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Solicitor General
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Guidelines

for Agents and Peace Officers Designated by the Solicitor General of Canada



**ELECTRONIC
SURVEILLANCE**

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GUIDELINES FOR AGENTS AND PEACE OFFICERS DESIGNATED BY THE SOLICITOR GENERAL OF CANADA

ELECTRONIC SURVEILLANCE

1999

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DEFINITIONS AND ABBREVIATIONS

For the purposes of these guidelines, the following definitions and abbreviation apply:

C.C.

Criminal Code of Canada (R.S., c. C-34, s.1.)

Designated Agent

A person (usually counsel employed by the federal Department of Justice or retained by the Attorney General of Canada) designated by the Solicitor General of Canada to apply for authorizations to intercept private communications

Designated Peace Officer

A peace officer, usually of senior rank, designated by the Solicitor General of Canada to apply for emergency authorizations

Designated Person

A person, usually a peace officer, designated by the Solicitor General of Canada to intercept private communications under the authorization of Part VI of the *Criminal Code*

Electronic Surveillance

The interception of private communication through the use of media, including audio, visual, audio-visual, all forms of telecommunication, and all forms of computers

Sealed Packet

A container in which all documents relating to an application made pursuant to any provision of part VI of the *Criminal Code* are held in order to be kept confidential

SECTION I - INTRODUCTION

Part VI of Canada's *Criminal Code* (Invasion of Privacy) has been an integral part of the criminal law in Canada since 1974. In 1975, the first guidelines on the use of electronic surveillance were published by the Solicitor General of Canada. The *Canadian Charter of Rights and Freedoms* has had a significant impact on the interpretation of the law, particularly as it relates to Part VI of the *Criminal Code*. There have been several amendments to Part VI since 1974, and the amendments introduced in 1993 (*s.c. 1993, c. 40*) have produced the most fundamental changes in this area of the law.

The 1993 amendments responded to a number of Supreme Court decisions. For example, a statutory response was necessary to address the issue of consensual interceptions in light of the *Duarte* decision. Video surveillance had not been incorporated into the law, and provisions had to be developed to deal with the availability of more modern technology. With these amendments, the exclusionary rule set out in section 189 was eliminated and the notification requirements were modified to provide a broader ability to seek judicial approval for a delay in notification in appropriate cases.

The 1993 provisions, in response to *Duarte*, provide statutory authority for a peace officer, or a specified public officer, to apply for an authorization for a consent intercept without the need to use a designated agent of the Solicitor General. The law was also amended to provide for broader general warrant provisions (**487.01 C.C.**), warrants for tracking devices (**492.1 C.C.**) and warrants for dial number recorders (**492.2 C.C.**).

Video surveillance was also incorporated into the law in response to the Supreme Court decision in the *Wong* case (1990). This type of surveillance, according to the Court, poses a "more pernicious threat to privacy" than audio surveillance. A judge must consider what terms and conditions are advisable to ensure individual or third party privacy as much as possible (**487.01(4) C.C.**).

Later *Criminal Code* amendments permit the issuing of an authorization for the period of one year when the offence being investigated is in relation to the activities of a criminal organization. Furthermore, the need for police to demonstrate that electronic surveillance is a last resort in the investigation has been eliminated **when the investigation is in relation to a criminal organization.**

The purpose of this guide is to provide assistance to designated agents and peace officers in the fulfilment of their duties and reporting obligations under the Invasion of Privacy provisions of the *Criminal Code*. The Solicitor General of Canada is required to report to Parliament information regarding authorizations to intercept private communications as soon as possible after the end of each year. This Report is to be prepared in co-operation with the RCMP, provincial and municipal police services and designated agents. This manual deals with the administrative and legal requirements imposed upon agents and peace officers designated for the purposes of sections 185 and 188 and subsection 186(5) of the *Criminal Code*. It does not discuss in any detail precedents for applications,

affidavits or orders, which are available through the Regional Offices of the federal Department of Justice. Precedents change frequently and it is not appropriate to fully address them in this manual. For a brief synopsis of selected important cases, refer to **Appendix A – Suggested Readings**.

SECTION II - DESIGNATIONS AND LICENCES

The Solicitor General of Canada or the Deputy Solicitor General of Canada are empowered to personally designate in writing “agents” who can apply for an authorization to intercept a private communication and apply for a renewal of an authorization (**185(1) C.C.**). The majority of agents so designated are counsel employed by the Department of Justice. Where no Department of Justice lawyer is available in the immediate area, this service may be contracted to an independent lawyer. Requests to have agents designated or revoked by the Solicitor General of Canada must, except in urgent cases, be made under the recommendation of the Director of the Regional Office of the federal Department of Justice (**see Appendix C**).

The Solicitor General of Canada may also designate “persons” who may intercept a private communication under authorization. Such designations are held by Commanding Officers of the RCMP and persons acting under the authority of the Commanding Officers, as well as peace officers and selected civilian employees in municipal and provincial police services across Canada (**186(5) C.C.**). Persons designated in writing for the purposes of section 185 C.C. are also able to apply for a renewal of authorization and an application for extension of notification. Requests to have persons designated by the Solicitor General of Canada for the purpose of intercepting private communications should be made by the Chief of the police service to the Solicitor General of Canada (**see Appendix D**).

The Solicitor General of Canada may also designate “peace officers” who may apply for emergency authorizations (**188(1) C.C.**). Requests to have peace officers designated by the Solicitor General of Canada should be made by the Chief of the police service.

The Solicitor General of Canada is also responsible for the issuance of licenses to persons who possess, sell or purchase any electromagnetic, acoustic, mechanical or other device or component primarily useful for surreptitious interception of private communications (**192(2)(d) C.C.**). This licensing authority has been delegated by the Solicitor General to the Commissioner, the Director of Technical Operations, and the Officer in Charge, Technical Investigation Services Branch of the RCMP. Enquiries regarding licensing should be directed to the Royal Canadian Mounted Police (**see Appendix B**).

**SECTION III - OFFENCES FOR WHICH AN APPLICATION FOR
AUTHORIZATION MAY BE MADE**

The Solicitor General of Canada or his/her agent may apply for an authorization to intercept a private communication upon the affidavit of a peace officer or public officer if the offence under investigation is one in respect of which proceedings would be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney-General of Canada **(185(1)(a), 183 C.C.)**.

No authorization should be applied for an offence related to section 2 of the *Security Offences Act* without obtaining the legal advice of the Attorney General of Canada **(see Appendix C)**.

A designated agent will be responsible for all applications for authorizations taken out in the territories for all offences defined in section 183 C.C.

SECTION IV - APPLICATION FOR AN AUTHORIZATION

Three documents must be completed when applying for an authorization to intercept a private communication:

1. an affidavit;
2. an application for authorization; and
3. a "draft" authorization to intercept private communications.

In addition to the statutory requirements in sections 185, 186 and 188 C.C, the procedures by which an application for authorization is made may vary from province to province and even within provinces. Regional Offices of the federal Department of Justice should be consulted to outline specific obligations in their region with regard to the preparation of affidavits and authorizations to intercept. **For a complete list of information to be specified in the affidavit, consult paragraphs 185(1) (c) to (h) of the *Criminal Code* - see also 185(1.1).**

Police personnel, in consultation with designated agents, will prepare the documents. The designated person who swore the affidavit should accompany the designated agent before the judge. It is generally accepted that the designated agent bringing the application before a Judge ought not to swear the affidavit, in order to avoid being a witness in the matter. It is preferable to have the affidavit sworn by a lawyer, other than the designated agent.

Individuals who appear before a judge are required to bring their original designation certificates to court. These documents may be shown to the judge but must not be included in the sealed packet.

The affidavit must include the facts relied upon to justify the belief that an authorization should be given and identify the particulars of the offence. The affidavit must also identify all persons whose existence is known at the time the application for the authorization is made and the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence. Persons may be identified in the affidavit in varying degrees of specificity. In some cases, it may be possible to provide the full names, addresses and occupations of such persons. In other cases, it may only be possible to identify the person as the "cohabitant with John Doe" or the "unknown male nicknamed Lucky", or the "supplier of John Doe", etc. It is important to ensure that the affidavit identifies as much as possible all pertinent individuals whose existence is known.

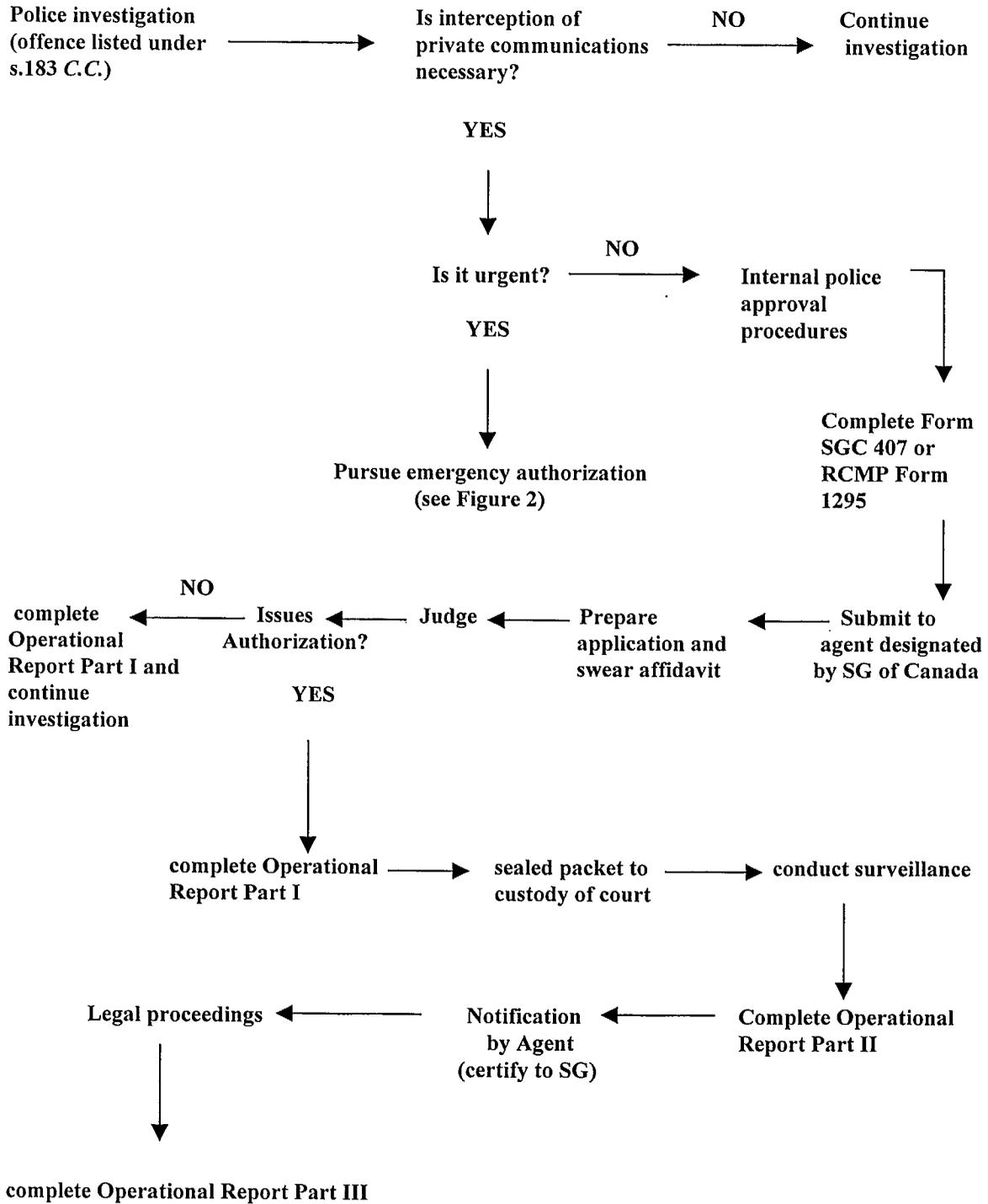
It is also important to ensure that full disclosure is made with respect to the proposed manner of interception and all places reasonably expected to be encountered, e.g. pay phones, multi-user phones, public phones, party-lines, business premises, etc. over which the target may not exercise exclusive control. The affidavit should also reflect the terms

and conditions to ensure the privacy of uninvolved persons, e.g. live monitoring, visual surveillance, etc.

In addition, the affidavit should include whether surreptitious entry is being proposed to effect an entry for the purposes of installing, maintaining or removing the electronic surveillance equipment. A 1990 Supreme Court decision emphasized the importance of having the supporting material and the order reflect the fact that the authorizing judge considered and approved of a surreptitious entry. The Regional Offices of the federal Department of Justice have drafted special clauses to be included in the affidavit and the authorization when a surreptitious entry for the purposes of installing, maintaining and removing interception equipment is proposed to be effected at any location.

Section 186(1) sets out the determination which the judge must make when granting an authorization. A judge must be satisfied that granting the authorization would be in the best interests of justice (**186(1)(a) C.C.**) and that other investigative procedures have been tried and failed, are unlikely to succeed or that the matter is so urgent it would be impractical to investigate using only other procedures (**186(1)(b) C.C.**). The latter requirements do not apply in limited circumstances relating to criminal organizations (**186(1.1) C.C.**). The particulars of an authorization are listed in 186(4) of the *Criminal Code*.

Figure 1 – Procedures to Obtain an Authorization



Special Considerations

It should be emphasized that an authorization to intercept is an extraordinary investigative tool which should be used only for the most serious cases.

A) Sensitive communications

In some cases it may be necessary to apply for an authorization which may result in the interception of communications of a sensitive nature by virtue of the official functions of a person named in the authorization, the profession exercised by such person, or in respect to the place where the interception is to occur. If communications might involve the privileges or immunities of members of Parliament, Senators, or other legislators, prior legal advice must be secured from the Attorney-General of Canada, who will in turn advise the Solicitor General of Canada.

Particular attention must be paid to potential violations of solicitor-client privileges, and full disclosure must be made. This is to enable the judge to include such terms and conditions as he considers advisable to protect privileged communications between solicitors and clients **(186(2) and (3) C.C.)**.

B) Notice of Intention to Produce Evidence

The contents of an authorization to intercept a private communication can only be adduced in evidence if reasonable notice is given to the accused stating this intention. This must be accompanied by a transcript of the private communication and a statement detailing the time, place and date of the private communication. Any privileged information is inadmissible as evidence without the consent of the person enjoying the privilege **(189(5) and (6) C.C.)**.

C) Other specific considerations

Designated agents must ensure that all matters relating to the law are addressed before bringing the application for authorization before a Judge.

The designated agent must satisfy a Judge that the application is appropriate and be prepared to respond to a Judge's questions. The designated person requesting the application may attend the meeting with the Judge if the designated agent believes this could be helpful.

The designated agent must conduct a full review of the police investigation to confirm that the necessary conditions exist to support the application for the authorization and to provide guidance to the police.

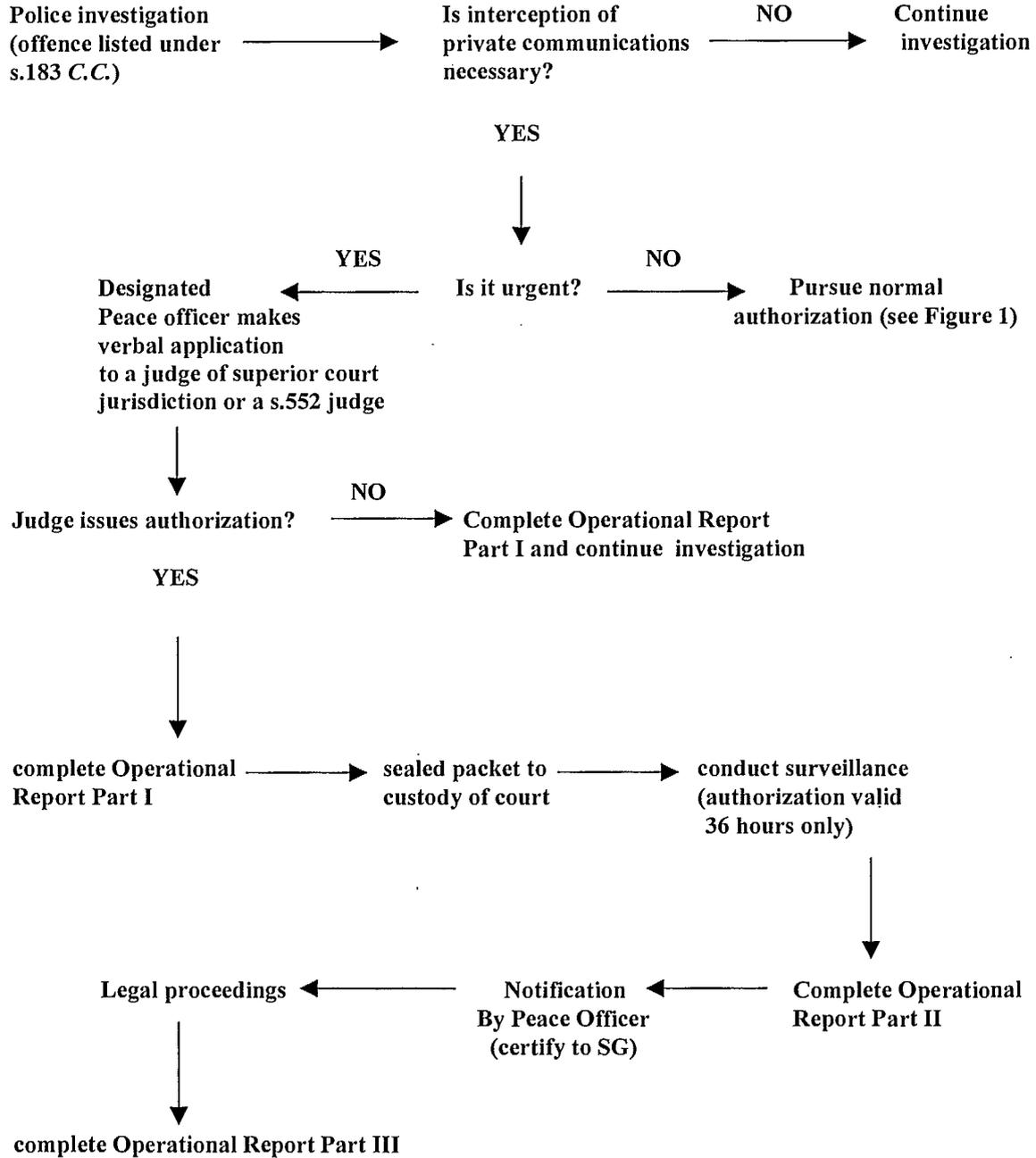
The designated person must ensure that the following factors have been reviewed prior to requesting a designated agent make an application:

- the offence is listed in section 183 of the *Criminal Code*
- the offence is of a serious enough nature that electronic surveillance is recommended
- the period provided for in the authorization does not exceed sixty days, unless it is in relation to a criminal organization, in which case it must not exceed one year
(186.1 C.C.)
- the full police investigation has been reviewed, and the review reveals that other investigative means have failed, **or** other investigative means will not work given the way in which targets operate, **or** urgency is such a factor that, given the nature of the offence, an interception is necessary. This requirement is not necessary for the investigation of offences in relation to criminal organizations. (185(1.1) C.C.)
- the Regional Office of the federal Department of Justice has been consulted to ensure that legal forms are current and reflect the current precedents
- the Attorney General of Canada has been consulted if required
- the investigator's affidavit fully discloses all information necessary and omits nothing which might be relevant to the Judge's determination of this request
- the application has merit

Applications for Emergency Authorizations

Designated peace officers may apply for an emergency authorization for a duration up to 36 hours if the urgency of the situation requires interception of private communications to commence before an authorization could be obtained with reasonable diligence under the normal procedure (188(1) C.C.). The designated peace officer can therefore deal directly with a judge of a superior court of criminal jurisdiction or a judge as defined in 552 C.C. for an authorization, rather than apply through a designated agent. Such designations are held by senior peace officers of various police services across Canada. The procedures by which an application for an emergency authorization may be made vary from province to province and even within provinces. Therefore, designated peace officers are advised to consult with the appropriate judge in their area to determine the procedural and documentary requirements necessary to obtain an emergency authorization.

Figure 2 – Procedures to Obtain an Emergency Authorization



Applications to Substitute for the Normal Notification Period

An application for an authorization may, on rare occasions, be accompanied by an application to substitute a period of up to three years for the normal 90 day period of notification, signed personally by the Solicitor General of Canada (**185(2) C.C.**).

The Judge must first decide on the application to substitute the period of notification. If the Judge grants the application to substitute the period of notification he will then rule on the application for the authorization itself. If the Judge does not agree to fix a period in substitution for the 90 days, the application for the authorization may be withdrawn. The application for the substitution period must be accompanied by an affidavit sworn on the information and belief of a designated person or persons acting under their authority.

The designated agent is responsible for preparing the legal documents necessary to make an application, including the draft Authorization, the Application to Substitute for the normal period, and supporting Affidavits. These documents should be sent by secure means to the Solicitor General of Canada (**see Appendix D**).

Authorizations in Relation to Criminal Organizations

An authorization or any renewal of an authorization may be valid for a period of more than sixty days, but not exceeding one year, where the authorization is in relation to an offence under section 467.1 or an offence committed for the benefit of, at the direction of, or in association with a criminal organization (**186.1 C.C.**). In addition, the application for such an authorization need not demonstrate that the use of electronic surveillance is a last resort in the investigation of the offence **185(1.1) C.C.**

SECTION V - APPLICATION FOR RENEWAL OF AN AUTHORIZATION

Applications for renewal are similar to an original application for an authorization to intercept. Three basic documents are required:

1. an affidavit of a peace officer;
2. an application for a renewal of an authorization; and
3. a draft renewal of an authorization.

The form of these documents and the procedural requirements will vary from jurisdiction to jurisdiction, and the advice of the Regional Office of the Department of Justice should be sought.

A designated agent for the purpose of section 185 C.C. may also make an *ex parte* application to a judge of a superior court of criminal jurisdiction or a section 552 C.C. judge for a renewal of an authorization.

An application for a renewal of an authorization cannot expand upon the original authorization except to extend the time originally specified. Some jurisdictions allow the renewal to alter the original terms and conditions providing they are more restrictive than the original (e.g. delete a name, delete an address, etc.). However, if there are changes that expand upon the original authorization (e.g., additional subjects, additional offences, changes in location, etc.) a new authorization must be obtained. An application for a renewal of an authorization will be made if the same conditions and factors which were provided to support the original application for authorization still prevail. The factors listed in the "Applications for Authorizations" section of this guide should therefore be reviewed. If the original authorization did not produce sufficient evidence to prove an offence, a strong argument must be presented to the Judge concerning what missing evidence is expected to be gathered by renewing the authorization.

The peace officer is required to provide specific information in the affidavit accompanying an application for a renewal, such as the reason and period for which the renewal is required. **For a complete listing of requirements, refer to paragraphs 186(6)(a) to (c) of the *Criminal Code*.**

The peace officer should have the interception logs available for inspection by the Judge.

SECTION VI - NOTIFICATIONS AND EXTENSIONS OF NOTIFICATIONS

A) Notification

Notification consists of:

1. notification to the object of the interception within ninety days or the substitute period;
2. certification to the court that issued the authorization that such person(s) have been notified (**196(1) C.C. and Protection of Privacy Regulations, C.R.C. 1978, c.444; sor/81-859, Canada Gazette Part II, 26/10/81, p. 3153**); and
3. certification of notification must be forwarded to the Solicitor General of Canada (**see Appendix D**).

These tasks are to be completed by the designated agent or the designated peace officer who applied for the authorization or the renewal of authorization. In the case of authorizations made pursuant to urgent situations, designated peace officers have powers, and concomitant responsibilities to notify, similar to designated agents.

If the offence for which the authorization has been issued is in relation to the activities of a criminal organization, the judge may extend notification to a period not exceeding three years if he or she is of the opinion that the interests of justice warrant the granting of this application (**196(5) C.C.**).

The designated person is responsible for supplying the designated agent with the biographic information necessary to notify in writing the persons who were the objects of the interception. This must be done at least fourteen days prior to the date the notification is to be given.

In practice, notice is served on those persons whose communications were intercepted, and who were identified in the authorization, either by name, or unnamed but known (e.g. the unidentified female living with John Doe). In cases where the person was identified but unnamed in the authorization, notification is to be served on such persons where sufficient information is acquired to effect notification.

If the private communication of a person identified in the authorization was not intercepted, for reasons such as absence, technical difficulties, etc. it is not necessary that the person receive notification as he or she was not the object of an interception.

It is recommended that double registered mail be used as the method to give notification.

B) Extension of Notification

Four documents must be completed when requesting an extension of notification:

1. an affidavit;
2. an application for extension of notification;
3. an authorization to intercept; and
4. a draft order for the extension of notification.

For the specific information that must be contained in this affidavit, refer to paragraphs 196(4)(a) and (b) of the *Criminal Code*.

It is advised that consultation with the Regional Offices of the federal Department of Justice be secured as procedural and documentary requirements for extensions of notifications vary between provinces.

To extend the period of notification, the Judge must be satisfied that the investigation of the offence to which the authorization relates is continuing. Extension of notification may also be granted if the judge is satisfied that a subsequent investigation of an offence listed in section 183 commenced as a result of information obtained from the previous investigation is continuing. In both such cases, the judge must also be of the opinion that the interests of justice warrant the granting of the application. Such extensions are not to exceed three years. **(196(3) C.C.)**

If the substitute period initially obtained becomes insufficient, it is possible to acquire a further delay of notification, providing the conditions described above still prevail. Unlimited extensions are now possible, with each extension not to exceed three years. In addition, there is an automatic extension once the application for an extension is made, until the application can be heard and disposed of.

Furthermore, a judge shall grant an extension of notification for a period of three years if he or she is satisfied that the investigation is in relation to an offence under section 467.1, or an offence committed for the benefit, at the direction of or in association with a criminal organization, and is of the opinion that the interests of justice warrant the granting of the application. **(196(5) C.C.)**

SECTION VII- SPECIAL INTERCEPTIONS

Interception to Prevent Bodily Harm

A peace officer, or a person acting under the authority of, or in co-operation with, a peace officer, both of whom, for the purposes of this provision, are known as an 'agent of the state' may intercept a private communication if:

- the originator of the private communication or the person intended by the originator to receive it has consented to the interception
- the peace officer believes on reasonable grounds that there is a risk of bodily harm to the person who consented to the interception
- the purpose of the interception is to prevent the bodily harm **(184.1(1) C.C.)**.

The contents of such an interception are inadmissible as evidence except for the purpose of proceedings in which actual, attempted or threatened bodily harm is alleged including an application for an authorization under Part VI of the *Criminal Code*, a search warrant or an arrest warrant **(184.1(2) C.C.)**.

The agent of the state who intercepts a private communication under this provision must destroy the recording and any notes or transcripts made from the recording as soon as practicable if nothing in that private communication suggests that bodily harm, attempted bodily harm, or threatened bodily harm has occurred or is likely to occur **(184.1(3) C.C.)**.

Interception with Consent

A person may intercept a private communication if the originator of the communication or the person intended by the originator to receive the communication consents to the interception and an authorization has been obtained **(184.2(1) C.C.)**.

Consensual interceptions are not admissible if the party consenting is an 'agent of the state'. In order to use consent intercepts obtained by or with 'agents of the state', an application to a provincial court or superior court judge or a judge as defined in section 552 must be made **(184.2(2) C.C.)**.

An application for authorization under this section can be made by a peace officer or public officer responsible for enforcing any federal or provincial law, not only those specified in 183 C.C. An affidavit must accompany this application, and **must include the information prescribed in paragraphs 184.2(2)(a) to (e) of the *Criminal Code***.

As one of the parties has consented, the requirements for obtaining the authorization are not as strict as for obtaining an authorization for a third party interception under sections 185 and 186 of the *Criminal Code*. The grounds for obtaining an authorization under this

section more closely resemble the grounds for obtaining an ordinary search warrant under section 487 C.C.

An application by a peace officer or a public officer for an authorization for a consensual interception of up to 36 hours duration may be made by telephone or other means of telecommunication if it would be impracticable in the circumstances for the applicant to appear personally (184.3 C.C.). The application, recorded in writing or otherwise by the judge, shall be on oath and be accompanied by a statement referring to the matters in paragraphs 184.2(a) to (e) of the *Criminal Code*. As well, the circumstances for why it is impracticable to appear personally must be stated. The oath may be administered by telephone or other means of telecommunication (184.3 (4) and (5) C.C.). The procedures for handling an authorization given by means of telecommunication that does not produce a writing are outlined in section 184.3(7), while section 184.3(8) applies to authorizations by means of telecommunication that produce a writing.

Interception in Exceptional Circumstances

A peace officer may intercept a private communication in exceptional circumstances when he or she believes, on reasonable grounds, that an authorization could not be obtained under any provision of this Part due to the urgency of the situation. Furthermore, the peace officer must believe on reasonable grounds that such an interception is immediately necessary to prevent an unlawful act that would cause serious harm to any person or to property. In addition, the originator of the private communication or the person intended by the originator to receive it is the person who would cause the harm or be the victim or intended victim of this harmful act (section 184.4 C.C.).

Interception of Radio-Based (Cellular) Telephone Communications

Interception of cellular phone calls are permitted under Part VI of the *Criminal Code*. The same requirements and procedures are required of designated agents and peace officers in the interception of this type of communication. (184.5 C.C.). Furthermore, an application for an authorization may extend to both private and radio-based communications at the same time. (184.6 C.C.)

SECTION VIII - REPORTING REQUIREMENTS

Form SGC 407 - Request for Application (for peace officers of municipal and provincial police services)

The completion of this form is the first step towards obtaining an authorization. When a peace officer determines that an authorization is necessary, he or she must complete this form and submit it to a designated agent. The designated agent will then apply for an authorization and send this form to the Solicitor General of Canada.

RCMP Form 1295* - Approval for Authorization

This Form serves the same purpose as Form SGC 407, except that this is used only by peace officers of the RCMP.

Form SGC 403-3 Operational Report Part I - Details of Authorization/Renewal

Once an application for authorization or renewal has been submitted, the peace officer must fill out this form. This must be done whether the application is granted or refused, and the peace officer must send this form to the Solicitor General of Canada.

Form SGC 403-3 Operational Report Part II - Installations/Interceptions

The peace officer is required to complete this Form at the conclusion of the authorization or renewal period and send it to the Solicitor General of Canada.

Form SGC 403-3 Operational Report Part III - Legal Proceedings/Disposition

The peace officer is required to submit this form to the Solicitor General of Canada when the legal proceedings pertaining to the authorization have been completed or before December 31 of each year if the legal proceedings have not been concluded.

Form SGC 408 - Invasion of Privacy Log

This form is for the personal records of all designated agents. Information regarding each authorization or renewal is to be recorded on this log. When the designated agent ceases to perform this role, this log must be sent to the Solicitor General of Canada.

Form SGC 409 - Certification of Notification

This Form is to be completed when notification is served to the object of an interception. The designated agent is responsible for filling out this Form **except** if the authorization was an emergency authorization. In such cases, the peace officer who requested the emergency authorization must complete this Form. This Form must be sent to the Solicitor General of Canada upon completion.

APPENDIX A - SUGGESTED READINGS

Books and Publications

- Bellemare, Daniel A. (B.A., LL.L., LL.M.). *L'Écoute Électronique au Canada*, Montréal, Les Éditions Yvon Blais Inc., 1981.
- Cohen, Stanley A. (B.A., LL.B., LL.M.). *Invasion of Privacy: Police and Electronic Surveillance in Canada*. Toronto, the Carwells Company Ltd., 1983.
- Ewaschuk, Eugene G. (Q.C.) *Criminal Proceedings and Practice in Canada* (Chapter 4, Protection of Privacy). Aurora, Canada Law Book Ltd., 1983.
- Manning, Morris (LL.B.). *Wiretap Law in Canada*, Toronto, Butterworths, 1978.
- Watt, David (B.A., LL.B., Q.C.). *Law of Electronic Surveillance in Canada*. Toronto, The Carswell Company Ltd., 1979, and First Supplement 1983.
- Watt, David (B.A., LL.B., Q.C.) *Criminal Law Precedents*, (Volume 1, Chapter 4, Protection of Privacy Act). Toronto, The Carswell Company Ltd., 1978.

Legal Case References

A series of Supreme Court of Canada of Canada decisions, principally *Duarte* (January, 1990), *Wong* (November, 1990) and *Garofoli* (November, 1990), affected the law and practice relating to investigations (and subsequent prosecutions) involving audio and video technology. Several provisions of the *Charter* were applied. The right against unreasonable search and seizure (section 8) figured in *Duarte* and *Wong*, while section 7, protection of life, liberty, and security of the person, figured in *Garofoli*.

***R. v. Duarte* (1990), 53 C.C.C. (3d) 1, 65 D.L.R. (4th) 240, [1990] 1 S.C.R. 30, 74 C.R. (3d) 281**

The court held that the interception (monitoring and recording) by the state of private communications with the consent of one, but not all, of the participants without a judicial authorization was contrary to section 8 of the *Charter*.

***R. v. Wong* (1990), 60 C.C.C. (3d) 460, [1990] 3 S.C.R. 36, 1 C.R. (4th)**

The court decided that video surveillance by the state of a locale in which there was reasonable expectation of privacy without prior judicial authorization was contrary to section 8 of the *Charter*. The Court acknowledged that there was no explicit statutory authority for an authorization for video surveillance but declined to discover such authority with Part VI or as part of a superior court's inherent jurisdiction. The Court

indicated that it was for Parliament to provide for it. A warrant for such surveillance can now be obtained under section 487.01 of the *Criminal Code*.

***R. v. Garofoli* (1990), 2 S.C.R. 1421, 60 C.C.C. (3d) 161, 80 C.R. (3d) 317**

This case spoke to a number of issues relating to an accused person's access to the sealed packet and the manner by which challenges to the admissibility of intercepted evidence are to be addressed. The Court held that section 7 of the *Charter* (encompassing the right to make full answer and defence) entitled an accused to access to the material used to obtain an authorization, subject to editing. The Court also determined that section 7 of the *Charter* mandated cross-examination of the affiant (though not confidential informants) on a showing of a basis that cross-examination will bear on one of the preconditions of an authorization.

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