do it with cellphones?

Greene: The concern with computers was not about the locational data around a computer. The concern was that by allowing the police to access a computer for any purpose it would create a huge possibility of privacy violation. That is not what is happening here.

Female: You wouldn't want us to look at cellphones the same way? Don't cellphones contain the same kind of personal information generically?

Greene: The police here, under section 400, are not entitled to access that personal information. They are entitled to access only the tracking data attached to the phone. The function for which the search is engaged in is critically important to this distinction.

Female: I think what you are trying to do is … I am not going to use the word avoid, but I don't want to suggest you are trying to prevent us from examining the main point of the appellant's argument on this issue, and that is, the information available to the State because of the location that is an issue here, not just location. If it was a location of a baseball bat, fine. We are having a location of a device that even without going into the inside of the phone and looking at the content as in the computer case, the issues involved in the computer cases. The location itself tells you something or has the potential of telling you something that could be private information.

Greene: I defer to my colleagues submissions on the subject of the anonymity and the innocuousness of this data. My submission is to the effect that the fact that those types of inferences, the pieces of information about what people do based on where they have been is still analogous to physical surveillance and has, even if you find a reasonable expectation, a diminished expectation of privacy and therefore should hang less heavily in the balance. The other side of the balance is the legitimate need of law enforcement. You made reference to this Justice Kroll when you talked about requiring reasonable and probable grounds in this case would make the technique of tracking data analysis functionally useless. Justice Benny in Kang Brown alluded to this concern by saying requiring reasonable and probable grounds in a sniffer dog search would render the technique of sniffer dog searches functionally useless because once you have reasonable and probable grounds you can search the bag without the dog sniff. In this instance, sorry Justice …

Female: Excuse me for interrupting. That Kang Brown and some of the other cases are much more specific. They are narrow, they are directed. They are focused. This was just some 20,000 people who were in the area. That's a distinction there.

Greene: There is a distinction, but in our submission the similarity exists both in terms of the functional uselessness of saying you need to have reasonable probable grounds to get all of this anonymous innocuous tracking data in order to apprehend this one individual. If we had reasonable and probable grounds on Victorious's cellphone we wouldn't need to have the metadata analysis in the first place because we would have already caught her or him.

Female: Can I ask you a question. I think part of what is interesting about this case is the 20,000, its metadata. What if we reduced this to a level we are much more comfortable with, which is just data? What if it was a request from [Hammerstein 01:23:20] for five anonymous cellphone location devices? Five discernable numbers come up, anonymously, would your argument be the same?

Greene: Yes Justice. If it's a smaller number of individuals then …

Female: It would be easier to identify more precisely some of the personal information.

Greene: It's important to note that the police cannot obtain this information merely by requesting it from Hammerstein. They have to go to a Justice of the peace and they have to …

Female: To see if they will assist?

Greene: Yes, that it will assist the investigation. They have to satisfy the Justice of the peace that there is objective evidence demonstrating that these searches would assist in the investigation. In our submission, the fact that there is a fewer or greater number of people will ultimately have to depend on the facts of that particular case and the evidence that is put before that JP.

Female: Could you help me, because it's a while since I have read the trial judgment.

Female: Which is the fundamental basis.

Female: Always.

Female: The appellate decision not to be …

Female: It wasn't a bad one!

Female: Not a very good concurring opinion. What would you have to show an authorizing judge to be able to get reasonable suspicion that it will assist … what is the evidentiary foundation for that kind of a request?

Greene: In this case, the police came to the Justice of the peace with tips from reliable informants that demonstrated the date on which Victorious would be travelling through

the Austin airport. The travel pattern that the police intended to search using a computer and the facts around the activities that Victorious had been engaging.

Female: That's number one. Number two, would they have had to explain what they intended to do with that anonymous information?

Greene: Yes, because in order to demonstrate that it would assist the investigation they would have to explain to the Justice of the peace what the investigation was and what the investigatory purpose was.

Female: What would the investigatory purpose yield?

Greene: Here, the investigatory purpose was to collect all this tracking data in order to find any people who matched a very specific travel pattern that Victorious followed according to the reliable informant. Once the computer had determined which of those individuals matched that pattern, they would go back to the Justice of the peace and request the subscriber information associated with that number based on reasonable and probable grounds to believe that evidence would be obtained. There is a form of tiered scrutiny that happens here where we have the broader search on the lower standard for the more anonymous information and the deeper more invasive one that happens once you have that link.

Female: You concede, I think, that you can't get the tier two which is less anonymous than if you get tier one first, which is anonymous. Is it really fair to say, its anonymous when it doesn't remain anonymous as the investigative process takes place?

Greene: It only stops being anonymous for people who match the pattern and the pattern gives the reasonable and probable grounds. For those other people, like Victorious, they have a privacy concern but their privacy concern is justified as a reasonable search because there is a reasonable and probable grounds to find evidence there. Justices if there is no further questions on section eight I would like to turn to section one of the charter, that if this court finds a breach of section eight that it can never the less be justified pursuant to section one. This begins at paragraph 61 of the respondent's factum.

Female: Its put against you is that there has yet to be a case as I understand it anyway where a section eight breach has been saved by section one because of the fact that got to say something that was unreasonable is reasonable.

Greene: Yes Justice. The reason why many cases don't get before the court [crosstalk 01:27:37], many cases don't get before the court on section one with respect to section eight because they are all done through section 242 remedies. This one is a section eight case where section one is being invoked to save the statute. It may be the case that the law fails an internal proportionality analysis within section eight. It can never the less be justified pursuant to section one. In light of what this court said in Bedford from paragraphs 124 to 127 which is that the question being asked at the proportionality stage of section seven, for example in gross disproportionality, is different from the question that's being asked at section one.

One of them is a qualitative exercise with respect to one individual's rights. The other is a quantitative exercise with respect to the justification of public policy in relation to the scope of the infringement. In our submission, this policy can be justified even in the event of a breach. First, because there is clearly and pressing substantial objective here. The courts below were unanimous on the fact that police require new investigative techniques to meet the modern realities of the high-tech crime environment.

Female: Are you submitting that if, which isn't your submission, but if it's an unreasonable search and if there is a reasonable expectation of privacy that the benefits to law enforcement outweigh this privacy right in a qualitative way. If this is a right we need to protect, are you saying that we really don't need to protect it because law enforcement is going to trump it and then we can save this?

Greene: The difference between proportionality analyses that happen under the enumerative rights from section seven to 14 is different from the section one analysis. Primarily in so far as the analysis is quantitative at the section one level as opposed to qualitative at the section eight level. If this court finds a breach of the qualitative individual's right under unreasonable search and seizure it can never the less be justified quantitatively in terms of the empirical significance of the State's objective and the minimal nature of the infringement. Now my friends state …

Female: Good luck!

Greene: I can make no other sense of the courts comments in Bedford than that, but …

Female: Your time is up.

Greene: Since my friends have made concessions with respect to rational connection, I would like to move to proportionality because in my view it's probably the core of the section

one analysis here. The first comment that I would make with respect to minimal impairment is a general comment that the appellant is merely pointing out certain ways in which the laws could have additional safeguards is not sufficient to fail the minimal impairment analysis. As Chief Justice [McGloclum 01:30:35] mentioned in [inaudible 01:30:36] 'the bar of constitutionality must not be set so high that responsible creative solutions to difficult problems would be threatened.' In this instance, the measures that my friends say should be inserted into the law are not justified and are against the intention of parliament.

First off, they state that there should be after the fact notice included in the law to make it minimally impairing. As you pointed out Justice Abele in your question, say, which is the only case in which that requirement was imposed was a warrantless wiretapping case. Justices [inaudible 01:31:11] pointed out that after the fact notice is one way of parliament remedying accountability concerns. It is not the only way. In this instance parliament has elected to go with a more direct accountability provision namely, prior judicial authorization. Our system of justice places a great deal of trust in trial judges to ensure that police behave properly with respect to searches and seizures.

It is that trust that parliament is relying on for the accountability of this provision. Furthermore my friends assert that this case, that this law fails under minimal impairment because of a potential for abuse. Yet, they do so in the face of no findings of fact whatsoever that the police acted in any way inappropriately with this data, and furthermore do so in the face of what Justice Benny said in Little Sisters, which is that parliament is entitled to proceed on the basis that its enactments will be applied constitutionally by the public service. My friends … sorry, Justice.

Female: I guess the question would be in the proportionality analysis. Is there a less intrusive less harmful way of doing it, although I am aware of the differences owed to parliament in these circumstances? Can you think of a single situation where someone would not be able to persuade a judge that there is a possibility that evidence my assist in the investigation of a crime? You have to think. Except that this is a really low standard. Is it really a safeguard to say you've got a judge looking at it?

Greene: There are two questions in there, the first is whether or not it's a safeguard and the second is the lowness of the standard. With respect to the lowness of the standard, we do concede that it is a lower standard than previously. As Justice [inaudible 01:33:10] pointed out in Cahill, reasonable suspicion is not a meaningless standard, it's one that must require objective evidence. My friends talk about generalized suspicion but the

generalized suspicion that was discussed by Justice [inaudible 01:33:24] in Kang Brown is not based on objective evidence that can be subjected to judicial scrutiny, which is what is required by section 400 and which was what was given in this case.

Female: Reasonable and probable grounds in Cahill to suspect that a crime has been committed is different from a suspicion that there is a possibility that what they are looking for will assist in the investigation. I guess when you are doing the proportionality analysis that allows intrusions. The question is, is the benefit so much greater?

Greene: Justice, as I see amount of time affected I have a moment to answer your question and conclude. There is a line drawing exercise to be done here. I would hesitate to say that there is a specific number at which this search becomes too broad. Ultimately it will be a [factory 01:34:15] of an inquiry for a trial judge to say this search is reasonably broad but searching the entire city or the entire country would be too broad. That would ultimately depend on the strength of the evidence that's provided by that trial judge and on the specific facts of that case. To determine whether or not something assists the investigation is a factory of an inquiry. In our submission it's one that trial judges should be trusted to make.

Female: Thank you.

Greene: Thank you Justices.

Female: We have heard excellent arguments from both sides. I think in the circumstances the court is going to retire to consider what to do in these circumstances and we should be back very shortly.

Female: Give a clap to the mooters.

Female: We just found the case too hard to decide right away. We are going to reserve our decision. It was an extraordinary moot. I am going to invite each of my colleagues to let you know personally how dazzled we were by what we heard and read from these forwarders. Justice Epstein.

Female: I would like to sum up my impression by saying I am speechless, and probably say no more …

Female: Justice [Kraul 01:36:44].

Female: … you would think we had writers, wouldn't you? I really am, I am just so incredibly impressed at your … the level of preparation and the extent to which you thought these issues out, issues that were not only complex on their own but incredibly complex when you realize how they are internally related to each other. Just that kind of context makes any argument difficult. It's also one that's difficult on its facts and its concepts, but also difficult in terms of its policy.

The core issues that we as a society have to consider about the balancing, the tension between giving the police powers to do their job and respecting privacy rights. It's becoming more complex of course as our society gets more complex. Good on you for being able to understand them as well as you did, deal with them as well as you did having regard to the complexity. Your knowledge of the case law to me was just astounding. Your ability to stand up and respond to questions and maintain eye contact and all the things that people who helped you prepare this moot urged you to do you did very well. Everybody in this school should be incredibly proud of you, I know I am.

Female: I can't add much to what Justice Epstein has said.

Female: You almost called her by her first name!

Female: Gloria. We were classmates in the class of 1977 here at the law school

Female: Sure, sure that [inaudible 01:38:38]!

Female: I am not going to add much except to say you really were, each one of you were terrific with a very, very complicated problem. I commend you all. I also commend the moot court committee and the problem writers because it was a terrific problem. The bench memo that we received, and I know Justice Abele commented on this privately before, it was excellent. It just made our jobs so much easier. I have to say that if in real life the preparation and the written material and the oral advocacy was always this good, life would be just a pleasure. It really was outstanding and congratulations to all of you and your committee.

Female: I want to tell you that the phrase the three of us use when we walked out of the room after the hearing was an old judicial word which we use rarely, and that was wow. It was such a pleasure to hear four people just explain to us and stand their ground on really difficult arguments. We were struggling with this as well and couldn't get over the sophistication of the arguments and the poise and the comfort. You were smiling at us when we were very obnoxious to you! That's not easy to do. If this is the way you are in

your very first public performance in front of judges I can tell you it's going to be really easy. Let me tell you why privacy in particular is such an interesting area for courts. We are always about five or 10 years behind the technology.

Now we are dealing with metadata, it's a little bit discouraging to think that when we finally finish metadata there will be something out there that will make metadata absolutely irrelevant. To think about a GPS tracking device, isn't that adorable from 1992, and here we are not dealing with being able to collect information from 20,000 people. I have a personal reason why I enjoy these privacy cases because as I was reading the materials, which were outstanding, I saw all of my descents and all of the bruises overturned by a majority in Edward's. Overturned … I have to tell you, the very first week I got to the Supreme Court of Canada 10 years ago, its amazing isn't it, for somebody who is only 36 years old, was a case called Kesling, nine nothing. The Supreme Court of Canada overturned me.

I remember the Globe headline saying, awkward welcome for Judge Abele. Then of course there is Patrick the garbage case. I haven't always been kind of been with the flow on this, but I think as time goes on there is more of an awareness that privacy is something that people think they are giving away but in the end don't want to and mediating that line between legitimate law enforcement and very important privacy rights which anybody under 20 seems to have a hard time grappling with. It's going to be a frontier that we are going to have to deal with through the assistance of really good counsel who can explain to us what the implications are, what the consequences are of our decisions either way for the public. Everybody has an interest in privacy. If we get lawyers in the future who were like the four of you today, then I say bravo to UFT law school, bravo to the four of you. Thank you for the privilege of letting us hear you today. It was great. Thank you.

Male: Thank you very much to [our highness 01:43:01]

Male: [Inaudible 01:43:02]

Male: It's on already, okay.

Female: Technology.

Female: 20,000 people can hear you, you know.

Female: First I would like to congratulate our mooters. You all did a fantastic job. I would like to thank our distinguished panel. I know I speak on behalf of anyone who has mooted. It really means the world to us to be able to argue about these fake facts and fake problems before you and we talk about it to all our friends afterwards. Thank you very much. Obviously I would like to thank our generous sponsors, McCarthy [inaudible 01:43:37], who are hosting the reception that will be outside. Really they have been a great sponsor to the moot over the years. Jenny and I have really appreciated being able to tap into their experience. I haven't actually had the chance to meet you in person yet, but thank you very much for always making yourselves available and for being able to answer any questions we have had. I would like to take the opportunity to invite Paul Morrison to come and say a few words now.

Paul: Thank you. I am going to stand beside the judges because I never stand in front of the judges with my back to them. At McCarthy's we have a long tradition of excellence in oral advocacy. There is a long list of names that I could give to you, John Robin Ep who is commonly referred to as the all-time dean of Canadian barristers was a member of our litigation department. More recently Ian Benny, not that long ago retired from the Supreme Court of Canada, was appointed to the Supreme Court of Canada straight out of our litigation department. We are proud of our tradition of oral advocacy. We are proud of our prominence in oral advocacy because we have a firm belief in the importance of oral advocacy to the proper administration of justice. It's for all those reasons that we are very proud to sponsor the grand moot.

We see it as a vehicle to develop and to showcase excellence in oral advocacy. To you four, thank you very much for justifying our belief in the grand moot program. You guys were terrific. Let me just … there are a lot of things I could say about how terrific you were and lots of things that I could say about what you did right. Can't say much about what you did wrong, but I can say a lot about what you did right. Let me just take one example. Judges, they are smart. These judges are smart. They read the material. These judges clearly read the material. What happens when judges read the material is, they form views. Some of them recognize judgments in which they were overturned. They form views. What happens is, when they ask you questions and they ask plenty of questions, when they ask you questions those questions are not always purely exploratory help me get to the right answer questions.

Those questions reflect their views. What your job is, you recognize their views are coming out. You recognize those views are not consistent with your position. Your job is to answer those questions to put your position without alienating the judge. You have

to be assertive without being offensive. You have to be focused and firm without being intimidated. That's the job of an oral advocate. You guys were terrific. All four of you were put in that position. All four of you discharged your oral advocacy obligations with excellence. I was very, very impressed, so congratulations. We have, here they are right here, we have a little gift. I can say that a few years ago …

Female: Thank you very much.

Paul: Later for you. I can say that a few years ago the gift to the mooters was of a liquid nature that will help you keep going late at night when you are preparing our submissions. These unfortunately are not. I hope none the less that they will find favor with you because you truly deserve it. Thanks very much, and congratulations.

Female: That [inaudible 01:47:48] by surprise.