

# **Wire Tap Law and the Fight for Section 8**

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*Crime and Punishment: New Aspects of Evidence in the Electronic Age*

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## I. INTRODUCTION

[1] This paper will address recent developments in wire tap law. Two areas of interest will be examined. First, specific legislative enactments will be reviewed as well as related judicial decisions in the ever expanding state use of electronic surveillance. Second, recent decisions of the courts in Ontario and Alberta regarding live monitoring requirements in wire tap authorizations and the use of an interception equipment feature called “put away” will be discussed.

## II. LEGISLATIVE HISTORY

[2] In 1974 Parliament enacted Part IV.1 of the *Code* by *An Act to amend the Criminal Code, the Crown Liability Act and the Official Secrets Act*, S.C. 1973-74, c. 50, known as the *Protection of Privacy Act*. The legislation was a response to wiretapping by the police which was unsupervised by Parliament or the judiciary.<sup>1</sup>

[3] There were five aspects of the original legislation which reflected the concern of Canadians about the technological advancements enabling the state to surreptitiously invade the privacy of the citizen: (1) the offence section; (2) the exclusionary rule; (3) the limitation on offences; (4) the duration provision; and, (5) the investigative necessity requirement. These sections, taken together with the standard of probable cause, set up a legislative shield protecting the citizen from unwarranted and overly broad electronic surveillance by the state. Wiretapping was only to be done

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<sup>1</sup> In *R. v. Demeter* (1975), 19 C.C.C. (2d) 321 (Ont. H.C.J.) *per* Grant J., at pp. 323-325 and 328-330, tape recordings of conversations between the accused and various other persons were admitted into evidence. The tape recordings pre-dated the coming into force of the amendments to the *Code* contained in Part IV.1 and were obtained through the wiretapping of the accused’s telephone, the use of a portable cassette tape recorder and a body pack transmitter. The wiretap on the accused’s telephone lasted for approximately 6 months and had been approved by the Deputy Chief of Police to whom authority had been delegated by the Chief of Police who had in turn been given authority by the Board of Commissioners; *aff’d* on other grounds: *R. v. Demeter* (1975), 25 C.C.C. (2d) 417 (Ont. C.A.); and, *Demeter v. The Queen* (1977), 34 C.C.C. (2d) 137 (S.C.C.).

in accordance with a judicial authorization, for a specified period of time, for serious offences and based upon information establishing that other investigative procedures were tried and failed or were unlikely to succeed or the urgency of the matter was such that it would be impractical to carry out the investigation using only other investigative procedures.

**1. Offence Section**

[4] Section 178.11(1) of the *Protection of Privacy Act* made it an indictable offence to wilfully intercept a private communication by means of an electronic, acoustic, mechanical or other device. Exceptions were provided for in sub-section (2) such as interceptions made with the consent of the originator or recipient and interceptions made in accordance with an authorization.

[5] The original offence contained in s. 178.11(1) has remained unchanged and is presently contained in s. 184 of the *Code*. The saving provisions contained in s. 184(2) have been expanded by sub-section (e)(i) and (ii) to include a person in possession or control of a computer system who intercepts a private communication which is reasonably necessary for managing or protecting the computer system. Section 184(3) permits the retention of such private communications if it is essential to identify, isolate or prevent harm to the computer system; or, for disclosure under s. 193(2) of the *Code*.

[6] Section 178.2(1) made it an indictable offence to disclose an intercepted private communication or to disclose its existence without the consent of the originator or the recipient. Sub-section (2) created various exemptions which have remained largely unchanged except for specific instances where disclosure is made to a peace officer, prosecutor or Director of the Canadian