

Entering Wiretap Evidence at Trial

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Life Liberty and the Pursuit of Proceeds

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INTRODUCTION

The purpose of this paper is to assist counsel to either prosecute or defend a wiretap case. It is designed to supplement Karen Molle's paper on this topic. The paper is to be a starting point for counsel when faced with this type of case and to assist in identifying non-Charter issues that will arise in this type of case. For reasons that are set out later in this paper if counsel wishes to have evidence excluded from an authorization that either was not properly granted or implemented, defence counsel should seek exclusion of the evidence under s. 24(2) of the *Charter* alleging a violation under s. 8 of the *Charter*.

The opinions expressed in this paper are those of the author and should not in any be viewed as those of Alberta Justice.

OVERVIEW OF THE LAW OF THE INTERCEPTION OF PRIVATE COMMUNICATIONS

Part VI of the *Criminal Code* is designed to protect the privacy of individuals by making it an offence under s. 184(1) of the *Criminal Code* to unlawfully intercept private communications. It should be noted that s. 184(2) makes it clear that it is not an offence to intercept a private communication when one side of the communication consents to the interception. Part VI also sets out several exceptions to that which allows law enforcement to intercept private communications.

To understand this area you must first look at what constitutes a "private communication". Section 183 of the *Criminal Code* states "private communication":

"means any oral communication, or any telecommunication made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and is made under circumstances which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it, and includes any radio based telephone communication that is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it".

Section 35 of the *Interpretation Act* (RSC 1985, C.I-21) provides a definition of telecommunications.

Examples of communications that have been held not to be private communications are things are such as pager communications¹ and calls to Police Communication Centres². It should be noted that courts, such as in the *Lubovac* case, look at whether or not there was a reasonable expectation of privacy in the communicated messages.

INTERCEPTIONS WHERE NO AUTHORIZATION IS REQUIRED

Under section 184.1 of the *Criminal Code*, the police can intercept private communications when one party consents to the interception when the agent of the state believes on reasonable grounds that there is a risk of bodily harm to the person who consented to the interception and the purpose of the interception is to prevent bodily harm. Evidence obtained by this type of interception is not admissible as evidence except for the purpose of proceedings in which actual attempted or threatened bodily harm is alleged³ and the police are under an obligation to destroy any recording and any notes made thereof if the private communication does not disclose any evidence of bodily harm or attempted bodily harm or attempted bodily harm is likely to occur. This section is designed primarily to protect undercover officers.

Another section of the Criminal Code that allows an interception in exceptional circumstances is section 184.4. It allows the police to intercept private communications when a peace officer believes on reasonable grounds that the urgency of the situation is such that an authorization could not with reasonable diligence be obtained under any other provision of Part VI of the Criminal Code and the peace officer believes on reasonable grounds that such an interception is immediately necessary to prevent an unlawful act that could cause serious harm to any person or property and that the originator of the private communication or the person the originator intended to receive it is the person who would perform the act that is likely to cause the harm to the victim or intended victim. Case law is divided whether or not this section violates section 8 of the *Canadian Charter of Rights and Freedoms*. In B.C. it was held to violate s. 8 and is not saved by section 1⁴. In Ontario it has

¹ *R. v. Lubovac*, (1989) 52 CCC (3d) 551 (ABCA)

² *R. v. Monahan*, (1981) 60 CCC (2d) 286 (ONCA) aff'd[1985] 1 SCR 176

³ Section 184.1(2) of the *Criminal Code*.

⁴ *R. v. Tse* (2008), 231 CCC (3d) 237 (BCSC) also referred to as *T. v. Six Accused Persons*