

## **Wiretaps**

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*Life, Liberty, and the Pursuit of Proceeds*

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This paper discusses issues that commonly arise as a result of improper execution of a wiretap order or that may arise when the Prosecution seeks to introduce the wiretap evidence at trial. The views expressed are solely those of the author.

## THE INTRODUCTION OF WIRETAP EVIDENCE AT TRIAL

The evidence gleaned from a wiretap is often highly compelling and may be all the Crown needs to establish the requisite elements of an offence. Wiretapping private communications is also extremely invasive by its very nature, as was emphasized by La Forest J. in *R v Duarte*:

... A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning. As Douglas J., dissenting in *United States v. White, supra*, put it, at p. 756: “Electronic surveillance is the greatest leveler of human privacy ever known.” **If the state may arbitrarily record and transmit our private communications, it is no longer possible to strike an appropriate balance between the right of the individual to be left alone and the right of the state to intrude on privacy in the furtherance of its goals, notably the need to investigate and combat crime.**<sup>1</sup> [Emphasis added.]

Given the highly intrusive but compelling nature of wiretap evidence, counsel must carefully consider whether the techniques employed by the police are in compliance with the statutory and constitutional requirements. Wiretap is one of the most complex forms of evidence for the Crown to coordinate and tender into evidence; counsel must be alive to the various issues that are relevant to the admissibility and probative value of such evidence. This paper will address some of the common issues that arise in wiretap cases. Part I will discuss the substance of the wiretap authorization itself and explain some of the terminology used in wiretap cases. Topics include:

- Facial validity of the authorization;
- Intercepting known and unknown subjects;
- The use of “basket” clauses to cover unknown persons and locations;
- Who can be intercepted when and where;
- Types of intercepts (automatic v. live monitoring);
- Minimization and protection of privacy interests; and
- Consequences of improper execution of an authorization.

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<sup>1</sup> *R v Duarte* (1990), 53 CCC (3d) 1 at 11 (SCC).

Part II will explore topics relevant to the introduction of wiretap evidence in court. The issues discussed are:

- Notice;
- Technical Evidence;
- Recordings of the Intercepted Communications;
- Transcripts of Intercepted Communications;
- Voice Identification; and
- Expert Evidence.

## **PART I - THE AUTHORIZATION**

### **Facial Validity**

As with any court order, the first issue for counsel to consider is the facial validity of the document. Some issues with respect to the facial validity of the authorization are:

- Who is the Applicant? An application for a wiretap order must be made by a specially designated agent (prosecutor).
- What is the Term? A wiretap order may not go beyond its 60-day term.
- What Offence is Stated? A wiretap order must state the offence that it relates to and it must only be for offences listed in section 183 of the Criminal Code.
- Who was the Authorizing Judge? A wiretap order must be signed by a section 552 judge. In Alberta, this is a judge of the superior court (Court of Queen's Bench).
- Are the Mandatory Terms Present? Section 186 requires a wiretap authorization to contain a number of terms and specific pieces of information. Ensure all of the required information is present.
- Is there a Signature? The order must be signed.
- Is there a Date? The order must be properly dated.

### **Content of the Order - Intercepting the "Known" Subject**

An authorization must state the identity of the persons, if known, whose private communications are to be intercepted.<sup>2</sup> Whether or not a person is "known" at the time an authorization is granted may impact the legality of intercepting their private communications.

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<sup>2</sup> *Criminal Code of Canada*, RSC 1985 c C-46 [*Criminal Code*] at s 186(4)(c).