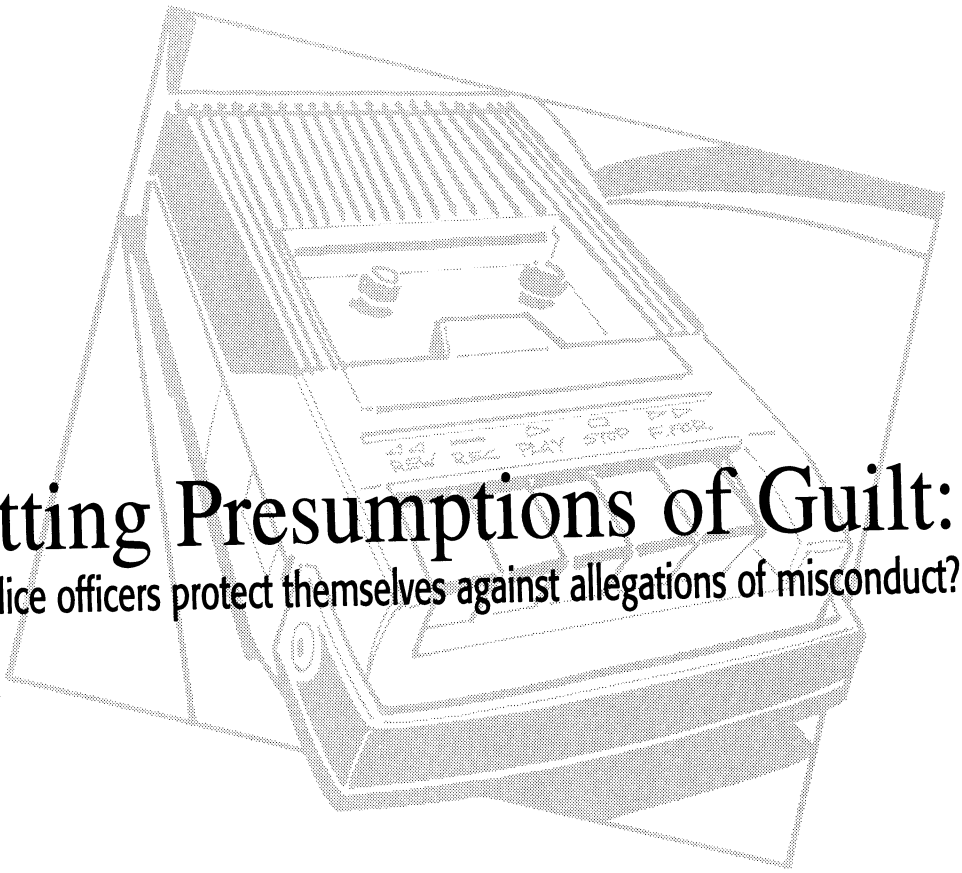

Rebutting Presumptions of Guilt:

How can police officers protect themselves against allegations of misconduct?

This article is dedicated to the memory of Constable Paul M. Kenney of the R.C.M.P.

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1. INTRODUCTION

Public accountability of police officers is of fundamental importance in Canadian society. However, after a recent police-involved shooting it was apparent that some journalists, politicians, and citizens are prepared to publicly pre-judge and condemn a police officer's action before all the facts are known.[1] For example, *within hours* of this shooting, and *before* an investigation was completed, the (then) federal Minister of Justice made statements in the House of Commons that raised considerable doubt about whether the presumption of innocence was operating.[2]

Another Member of Parliament stated that the officer, when confronted by the suspect, who was wielding a butcher knife, should have shot the suspect in the arm or leg.[3] Such an expectation is unrealistic, as the difficulty in hitting a moving target is common wisdom among persons knowledgeable in the use of firearms. This type of response indicates that some individuals, for ideological, political, or other reasons, operate on the *presumption* that officers have engaged in misconduct, regardless of the specific circumstances of each case. As a result, police officers may want to consider measures that will assist in protecting their *personal interests* should an allegation of "misconduct" arise. One such measure is to tape record interactions with the public that could potentially lead to allegations of wrongdoing. This is not to say that the conduct of police officers should not be held to a high standard or criticized; rather, the concern is whether an individual officer can be certain that he or she will be treated in accordance with fundamental legal principles when a serious allegation arises (*e.g.*, presumption of innocence).

A police officer may want to make a personal interest recording for a number of reasons, the most important of which would be to provide an accurate account of an incident that could lead to an allegation, investigation, or charge against the officer. The

purpose of the recording is not to pursue an investigation, but to protect the personal interests of the officer.

The following two cases illustrate the usefulness of personal interest recordings when dealing with allegations of misconduct. In 1989, four R.C.M.P. officers were reported to have used excessive force against a woman during the execution of a search warrant by "holding [the complainant] by the throat and putting a knee to her stomach."[4] The preliminary investigation revealed that there were only two officers present during the execution of the search warrant. A tape recording made at the scene by one of the officers established that the complainant had fabricated the allegations of use of force.[5] More recently, in 1993, two municipal officers in Nova Scotia were able to rely on a recording made while a complainant was being escorted to jail to establish that the complainant made death and other verbal threats against the officers and their families.[6] The complainant denied threatening the officers, even when confronted with the tape at a subsequent public hearing into the complainant's allegations that he was assaulted by the officers. The tape provided persuasive evidence of what transpired, which accorded with the officers' (and not the complainant's) version of events.[7]

Until recently, the Criminal Code[8] permitted police to intercept or record a communication to which they were party, or where they had the "consent" of one of the participants in the conversation. Known as "participant" or "one-party consents,"[9] this statutory authority was routinely relied on by police to intercept communications for investigative purposes.[10] These provisions also permitted police officers to make personal interest recordings.

In 1990, however, the Supreme Court of Canada ruled in *R.* v. *Duarte*[11], *R.* v. *Wiggins*,[12] and *R.* v. *Wong*,[13] ("the Trilogy") that it was unconstitutional for the police to intercept private communications based on consent without prior judicial authorization. Asserting that "agents of the state" were engaging in unreasonable search and seizure, the Supreme Court found that consent interceptions were a violation of the "reasonable expectation of privacy" under section 8 of the Charter. Thus, investigative one-party consents by agents of the state became unconstitutional.

On August 1, 1993, the federal government amended the Criminal Code[14] in an attempt to bring the interception provisions into constitutional conformity. The amendments require the police, except in limited circumstances (*e.g.,* emergency), to obtain judicial authorization to intercept communications.

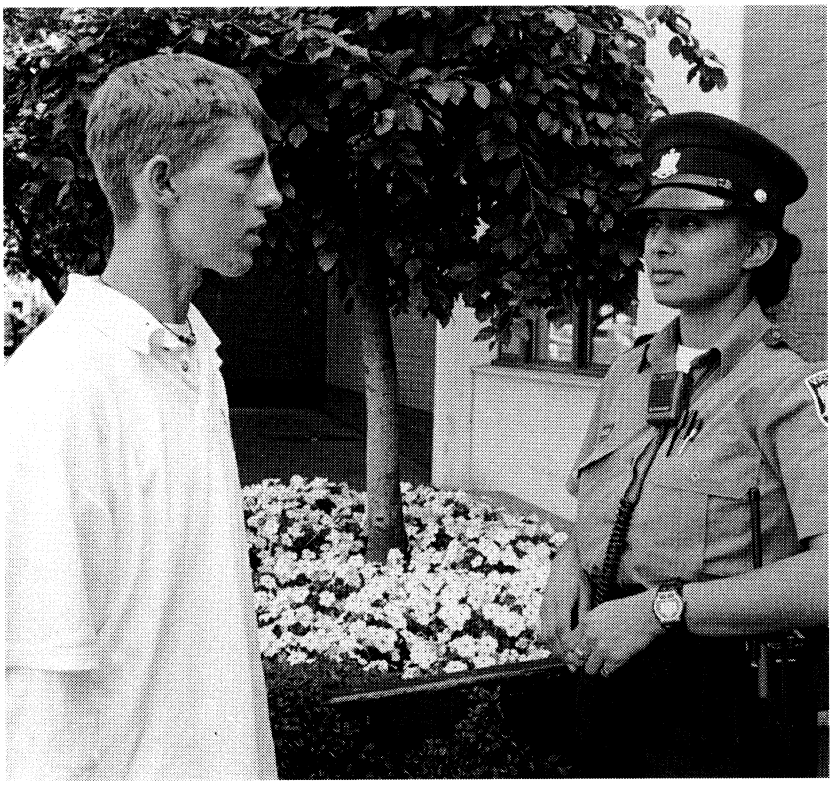
The issue of personal interest recordings by police officers was not raised in the Trilogy, nor was it directly addressed by the amendments to the Criminal Code. Consequently, whether a police officer can record communications with the public to protect her or himself against allegations of misconduct remains an unanswered question. An examination of the recent amendments to the Criminal Code and the principles that arise from the Trilogy may assist in determining the answer.

2. THE CRIMINAL CODE PROVISIONS ON INTERCEPTING COMMUNICATIONS

The recent amendments to the Criminal Code do not resolve the issue of personal interest recordings by police officers. Section 183 of the Code defines a "private communication" as a communication in which the originator, under the circumstances, has a reasonable expectation that the communication will not be intercepted. Wilfully intercepting a private communication is an offence under section 184(1). However, under section 184(2)(a), if "a person has the consent to intercept, express or implied" of the originator or intended recipient, it is not an offence. Thus, it appears that any person (*except* possibly a police officer) can continue to intercept communications without judicial authorization, provided he or she is a party to the communication or has the consent of one of the parties.

A closer examination of the Code's provisions is required to determine the statutory impact on personal interest recordings. First, section 184.1(1) permits consent interceptions, without prior judicial authorization, where the agent of the state has reasonable grounds to believe that the person consenting is at risk of bodily harm, and the purpose of the interception is to prevent that harm (*i.e.,* bodily harm interception). Subsection (2) makes the contents of the interception "inadmissible as evidence except for the purposes of proceedings in which actual, attempted or threatened bodily harm is alleged ..." Subsection (3) directs the intercepting agent to

destroy any recording, notes, and transcripts arising from a bodily harm intercept, provided it is not needed to prove harm under subsection (2). This measure is primarily intended to ensure the police have an ability to adequately protect undercover operators. In effect, it authorizes an "electronic life line between undercover operatives and back-up teams."[15]



Second, section 184.2(1) states "A person may intercept. ... a private communication where either the originator of the private communication or the person intended by the originator to receive it has consented and an authorization has been obtained ..." (*i.e.,* consent and authorization interception). Subsection 2 restricts applications for an authorization to peace or designated public officers. To obtain an authorization the officer must make an application in writing, along with an affidavit which outlines, among other things, the reasonable grounds for believing an offence will be committed, the particulars of the offence, and the period for which the authorization is requested.

Neither section 184.1 (bodily harm) nor section 184.2 (consent and authorization) appear to provide a basis for an officer to make a personal interest recording. Under section 184.1, officers will not always have reasonable grounds in advance to believe that "bodily harm" may arise out of a public interaction. For instance, some police-civilian encounters where there is no concern of risk of bodily harm to the consenting officer can lead to allegations (*e.g.*, routine arrest where it is alleged the officer did not tell the accused of the right to retain counsel). Further, the "purpose" of the personal interest recording is not to prevent bodily harm. This may be an indirect result, but a recording to protect personal interests is directed more to providing exonerative evidence. Bodily harm intercepts also require the officer to destroy the recording "as soon as is practicable," well before the expiry of limitation of action periods for civil, administrative, or criminal proceedings which might be brought against the officer and thus defeating the "personal interest" purpose of the recording.

In relation to a consent and authorization interception (section 184.2), it is impractical to expect police officers to swear an affidavit in order to obtain judicial authorization to record communications in the circumstances of a personal interest recording. For example, an officer dispatched to a violent domestic dispute could not justify delaying attendance to obtain an authorization, yet this type of call can lead to serious allegations against officers (*e.g.*, excessive use of force). Even if a delay could be justified, the officer would not be able to categorically identify the offence involved or the time frame in which it might occur, since each incident has to be judged individually on the spot.

Third, police officers under section 184.4 can make an interception in "exceptional circumstances" where:

(a) the 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 this Part;

(b) the peace officer believes 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; and

(c) either the originator of the private communication or the person intended by

the originator to receive it is the person who would perform the act that is likely to cause the harm or is the victim, or intended victim, of the harm. [Emphasis added.]

The threshold of "serious harm" makes a personal interest recording impossible under this section. If the officer waited until he or she had formed reasonable grounds to turn on the recorder, it might be too late. A prudent officer would initiate the recorder before entering the scene, since it can easily be turned off if there is no further need for a recording.

Fourth, section 487.01 outlines the authority for a judge to issue a "general warrant" to the police to utilize a device, investigative technique, procedure, or do anything described in the warrant that would otherwise constitute an unreasonable search or seizure of a person or property. The judge must be satisfied that an offence has been, or will be, committed against an Act of Parliament, and that the evidence will be obtained through the technique or device. The judge must also be satisfied that issuing the warrant is in the best interests of the administration of justice, and that there is no other provision that would provide authorization to conduct the procedure. The issuance of a warrant shall be on such terms and conditions as the judge considers necessary to ensure it is reasonable. This section contemplates the use of video surveillance, and requires the terms and conditions to be imposed by the judge to ensure that privacy is minimally impaired.

Personal interest recordings cannot be dealt with under section 487.01 for the simple reason that a warrant to intercept personal interest communications would have to be issued in perpetuity to allow officers to record situations while they are agents of the state. There is also some question that the authority for the judge to issue a general warrant is too vague to withstand Charter scrutiny.[16]

It is evident that the above exceptions allowing police, as agents of the state, to intercept communications are not really applicable to personal interest recordings. The four provisions reviewed do not deal with interceptions by police other than for investigative purposes. On the other hand, under section 184(2)(a) it appears that consent interceptions by police officers to protect personal interests are *probably* exempt from criminal sanction. The issue, then, is whether the courts will be prepared to find that personal interest interceptions are constitutional.

"... 'agents of the state' cannot use one party consents to intercept communications of citizens where the citizen has a 'reasonable expectation of privacy' unless they have prior judicial authorization."

In addressing the constitutionality of such interceptions, two issues must be examined: is the police officer acting as an agent of the state? and if so, does the citizen have a reasonable expectation of privacy in the circumstances? Since it appears that the issue of a personal interest recording cannot be completely resolved under the Criminal Code, it may be useful to return to the Trilogy to determine whether or not police officers can record communications to protect their personal interests.

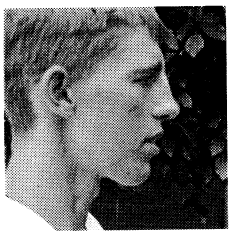
3. SECTION 8 OF THE CHARTER: AGENTS OF THE STATE AND EXPECTATIONS OF PRIVACY

Section 8 of the Charter protects citizens against "unreasonable search and seizure" by the state. The Trilogy found that "agents of the state" cannot use one party consents to intercept communications of citizens where the citizen has a "reasonable expectation of privacy" unless they have prior judicial authorization. Thus, determining whether or not a police officer can use a personal interest recording requires an analysis of the two thresholds created by the Supreme Court of Canada under section 8 to establish an unreasonable search or seizure.

First, is a police officer an "agent of the state" for the purposes of a personal exonerative record-

ing? In the Trilogy the Supreme Court did not define an "instrumentality of the state" or provide any guidance on the scope of this status. The problem is that section 8 is attached to the agent, yet fails to recognize the personal interests of that agent. Will a court be prepared to discern between the individual and state interests of an agent?

Second, when is there a "reasonable expectation of privacy"? The onus is on the person alleging a violation of section 8 to establish that he or she had a "reasonable expectation of privacy" that was violated by the state.[17] Judicial and academic scrutiny has only focused on situations involving the use of surreptitious recordings where the person being recorded was *unaware* he or she was dealing with an agent of the state.[18] If this veil is removed, and an individual is aware he or she is dealing directly with an agent of the state, is the expectation of privacy sufficiently reduced to make personal interest recordings by police officers reasonable? Moreover, does the location of the personal interest recording, or the number of participants involved, also impact on the expectation of privacy?



There are two possible ways to approach the constitutional analysis of personal interest recordings. The first is to assert that section 8 is not applicable to a scenario where a police officer records communications to protect personal interests. The officer is merely recording his or her communications with third parties to protect private interests. It can be argued that this is unrelated to the officer's function as an agent of the state, since the officer is not conducting an investigation or actively seeking to gather evidence for a state prosecution. The second approach, if an officer *is* found to be an agent of the state for the purposes of a personal interest recording, is to assert that, based on the *Hunter* and *Duarte* analysis of section 8, there is no reasonable expectation of privacy in communications with *known* agents of the state. In *Duarte*, it was clear that the officers who intercepted the communication were acting as agents of the state conducting an investigation. However, the court found that under section 8 of the Charter, it is also necessary for a party to have a reasonable expectation of privacy for a search or seizure to be declared unreasonable.

Beginning with the agent of the state analysis, several factors highlight the personal interests at stake for an officer when an allegation of misconduct is filed. For instance, R.C.M.P. officers under investigation for an allegation of misconduct can be "ordered" to answer questions.[19] Failure to provide an ordered statement can lead to further charges and sanctions against the officer.[20] Although there is a statutory "use immunity" with respect to the statement — that is, the ordered statement cannot be used against the officer in subsequent proceedings — there is no "derivative use immunity"[21]: evidence identified based on the officer's compelled answers is admissible in subsequent proceedings against the officer. In addition, the recent decisions of the Supreme Court of Canada in *R.* v. *Kuldip*[22] (use of testimony) and *R.* v. *Stinchcombe*[23] (disclosure) have cast some doubt on the effectiveness of "use immunity" to prevent ordered statements from being used in proceedings against an officer.

The former commissioner of the R.C.M.P., R.H. Simmonds, clearly stated the force's purpose behind requiring ordered statements:

> What we can do as a result of the ordered statement — and even this causes us problems from time to time before the courts and with members — is go out and get what you might call independent evidence.[24]

Even more disturbing is the fact that there is *no* right to counsel during the taking of an ordered statement:

> During a Code of Conduct [*i.e.*, internal] investigation, legal counsel or representative may be *excluded* when a statement is being taken or during the *questioning of a suspect member* ...[emphasis added].[25]

The result is that R.C.M.P. officers can be faced with having to disprove a charge (criminal, civil or internal) based on evidence derived from the statement they were forced to provide, without the benefit of legal counsel.[26] With a personal interest recording, the officer may be able to avoid giving a statement at all, since the recording would reveal what transpired.

When a police officer is charged, it is the individual officer who is named in any information alleging a criminal or disciplinary offence, not the department. Further, if it is concluded that the officer was acting outside the scope of his or her duties

there may be no funded counsel available from the department at the investigative or trial stage,[27] which can leave individual officers vulnerable. Even Alan Borovoy, a noted proponent of civil rights in Canada and police watchdog, has recognized that police officers are particularly vulnerable to criminal charges as a result of public complaints.[28]

These observations highlight some of the significant personal interests that can be at stake for an officer when there is an allegation of misconduct. The distinction between the personal and agent capacity of an officer is an important one, and, if accepted, would place the officer (as an individual) within the consent exception of the Criminal Code, thereby avoiding the application of section 8 of the Charter. Without such a distinction, the courts would

"The distinction between the personal and agent capacity of an officer is an important one ... Without such a distinction, the courts would be unfairly requiring strict accountability of officers, while denying them the ability to protect their interests when subjected to the rigours of a ... misconduct review."

be unfairly requiring strict accountability of officers, while denying them the ability to protect their interests when subjected to the rigours of a (criminal, administrative, public, or civil) misconduct review. The need for such a distinction is particularly striking when one considers that some police officers (*e.g.*, R.C.M.P.) can be the target of an evidence gathering process (*i.e.*, ordered statements) that is not subject to judicial or public review. When determining the constitutionality of personal interest recordings, the courts should not overlook the human interests of "instrumentalities of the state."

The second analysis under section 8 is expectation of privacy. One of the underlying themes of the Trilogy was the state's clandestine recording of private communications without the knowledge of all of the parties. Does the public have the same expectation of privacy when they know they are communicating with an agent of the state? Further, how is the expectation of privacy affected by a known agent of the state surreptitiously recording a party's communication with the officer?

Quigley and Colvin, in their review of decisions under section 8, note that the courts have not been entirely clear on when a person can depart from the section 8 criteria established in *Hunter,* and that the criteria themselves are not a very satisfactory way to analyse all problems.[29] In *Hunter*, Justice Dickson (as he then was) held that the minimum requirement under section 8 for a reasonable search or seizure is prior judicial authorization. To obtain that authorization, an agent of the state is required to establish on reasonable and probable grounds, under oath, that they believe an offence has been committed, or is about to be committed, and the evidence sought is located on the premises to be searched. In *Duarte*, Justice LaForest reinforced these threshold requirements by finding that a consent-based interception of a private communication by the state, without judicial authorization, is unreasonable. He concluded that Parliament "succeeded in striking the appropriate balance" with the Part VI (then Part IV.1) provisions that required the issuance of judicial authorizations to intercept communications.[30]

Similar to the observations made above regarding the recent amendments to the Criminal Code, it would be impossible for an officer to meet the strict constitutional requirement to obtain an authorization for a personal interest recording. There is no ability to predict where or when an authorization would be necessary, or to provide it in an expeditious fashion. A second problem is that an officer will not always have reasonable and probable grounds in advance upon which to request an authorization. The judicial requirements arising from *Hunter* and *Duarte* are too impractical to apply to personal interest recordings. The comments of Stanley Cohen, in relation to the state intercepting communications, are apt:

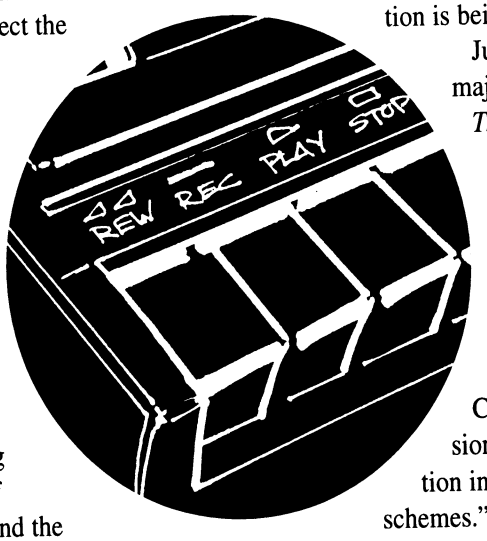
> [A] blanket warrant requirement is neither desirable as a matter of policy, nor practical in the context of the *real world of law enforcement* ... [31] [emphasis added].

In *Hunter,* Dickson did concede that a warrant may not be necessary in every instance, indicating there may be instances where prior judicial authorization would not be "feasible."[32] Despite the findings in *Duarte* that a consent-based interception of a

private communication by the state is unreasonable without prior judicial authorization, it may be argued that it is not "feasible" for an officer to obtain prior judicial authorization to make a personal interest recording.

Considering the purposive approach to the Charter, it can be argued that the courts cannot effectively "balance the interests" under section 8 unless they recognize that agents of the state also have private interests in need of protection. It is not always a bilateral question of state versus individual, since a police officer also has important private interests worthy of constitutional recognition. Allegations of misconduct against an officer may involve a trilateral balancing of interests: the state, the complainant, and the individual police officer. It should be noted that the interests of these parties are not all the same.

The Supreme Court has shown some willingness to find certain actions by the state reasonable despite their failure to meet the standards elucidated in *Hunter* for section 8. For example, in *R. v. Simmons*, Chief Justice Dickson noted that "[t]he Charter [sic] does not protect the individual from all searches, but only from those deemed unreasonable."[33] In *Simmons*, the majority found that "the degree of personal privacy reasonably expected at customs is lower than in most other situations."[34] Persons who attend at a border entry point cannot expect to be free from a certain level of scrutiny. As a result, "routine questioning by customs officers, searches of luggage, frisk or pat searches, and the requirement to remove such articles of clothing as will permit investigation of suspicious bodily bulges. . .are not unreasonable within the meaning of section 8."[35] Can the reasoning of *Simmons* be applied in the context of personal interest recordings? In other words, can a reduced expectation of privacy be shown in communications with known agents of the state?



Generally, any person who speaks with a known agent of the state (*e.g.*, a police officer), particularly one that enforces laws, understands that the agent is under an obligation to report communications made to him or her. As a result, there is little, if any, expectation of privacy in communications with a known agent of the state. If it is common knowledge that police officers investigate and charge people, and make reports based on what is said to them, it can be argued that the expectation of privacy is significantly reduced.

Further, Marc Rosenberg, writing in the wake of *Duarte* and *Wong*, argues that the application of section 8 is not unlimited in that "[t]he authorities must do something, *use some means of investigation*, which engages its terms"[36] [emphasis added]. An officer is not investigating pursuant to the state's interests when recording a personal interest communication, unless, of course, the officer has informed the individual that they are under investigation, and informs the person the "statement" is being recorded. At this point the officer is no longer relying on the personal interest purpose (to refute any possible allegations) but has adopted a state purpose (investigative) for the recording. Section 8 of the Charter, however, would not arise for the (now) investigative recording because the person will have been advised that their communication is being recorded.

Justice Wilson, writing for the majority in *R.* v. *McKinlay Transport Ltd*,[37] set out another consideration when interpreting the Charter. She indicated that "flexibility" is important; that it would be incorrect "for the courts to apply a rigid approach to a particular section of the Charter [sic], since the provision must be capable of application in a vast variety of legislative schemes."[38] Further, Wilson concluded:

> Since individuals have different expectations of privacy in *different contexts* and with regard to *different kinds of information and documents, it follows that the standard of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful* [39] [emphasis added].

In *McKinlay Transport* the majority drew a distinction between a criminal or quasi-criminal context, where the rigours of *Hunter* will rarely be avoided, and "the administrative or regulatory context, to which a lesser standard may apply depend-

ing upon the legislative scheme under review."[40] The court recognized that "there will be instances in which an individual will *have no privacy interest or expectation* in a particular document or article required by the state to be disclosed"[41] [emphasis added].

This view coincides with the observation that when a person knows he or she is communicating with an agent of the state there is little, or no, expectation of privacy in that context. Individuals may expect that certain personal information provided to the agent is private (*e.g.,* a phone number); but this could not reasonably be expected to extend to any communications upon which they are *basing* a complaint against the officer. There is also a distinction to be made between criminal and internal allegations of misconduct, in that the former involves a criminal context, and the latter an administrative context. Since allegations of misconduct can involve criminal, internal, public, and civil contexts, the courts may have to recognize that a lesser standard of privacy exists in communications with known agents of the state because of the priority placed on police accountability.

Two other factors should also be considered. First, most personal interest recordings will be made in public locations. Certain locations, and actions of civilians, are so completely public that it would impossible to argue there was a reasonable expectation of privacy either objectively, subjectively, or socially.[42] As a result, it may not be reasonable for someone to expect that their communications with an officer would be heard only by that officer. Second, many communications cannot be considered "private" based on the number of participants. If a person is communicating in the presence of the police and several other people, is there any reason for that person to believe he or she is engaging in a "private conversation"?

These two additional factors would impose a very onerous burden on a party trying to assert that a personal interest recording breaches a reasonable expectation of privacy. The objective and subjective expectancy tests discussed by the Supreme Court in the Trilogy could not be met. It remains to be seen, however, whether the court will rely on the social expectation test[43] to erect a constitutional barrier under section 8 against personal interest recordings. To sustain Justice LaForest's social expectation position, the Supreme Court will have to maintain that individuals in society never expect an agent of the state with whom they are dealing to "record" communications. It should be noted, however, that the police already record communications (frequently in the presence of citizens) in notebooks, forms, reports, court briefs, statements, and on interview tapes.

The above analysis suggests it would be difficult for a party to argue that he or she has an expectation of privacy in the usual or routine communications that occur with known agents of the state. A privacy issue may arise, however, if an undisclosed personal interest recording is made of a communication between an officer and a civilian (*i.e.,* only two parties) in a non-public location. The question may be merely academic, since the officer could simply advise the other party, if it is necessary to make a recording, that a tape recorder is being used. The critical element is probably that the person is *aware* they are communicating with an agent of the state. That citizens know they are speaking to an agent of the state, usually in a public or semi-public location, sometimes with several people present, tends to remove any appreciable subjective or objective expectation of privacy under section 8 of the Charter. If, however, the courts elect to follow the social expectation path of Justice LaForest, an undisclosed officer-civilian personal interest recording made in a non-public location could possibly be susceptible to an unreasonableness finding under section 8 of the Charter.[44]

4. OBSERVATIONS

This article has attempted to consider the legal and constitutional position of an officer who utilizes a tape recorder as a means of protecting his or her personal interests against allegations of misconduct. Current trends in police accountability may make individual officers' interests susceptible to abuse by the accountability "system." Many police critics fail to recognize that the individual officer is not always protected, or adequately represented, in a process that can be abused by complainants, journalists, civilians, and management, all of whom have their own vision of accountability. [45]

It should be noted that police officers may not have significant latitude in determining their course of action in a given situation. A police officer may have to act without time for reflection on what are

sometimes finite legal distinctions that can separate criminal or disciplinary conduct from permissible conduct. Sometimes officers are operating in an area of conflicting and contradictory legal, policy, and social demands. It is important to remember that "law," by its very nature, can create situations that require the police to operate in grey areas, with no clearly defined expectations or consensus, until such time as the judiciary, legislators or the public provide direction.[46] On the other hand, when police officers do act improperly they must be held accountable. The problem is that accountability can become a manipulative and amorphous concept, particularly when some journalists, politicians, interest groups, and other members of the public are prepared to presume police wrongdoing when allegations of misconduct arise. Personal interest recordings are one measure that may assist officers, *and* the public, to ensure the accountability process is fair and effective.

"Sometimes officers are operating in an area of conflicting and contradictory legal, policy, and social demands. ... 'law,' by its very nature, can create situations that require the police to operate in grey areas..."

The recent amendments to the interception provisions of the Criminal Code do not deal directly with personal interest recordings. However, based on section 184(2)(a), it appears that personal interest recordings are not a statutory violation. If Parliament is prepared to protect the physical integrity of officers by enacting the bodily harm exception, it may want to clarify the issue of personal interest recordings by expressly protecting the legal/private integrity of police officers. For example, a provision could be enacted that permits an officer to intercept communications to protect his or her personal interest. If there are objections to such a measure, consideration could also be given to limiting the admissibility of such recordings to situations where the officer is accused of misconduct or charged with an offence. Another possibility is for Parliament to expressly exclude communications with *known* agents of the state from the definition of "private communication."

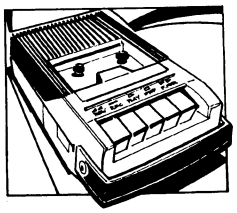
After reviewing the requirements of section 8 of the Charter and the Trilogy, a strong argument can be made that police officers can rely on personal interest recordings in most instances. This is so because a personal interest recording is not made in the "agent" capacity, or because there is no expectation of privacy in most communications with known police officers. If the non-agent argument is rejected, it appears the only unresolved question under the no-expectation-of-privacy argument is whether a citizen's privacy expectation, in the limited circumstances of a non-public communication between a known agent and a civilian that is recorded without the knowledge of the civilian, is reduced to such a level that a personal interest recording is a reasonable search or seizure. The officer, in this scenario, will be relying on the fact that the citizen knew that he or she was communicating with an agent of the state, regardless of whether or not the person knew a recording was being made. In order to answer this question, the conflict among the three forms of the expectation of privacy test (objective, subjective, and social) utilized by the various members of the Supreme Court will have to be resolved. For advocates of personal interest recordings it will be important to emphasize that the purpose of the recording is not investigative, but is intended to protect the private interests of the officer.

It is interesting that the current statutory provisions and Trilogy decisions seem to permit a citizen to record communications without authorization, but police officers may be denied the ability to protect their personal interests because they are identified as agents of the state, regardless of the purpose behind recording the communication. Considerable weight can be given to the fact that a recording can accurately reproduce events and thus assist in settling important questions of accountability. In light of the fact that personal interest recordings would only be instituted as a protective non-investigative measure against allegations of misconduct, the general concern regarding privacy interests of citizens is somewhat dissipated.

Officers should not expect that they will always have the final say with respect to a recording. If a recording is made which identifies a situation where the officer has engaged in a criminal or disciplinary offence, there is no reason to believe the investigating agency, at least with respect to a criminal allegation, could not seize the tape. The tape would be evidence in a criminal investigation, and the department could certainly obtain a search warrant to

search the officer's locker, private vehicle, or home for the tape.

In addition, as acknowledged by Glanville Williams, introducing recorders may lead some parties to be sceptical if a recorder is not utilized in every instance.[47] If officers begin to make common use of recordings to rebut allegations, there may be questions raised if an incident goes unrecorded. Further, tape recordings may not be conducive to the betterment, or maintenance, of relations with the public. It should be understood, however, that a personal interest recording would only occur where the officer believes that a situation could give rise to an allegation. Moreover, the recording of an incident assures that everyone's interests are treated fairly, based on reliable evidence. Even sceptics of the police accountability process cannot deny that personal interest recordings have the potential to provide valuable and reliable evidence when an allegation of misconduct arises.



ENDNOTES

1 "Pattern Disturbing, Rae says" *Globe and Mail* (4 May 1992) A1; "Ottawa Pledges to curb police use of deadly force: Concerns that rules are *too* broad" *Globe and Mail* (5 May 1992) A1; "Campbell pledges limits on use of deadly force" *Globe and Mail* (5 May 1992) A2.

2 *House of Commons Debates* (4 May 1992) at 10042 (see Kim Campbell).

3 See note 1.

4 "RCMP face complaints" *The Chilliwack Times* (2 May 1989).

5 Personal Communication by the author with one of the named officers and review of the tape recording.

6 See *Purcell* v. *Smith and McKenna* (1993), Nova Scotia Police Commission Civilian Review Board.

7 The author was present for the testimony at the *Purcell* hearing into the allegations against the officers.

8 See Part VI of the Criminal Code, "Invasion of Privacy" provisions.

9 David Watt, *Law of Electronic Surveillance in Canada* (Toronto: Carswell Co., 1979) c. 2; Ronald J. Delisle and Don Stuart, *Learning Canadian Criminal Procedure,* 2d ed. (Scarborough: Thomson Professional Publishing, 1991) at 188-89.

10 Law Reform Commission of Canada, *Electronic Surveillance* (Working Paper No. 47) (Ottawa: L.R.C.C., 1986) at 27.

11 *R.* v. *Duarte* (1990), 74 C.R. (3d) 281.

12 *R.* v. *Wiggins* (1990), 74 C.R. (3d) 311.

13 *R.* v. *Wong* (1990), 1 C.R. (4th) 1.

14 An Act to Amend the Criminal Code, the Crown Liability and Proceedings Act and the Radio Communication Act, S.C. 1993, c. 40 in force by O.I.C. 1 August 1993, SI/93 154.

15 "Bill Presented to Parliament To Ease Up On Police Surveillance Restrictions" (January, 1993) Blue Line Magazine at 8.

16 Canadian Police Association, *Submission to the Legislative Committee on Bill C-109 Wiretap* (Ottawa: 1993).

17 *R.* v. *Hunter*, [1984] 2 S.C.R. 145.

18 For example, see Marc Rosenberg, "Controlling Intrusive Police Investigative Techniques Under Section 8" (1991), 1 C.R. (4th) 32.

19 Section 40(2) of the Royal Canadian Mounted Police Act, R.S.C. 1985 (2nd Supp), c. 8 states that officers must answer questions when under investigation for a conduct offense.

20 See note 19; also see, for example, s. 40 of the Code of Conduct (contained in the regulations of the R.C.M.P. Act), which states that it is a disciplinary offence to disobey a lawful order, and dismissal is a sanction that could ultimately be imposed against an officer for a disciplinary offence.

21 See note 19, s. 40(3).

22 *R.* v. *Kuldip*, [1990] 3 S.C.R. 618.

23 *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326.

24 House of Commons, Legislative Committee on Bill C-65 – An Act to Amend the Royal Canadian Mounted Police Act and Other Acts in Consequence Thereof, Minutes of Proceedings and Evidence, Issue No. 7, (27 November 1985) at 7:16.

25 R.C.M.P. Administration Manual: "Code of Conduct (Part IV) Investigations," XII.4.E.3. (17 November 1994).

26 For further discussion on other possible issues, see Craig S. MacMillan, "Lilburn in Uniform? A Charter Analysis of 'Ordered Statements' Under the *R.C.M.P. Act*" (1993) 2 Dalhousie J. Legal Studies 93.

27 For example, see R.C.M.P. External Review Committee, *Decisions*, G-63 Summary, (16 October 1992) where it was concluded by the R.C.M.P. Commissioner that public funds should not be used for defence of an officer facing a criminal charge.

28 Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-65, see note 24 at 6:7-8; more generally, see Laurence Lustgarten, *The Governance of Police* (London: Sweet & Maxwell, 1986); Ian Freckelton, "Shooting the Messenger: The Trial and Execution of the Victorian Police Complaints Authority" in Andrew Goldsmith, ed., *Complaints Against the Police: The Trend to External Review* (New York: Oxford University Press, 1991) at 94.

29 Tim Quigley and Eric Colvin, "Developments in Criminal Law and Procedure: The 1989-90 Term" (1991) 2 Supreme Court L.R. 265 at 274.

30 See note 11 at 292.

31 Stanley Cohen, "Not As Easy As It Seems: Closing the Consent Loophole" (1990), 74 C.R. (3d) 304 at 306.

32 See note 17.

33 *R.* v. *Simmons* (1989), 66 C.R. (3d) 297 at 318.

34 See note 33 at 321.

35 See note 33 at 321.

36 See note 18 at 35.

37 *R.* v. *McKinlay Transport Ltd.* (1990), 76 C.R. (3d) 283.

38 See note 37 at 298.

39 See note 37 at 298.

40 See note 37 at 300.

41 See note 37 at 296.

42 These were the competing tests that arose out of the Trilogy as to the basis of a reasonable expectation of privacy.

43 *Wong,* see note 13 at 9.

44 Unfortunately, space restrictions do not permit an examination of s. 1 (i.e. whether personal interests statements are justified in a free and democratic society) and s. 24(2) of the *Charter* (whether a personal interest recording brings the administration of justice into disrepute) in relation to the ultimate outcome of non-public officer-civilian contacts under the social expectation test of privacy.

45 See Jerome Skolnick and James Fyfe, *Above the Law: Police and the Excessive Use of Force* (New York: The Free Press, MacMillan Inc., 1993); Mike Maguire and Claire Corbett, *A Study of the Police Complaints System* (London: H.M.S.O., 1991).

46 Craig S. MacMillan, "Who Will Protect Those Who Protect?" (December, 1989) Blue Line Magazine.

47 Glanville Williams, "The Authentication of Statements To The Police", [1979] Crim. L.R. 6 at 16.