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WIRETAPPING AND OTHER ELECTRONIC SURVEILLANCE: Law and Procedure Robert W. Hubbard, Mabel Lai and Daniel Sheppard Release No. 5, December 2025

What's New in this Update:

This release features commentary on new updates to Appendix A1—Part VI of the Criminal Code and Appendix A2—Criminal Code Provisions Outside of Part VI.

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Highlights

- **Appendix A1—Part VI of the Criminal Code—Invasion of Privacy—Section 185: Application for authorization—Annotations: Courts of Appeal**—The accused challenged the constitutionality of s. 185 of the *Criminal Code*, to the extent that it permits private communications to be intercepted without requiring reasonable grounds to believe that those interceptions “will” afford evidence of the offence, with a claim that reasonable grounds to believe they “may” assist the investigation, without individualized grounds regarding persons or precision regarding places or devices, was too low a threshold to safeguard privacy sufficiently. The Court of Appeal dismissed upheld the constitutionality of the impugned *Criminal Code* sections and dismissed the accused’s appeal. Underlying its conclusions, the appellate court turned to the contrasting nature of the evidence sought by way of third-party interceptions, vis-à-vis evidence sought with authorized searches of locations – whereas search warrants tend to be single-entry authorizations to permit for searches of precise locations for items reasonably believed to exist, wiretap authorizations hinge on the anticipation, within the authorized time-frame, of relevant conversations and communications taking place, the actual investigative value of which could only be determined after they have come into existence. Given the prospective and uncertain nature of what evidence may be collected from interceptions in the future, the unique “may assist” standard was articulated in s. 185(1)(e): *R. v. Hafizi*, 2023 ONCA 639, 2023 CarswellOnt 14826 (Ont. C.A.).
- **Appendix A2—Criminal Code Provisions outside of Part VI—Section 487.01: Application for disposition—Annotations: Courts of Appeal**—A confidential informant advised police that the man, a known high-level drug-dealer whose fiancée had been slain by masked assailants, was aware of the persons behind the murder and was planning to arrange for retaliation. With the belief that the man’s cellphone contained information relevant to their murder investigation, and in light of his criminal past and outstanding charges, the officers obtained a warrant to detain him and to seize his phone. The authorization specified as the target the device with a particular phone number, limited the search for the phone to the man and the area surrounding him at the time, and, in the event more than one device was found, permitted the police to seize them for the limited purpose of ascertaining which was the targeted phone. The officers pulled the man over to execute the search, and resistance on the man’s part resulted in the police placing him in handcuffs

while they carried out the search of his person and vehicle. One of the officers found three phones in the vehicle, along with a magazine for a handgun. Familiar with the man having hidden things in his vehicles in the past, the officer also checked behind the panel of the driver's side door, which was easily accessible by popping off the door-lock mechanism – therein, the officer found no additional devices but discovered two loaded handguns, the possession of which led to the arrest of the man. The weapons evidence was excluded after the applications judge had found the police to have overstepped the authorization resulting in a search violating s. 8 of the *Charter*. The Court of Appeal, however, held the applications judge to have erred in concluding that the officers were capable of identifying with certainty the target phone at the roadside without need to seize the remaining devices; in failing to see that the authorization had contemplated the seizure of a plurality of devices; in failing to consider the knowledge held by the officers about the man's criminal past and how it had informed their concerns of safety, evidence-preservation, and the man's motivation to keep his phone away from the police; and in discounting the accessible space behind the door panel to be part of the man's "surrounding area" to be searched: *R. v. Bhatti*, 2025 ONCA 697, 2025 CarswellOnt 16897 (Ont. C.A.).