

CARSWELL'S CRIMINAL LAW SERIES

LAW OF

**ELECTRONIC
SURVEILLANCE**

IN CANADA

by

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FOREWORD

On June 30, 1974, the *Protection of Privacy Act* was proclaimed in force in Canada. On a prior occasion I said "it is apparent that in enacting the *Protection Act, 1973-74* (Canada), c.50, now Part IV.1 of the Code, Parliament had two objectives. The first was to protect private communications by prohibiting interception and to render inadmissible evidence obtained in violation of the statute. The second objective which balances the first was to recognize the need to allow the appropriate authorities subject to specific controls to intercept private communications in the investigation of serious crime and to adduce the evidence thus obtained."¹

These general objectives can be shortly and easily stated, but the implementation of these objectives has been a difficult task. This task first confronted the legislative draftsmen and now the courts.

While the criminal law has been enlarged by the creation of new offences related to the invasion of privacy, it is in the area of the admissibility of evidence that this new legislation has had its greatest impact. Evidence obtained by electronic surveillance is often critical in criminal prosecutions. Its exclusion frequently leads to an acquittal; its admission often results in conviction. Battles over the admissibility of such evidence followed quickly on the heels of the passage of the Act and in due course a trickle and then a torrent of judicial opinion began to find its way into the law reports. In this manner, some problems were solved, but each resolution tended to expose still another problem.

Now, some five years after the passage of the legislation, it is both appropriate and desirable that a comprehensive text on this difficult subject should be produced. Happily, in David Watt, we have an author who is equal to the task. As Senior Crown Counsel with the Department of the Attorney General for the Province of Ontario, he has a broad experience both in the trial and appellate courts. In Ontario he has argued almost all of the major wiretap cases to come before the Ontario Court of Appeal. He has written and lectured widely on the subject of electronic surveillance and is an acknowledged expert in the field. Uniquely, he also fully understands the scientific and mechanical aspects of electronic surveillance. All of these qualities have been brought to bear in the production of a comprehensive, lucidly written and superbly organized text. No Canadian case on the subject has escaped notice and in those areas where Canadian authority is thin, generous and helpful reference to American authorities is provided. I would find it difficult to imagine that in future anyone, whether approaching his first case involving electronic surveillance, or simply another case in a long line of

1. *R. v. Welsh* (No. 6) (1977) 15 O.R. (2d) 1 at page 7.

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such cases, would do so without reading the relevant parts of Mr. Watt's book. This work represents a substantial contribution to Canadian legal literature and I have no doubt will quickly find an honoured place in the law libraries of this country.

September 1979

T.G. Zuber
Osgoode Hall
Toronto

PREFACE

The purpose of this book is to provide some assistance to defending and prosecuting counsel, members of the judiciary and law enforcement personnel whose involvement in the administration of criminal justice encompasses the collection, presentation and scrutiny of evidence obtained by means of electronic surveillance. This text attempts to review the appropriate statutory provisions both under Part IV.I of the *Criminal Code* and Title III of the *Omnibus Crime Control and Safe Streets Act of 1968*, outline the relevant issues of law, marshal the decided authorities, describe the present state of the law and offer assistance in undecided or unclear areas. The views expressed should not be taken as in any way reflective of the official policy or practice of the Attorney General of the Province of Ontario.

In completing this text I have drawn freely from and relied heavily upon the advice and encouragements of friends and colleagues at the defence bar, upon the experience and wisdom of members of the judiciary and the technical knowledge and expertise of the police intelligence community. Crown counsel in other provinces have been most helpful in their suggestions and have educated me in their practice and procedure in relation to the obtaining and execution of surveillance orders as well as the presentation of evidence gathered thereby in the courtroom. Their unselfish assistance and constant encouragement continues to be invaluable.

There are some to whom an especial debt of gratitude is owed. Morris Fish of the Quebec Bar, Professor Ellis Craig of the Faculty of Law of the University of New Brunswick, and Edward L. Greenspan of the Ontario Bar, at once a friend and constant adversary, carefully reviewed the manuscript at various stages of its development and offered helpful and constructive criticism. Robert Patterson and Richard Hayward, members of the Intelligence Branch of the Ontario Provincial Police, provided valuable insight into the technical aspects of electronic surveillance. David Frankel of the Department of Justice (Canada) office in Vancouver, British Columbia, not only reviewed the manuscript with scrupulous care but also provided me with an almost inexhaustible supply of rulings and judgments from Western Canada which illuminated many of the dark recesses of Part IV.I. Mrs. Nancy Garton, Librarian at the Ministry of the Attorney General (Ontario), was most helpful in providing access to the relevant American authorities.

The drudgery of translating my illegible handwriting and of typing and re-typing the several stages of the manuscript was professionally accomplished by Ann Byrne and Mrs. Lynn Geisler. Their perseverance, patience and occasional nagging encouraged the expeditious completion of the book. The translation of manuscript to published text was expertly

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done by Yvonne Bondarchuk and Carol Graham of the Carswell Company.

The Honourable Mr. Thomas G. Zuber of the Court of Appeal for Ontario graciously agreed to write the Foreword to this work. I only hope that the expectations he there expressed are in some small measure achieved by this text.

Finally, for their patience, forbearance and encouragement, no words can adequately describe the debt I owe to my wife, Jean, and my daughter, Katharine Anne, who have for the second time in as many years provided me with the necessary initiative and support to complete a publication.

I have endeavoured to state the law as of May 31st, 1979, but in view of the ever-changing quality of this area of the law, a yearly supplement will be added to the text.

Toronto, Ontario
June, 1979.

John David Watt

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