Surreptitious Recordings by Civilians in Criminal Trials: Challenging Their Admissibility at Common Law and Under the Charter

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Abstract:

For decades, courts in Canada have admitted surreptitious recordings made by civilians in criminal trials. Until recently, courts have applied a common law test for admissibility focused on the fairness and accuracy of a recording and whether it is more prejudicial than probative. Recent decisions of the Supreme Court of Canada have put in place a foundation for a second basis for challenging the admission of surreptitious recordings: police receipt and review of them without a warrant is an unreasonable search and seizure under section 8 of the *Charter*. At least one trial court has applied this reasoning to exclude a recording. This article examines both the common law and *Charter* cases for challenging admission, beginning with the common law test and cases applying it, followed by a discussion of Supreme Court jurisprudence supporting the application of section 8 to police receipt of a recording made by a civilian. It concludes with arguments justifying the need for a warrant requirement to render such a seizure and search reasonable.

Introduction

It is not a criminal offence in Canada to surreptitiously record a conversation to which you are a party. In some provinces, a person may commit a tort by making such a recording.[1] For decades, courts across Canada have admitted into evidence surreptitious recordings that a complainant has made of their conversation with the accused. Until recently, defence could challenge their admissibility only on the basis of common law rules of evidence.[2] But the law is changing. Recent decisions of the Supreme Court of Canada have put the building blocks in place for a court to recognize that police or Crown receipt of a surreptitious recording from a third-party civilian, with the intention of using it for prosecutorial purposes, constitutes a search or seizure under section 8 of the *Charter* that would require a warrant to render it reasonable.[3] At least one superior court has done so, in a case involving a civilian who made an unlawful recording of a conversation to which she was not a party.[4] The reasoning should

[1] Manitoba, Saskatchewan, and Newfoundland and Labrador's privacy legislation explicitly stipulates that surreptitious recording without lawful authority is *prima facie* evidence of a violation of the tort of privacy and actionable *per se*: *Privacy Act*, RSS 1978, c P-24 (Saskatchewan); *The Privacy Act*, CCSM c P125 (Manitoba); *Privacy Act*, RSNL 1990, c P-22 (Newfoundland and Labrador). See also British Columbia's *Privacy Act*, RSBC 1996 c 373, s 1(4), stating that "privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass."

[2] The test is canvassed in Part I below.

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

[4] *R v Vey*, 2019 SKQB 135 [*Vey*] discussed in more detail below.

apply to *any* surreptitious recording, including those in which the complainant is a participant and gives the recording to police.

Part I of this article sets out a brief overview of the common law test for admitting surreptitious recordings and cases applying it. Part II considers Supreme Court decisions that lay a foundation for finding that police or Crown engage section 8 when they receive and use a recording a civilian volunteers. A concluding section explains why requiring a warrant to seize and review surreptitious recordings would better protect everyone's privacy without precluding the Crown from using these recordings to obtain a conviction.

Part I: Common Law Test for Admission

Courts commonly cite the Alberta Court of Appeal's decision in *R v Bulldog* for the test for whether to admit a surreptitious audio or video recording.[5] Surveying case law from across Canada, the court in this case holds that a recording may be admitted where it is a "substantially accurate and fair representation of what it purports to show"; it is relevant; and its probative value outweighs its prejudicial effect.[6] A recording may be admitted where it is distorted or not completely accurate, so long as the deficiency is neither material nor substantial enough to mislead.[7] The standard for assessing accuracy and fairness is a balance of

[5] *R. v. Bulldog*, 2015 ABCA 251 [*Bulldog*] at paras 31-33.

[6] *Ibid* para 33; the court at para 31 cites *R v Crawford*, 2013 BCSC 2402 at para 48 for the point about accuracy. A similar test is applied in family law cases, where surreptitious recording commonly arises; in British Columbia, a party seeking admission must establish "relevance, identification and trustworthiness, and that the probative value outweighs any prejudicial effect": *Finch v. Finch*, 2014 BCSC 653 at para 62; see also *Mathews v. Mathews*, 2007 BCSC 1825 [*Matthews*]. Other family law cases refuse admission to discourage others from making such recordings: *St. Croix v St. Croix*, 2017 ABQB 490; *Hameed v. Hameed*, 2006 ONCJ 274; *Shaw v. Shaw*, 2008 ONCJ 130. In the labour context, tribunals are also wary of them; see, *e.g. British Columbia Government and Service Employees' Union v British Columbia Public Service Agency*, 2016 CanLII 77600 (BC LA), holding at paras 13-14 that "In British Columbia, the prevailing opinion is that the evidentiary probative value of surreptitious recordings of workplace conversations is outweighed by the possible deleterious and chilling effect admissibility of such recordings will have on workplace cooperation". They are admissible when "persons in the employment or broader relationship making and tendering the recording had to resort to surreptitious recording to deal with a relationship power imbalance in order to objectively establish their credibility in the face of being accused of being a perpetrator or liar, rather than a victim."

[7] *Bulldog*, *supra* note 5 at para 31.

probabilities.[8] Case law on point sheds light on when a surreptitious recording will be relevant and more probative than prejudicial.

In *R v GJ*,[9] a foster parent was charged with sexually assaulting sisters in his care decades prior. One of the sisters, visiting him in 2010, made a surreptitious recording lasting 2 minutes and 9 seconds using a device carried in her purse.[10] At one point, the complainant asked the accused why did he molest her as a girl? He responded: "I don't know, I don't know. You didn't push me away. We can't go back."[11] The court considered but dismissed the notion that police use of the recording engaged section 8 of the *Charter*. This turned on the finding that the complainant was not a state agent, since she made the video well before approaching police and without it being clear that providing it to police was her primary purpose.[12] Turning to the common law, the court considered the probative value of the recording to be high, given its clarity and lack of editing or distortion.[13] The court then applied the four-fold test for prejudice from the family law decision in *Mathews*,[14] which considers prejudice to the party, to the trial process (in terms of time), to the reputation of the administration of justice (given the "inherent unfairness when one is unaware of the recording"), and to the administration's reputation if the evidence were excluded.[15] The recording here was short and any adverse effect it may have on the repute of the justice system would be outweighed by the effect of excluding it, given its importance to the case.[16] The recording was admitted, and the accused's

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[8] *Ibid* at para 38.

[9] *R. v. G.J.*, 2012 ONSC 5413 [*G.J.*].

[10] *Ibid* at para 7.

[11] *Ibid* at para 9.

[12] *Ibid* at paras 22-23. Having a primary purpose of turning over evidence to police at the time a civilian obtains (or creates) it is not a part of the Supreme Court of Canada's test for agency in *R. v. Broyles*, [1991] 3 S.C.R. 595, where Iacobucci J, at para 608, held the question to be whether a civilian would have done what they did "in the form and manner in which [they did it], but for the intervention of the state or its agents" (Cited in *J.G.*, *supra* note 9 at para 20).

[13] *J.G.*, *supra* note 9 at para 30.

[14] *Mathews*, *supra* note 6.

[15] *Mathews* is cited in *J.G.*, *supra* note 9 at para 29.

[16] *J.G.*, *supra* note 9 at para 32.

admissions were admitted for the truth of their contents under the party admissions exception to hearsay.[17]

In *R v Iyer*,[18] a property developer made fraudulent misrepresentations at meetings with investors caught on surreptitious recordings made by the boyfriend of one of the investors. Here too, the court briefly considered but rejected the possibility that section 8 was engaged, by finding that, at the time he made the recording, the boyfriend was not a state agent.[19] In relation to the test for admissibility in *Bulldog*, the accused took issue with the accuracy of what the recordings depicted. They failed to capture portions of the meetings and concerns about continuity of custody of the recordings were material. The court rejected both submissions.[20] The witness failed to capture more of the meetings due to a mistaken assumption that the device would continue to record on the other side of the tape.[21] There was no evidence that portions of the meeting not captured rendered the recording materially inaccurate.[22] The witness who made them could clearly identify the accused's voice on them. The accused made admissions relevant to and probative of elements of the offences charged (33 counts of fraud) that outweighed any prejudice they might cause.[23]

By contrast to *G.J.* and *Iyer*, the court in *R v Parsons* did not admit a surreptitious recording because it was not accurate enough, and thus not more probative than prejudicial.[24] The accused was charged with sexual assault. While he was visiting with the complainant and her family, the complainant's sister surreptitiously recorded a portion of the gathering using her iPhone. The conversation lasted roughly an hour, but she captured only 11 minutes of it.[25] The court assumes that since the statements were not made to a person in authority, there

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[17] *Ibid* at para 12 and 33.

[18] *R v Iyer*, 2015 ABQB 577.

[19] *Ibid* at paras 72 to 80.

[20] *Ibid* at para 42.

[21] *Ibid* at para 31.

[22] *Ibid* at para 36.

[23] *Ibid* at paras 57 to 60, Moen J does not discuss how admitting the recording might cause prejudice here, but simply asserts that "the recordings are more probative than prejudicial."

[24] *R. v. Parsons*, 2017 CanLII 82901 (NL SC) [*Parsons*].

[25] *Ibid* at para 5.

were no *Charter* issues to consider.[26] The contentious portions of the recording were the accused's assertion at the outset that "it's me own fault" and later saying: "Yeah, I'm nervous and I I don't want to get involved with the law and lose me family over something I done when I was drunk".[27] Defence noted the lack of specificity in the family members' allegations to the accused and the lack of context for any inculpatory statements he was alleged to make here, especially the opening admission—for which there was no evidence about what he was referring to.[28] The court agreed, finding that the recording was not a "substantially accurate and fair representation of what it intended to show."[29] The deficiency in the lack of context could not be remedied by family members testifying, and admission would be "highly prejudicial to the Accused even if it could be said that the statements had some probative value."[30]

Part II: Civilian recordings and section 8

The cases above demonstrate a consistent reluctance to find that section 8 applies. Courts assume the *Charter* could only apply if a civilian who brings police a recording was a state agent at the time they created it. Courts have tended not to frame the issue of section 8 on whether the accused had a privacy interest in the item police obtain.

In this part, I show that framing the question of whether section 8 was engaged around agency runs contrary to the Supreme Court of Canada's holdings on third-party transfer of evidence to police. The Court has consistently held that whether police engage section 8 in asking for or receiving evidence from a third party depends on whether the accused retained a privacy interest in the item against the state and whether police had an investigative purpose in obtaining it. I also briefly canvass the Court's holdings in *Cole*, *Marakah*, and *Reeves*, where the Court rules out one-party consent and finds that a person can retain a reasonable privacy interest in textual statements they no longer control.[31] The thrust of both points is to establish

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[26] *Ibid* at para 3.

[27] *Parsons*, *supra* note 24 at paras 31 and 35.

[28] *Ibid* at paras 37-39.

[29] *Ibid* at para 41.

[30] *Ibid.*

[31] *R v Cole*, 2012 SCC 53 [*Cole*]; *R v Marakah*, 2017 SCC 59 [*Marakah*]; and *R v Reeves*, 2018 SCC 56 [*Reeves*].

an additional basis on which to challenge the admissibility of a surreptitious recording to that of the common law: that police or Crown receipt or use of the recording without a warrant is unreasonable under section 8.

a. Supreme Court holdings on surreptitious recording

To lend context, in 1974, Parliament added a framework to the *Criminal Code* for lawful wiretapping.[32] A cornerstone of the framework is the offence of 'intercepting' a private communication *with a device.*[33] Among the exceptions carved out of the offence is one for persons who intercept a conversation with the consent of one party.[34] The Supreme Court in *R v Duarte* (1990) held that police cannot circumvent the requirement to obtain a warrant by obtaining an informant's consent to record the conversation he's about to have with a target.[35] While the *Charter* does not protect us from the risk of speaking to a "tattletale," Justice La Forest reasoned, the risk of our interlocutor "making a permanent electronic record" is a risk of a "different order of magnitude."[36]

The Court's other cases dealing with surreptitious recording—*Wong*,[37] *Araujo*,[38] and *Fliss*[39]—concern whether police are authorized to make a recording or what use may be made of the fruit of a recording they made unlawfully. None deal with the status or use that police might make of a recording by an independent civilian. The Court has, however, dealt with a number of related issues.

They can be approached in terms of two broader questions: do police conduct a search or seizure on receipt or review of evidence from an independent party? And does a person have a reasonable expectation of privacy in a surreptitious recording that a civilian volunteers? I take each issue in turn.

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[32] *Criminal Code*, RSC 1985, c C-46 [*Code*], Part VI.

[33] *Ibid*, s 184(1).

[34] *Ibid*, s 184(2).

[35] *R v Duarte*, [1990] 1 SCR 30 [*Duarte*].

[36] *Ibid* at 48.

[37] *R v Wong*, [1990] 3 SCR 36.

[38] *R v Araujo*, [2000] 2 SCR 992.

[39] *R v Fliss*, 2002 SCC 16.

b. Police receipt on third party disclosure

A person's rights under section 8 of the *Charter* are engaged if the person carrying out the search or seizure is an agent of the state;[40] their actions amount in some way to a 'search' or 'seizure';[41] and the actions intrude upon or diminish a reasonable expectation of privacy on the part of the person or entity searched.[42] In *R v Evans*, Sopinka J held that state actors conduct a 'search' for the purposes of section 8 where "a person's reasonable expectations of privacy are somehow diminished by an investigatory technique" or where "state examinations constitute an intrusion upon some reasonable privacy interest".[43] In *Dyment*, La Forest J held that "the essence of a seizure under s. 8 is the taking of a thing from a person by a public authority without that person's consent."[44] None of the Supreme Court's decisions involving third-party transfer of evidence to police involve a civilian *volunteering* evidence. The Court has only dealt with transfer from state agents or requests for evidence from independent third parties. But a clear principle emerges: police conduct a search or seizure if the item they ask for or receive is private.

In *Dyment*, a doctor took a vial of blood from an accused for medical purposes, after a car accident and without his knowledge.[45] Discovering the accused had been drinking, the doctor turned over the sample to police. Setting out the majority's reasons on point La Forest J held: "If I were to draw the line between a seizure and a mere finding of evidence, I would draw it logically and purposefully at the point at which it can reasonably be said that the individual had ceased to have a privacy interest in the subject-matter allegedly seized."[46] The officer's

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[40] This follows from the Supreme Court's interpretation of section 32 of the *Charter* to mean that the rights set out in the *Charter* apply only to actions on the part of the state: *R.W.D.S.U. v Dolphin Delivery Ltd.,* [1986] 2 SCR 573; *Vriend v Alberta*, [1998] 1 SCR 493.

[41] *R v Evans*, [1996] 1 SCR 8 and *R v Dyment*, [1988] 2 SCR 417 [*Dyment*], defining 'search' and 'seizure' for the purposes of section 8 and discussed further below.

[42] *Hunter v Southam Inc.*, [1984] 2 SCR 145 [*Hunter*] at 159, holding that the purpose of section 8 is to protect a reasonable expectation of privacy.

[43] *Evans*, *supra* note 41 at para 11.

[44] *Dyment*, *supra* note 41 at 431. Not included in this often-cited definition is the requirement for a subsisting privacy interest in the item. Justice Fish made this explicit, writing for the majority in *Cole*, *supra* note 31 at 34: "a taking is a seizure, where a person has a reasonable privacy interest in the object or subject matter of the state action and the information to which it gives access."

[45] *Dyment*, *supra* note 41.

[46] *Ibid* at 435.

receipt of the sample constituted a seizure because the accused retained a privacy interest in the sample when the officer received it.[47] The warrantless seizure was unreasonable.[48]

In *Colorusso*,[49] following a motor vehicle accident involving a fatality in which alcohol was suspected, hospital staff took a blood sample and, with an officer's assistance, a urine sample. The accused consented to samples being taken for "medical purposes."[50] At the coroner's behest, the officer delivered the samples to a forensic lab for storage. A majority of the Court held that the officer conducted an unreasonable seizure because he intended "from the outset" to make use of the samples for a prosecutorial purpose to which the accused had not consented.[51]

In *Buhay*, guards opened a temporarily private locker to find a bag containing marijuana and reported it to police.[52] Guards later opened the locker and police seized the bag. The Court held that despite the guards having violated the accused's privacy, Buhay retained a privacy interest in the locker and bag in relation to police, whose warrantless seizure of the bag was unreasonable under section 8.[53]

In *Cole*, a principal gave police a teacher's board-issued laptop containing nude pictures of a student.[54] The Court held that the principal was authorized to seize the laptop for administrative purposes, but Cole retained a reasonable privacy interest in the laptop since he was permitted some personal use of it. On this basis, police receipt of it for a criminal investigative purpose constituted a seizure. Justice Fish held that police may have been

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[47] As Laforest J puts it, *ibid*, "the sample was surrounded by an aura of privacy meriting *Charter* protection."

[48] *Ibid* at 438.

[49] *R v Colarusso*, [1994] 1 SCR 20.

[50] *Ibid* at 30.

[51] *Ibid* at 58-60.

[52] *R v Buhay*, 2003 SCC 30 [*Buhay*].

[53] *Ibid* at para 34.

[54] *Cole*, *supra* note 31.

authorized to take custody of it temporarily, for safekeeping, while obtaining a warrant.[55] Holding on to it at length and reviewing its contents without a warrant was unreasonable.[56]

In *Spencer*, police asked Shaw to disclose subscriber information attached to an internet protocol address implicated in a child pornography investigation.[57] The Court held that subscriber information attracts a privacy interest, given what it may reveal about online activity. In light of this interest, police conducted a search in asking for and receiving Spencer's subscriber information from Shaw—and the search required some form of authorization to be reasonable.[58]

In *Marakah*, the Court held that the accused retained a reasonable expectation of privacy in texts that police seized from a recipient's phone when investigating firearms offences.[59] In *obiter*, Chief Justice McLachlin considered how the holding might be applied where "police access text messages volunteered by a third party".[60] If the accused were held to retain a privacy interest in the exchange, she suggested, section 8 would be engaged and "police officers will be aware that they should not look at the text messages in question prior to obtaining a warrant."[61]

c. Reasonable privacy interest without control

The last section showed how the Supreme Court has consistently found a search or seizure where police take or receive an item from a third party in which the accused retains a privacy interest. If so, does an accused have a reasonable privacy interest in a surreptitious recording a civilian turns over? The Court's holdings in *Marakah* and *Reeves* suggests that an accused person does have a reasonable interest and it would not be waived by another party's voluntary disclosure.

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[55] *Ibid* at para 65.

[56] *Ibid* at paras 62-71.

[57] *R v Spencer*, 2014 SCC 43 [*Spencer*].

[58] *Ibid* at para 73.

[59] *Marakah*, *supra* note 31.

[60] *Ibid* at para 50.

[61] *Ibid*.

Marakah established that text messages can engage a high privacy interest, given how much personal information can be gleaned from them,[62] and that a sender can retain privacy in a message despite not having control over it in the recipient's hands. As McLachlin CJ held, a sender still exerts "meaningful control over the information they send by text message by making choices about how, when, and to whom they disclose the information."[63] As a result, she held, "the risk that a recipient could disclose an electronic conversation does not negate a reasonable expectation of privacy in an electronic conversation."[64]

In *Cole* and *Reeves*, the Court rejected the third-party consent doctrine.[65] The school board in *Cole* owned the laptop the principal turned over to police. The Court held the board's consent could not authorize police to seize or search the device. Third party consent would entail police interference with a person's privacy interest "on the basis of a consent that is *not* voluntarily given by the rights holder, and *not* necessarily based on sufficient information in his or her hands to make a meaningful choice."[66] In *Reeves*, a spouse consented to police seizing the family computer alleged to contain evidence of her partner's possession of child pornography. Citing *Cole*, the Court held that police could not rely on the spouse's consent, despite her having a shared or 'overlapping' interest in the device.[67] Justice Karakatsanis, for the majority, held: "[w]e are not required to accept that our friends and family can unilaterally authorize police to take things that we share."[68]

An accused would have a reasonable expectation of privacy in the subject matter of a surreptitious recording—the conversation itself—on the basis of his assumption that it was private and confidential in nature, and the assumption being objectively reasonable.[69]

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[62] *Ibid* at paras 35 and 37, noting at 35: "it is difficult to think of a type of conversation or communication that is capable of promising more privacy than text messaging"; they are "capable of revealing a great deal of personal information".

[63] *Ibid* at para 39.

[64] *Ibid* at para 40.

[65] *Cole*, *supra* note 31; *Reeves*, supra note 31.

[66] *Cole*, *supra* note 31 at para 78.

[67] *Reeves*, *supra* note 31 at paras 40-55.

[68] *Ibid* at para 44.

[69] See *Marakah*, *supra* note 31a at para 15 for the Court's general test for finding a reasonable expectation of privacy, asking: "What was the subject matter of the alleged search?; Did the claimant have a direct interest

Provincial privacy law and criminal cases in which recordings are tendered (recognizing a prejudice to the accused and to the administration of justice) would support this finding.[70] And as *Cole*, *Marakah*, and *Reeves* have established, the accused would retain their privacy interest in the recording despite the complainant's consent to provide it to police or Crown. Police or Crown taking custody of the recording or proceeding to review it with a prosecutorial purpose would engage section 8 and require a warrant be reasonable.

d. *R v Vey* as precedent

Vey applies much of the reasoning above to find that a surreptitious recording an independent civilian brought to police led to a violation of section 8.[71] In this case, however, the complainant did not *give* the recording to police; the officer seized it. And she was not a party to the conversation; she made the recording unlawfully. But the case sets an important precedent. Its key findings are worth noting briefly.

A wife, Brigitte, suspected her husband, Curtis, was having an affair. In July of 2013, she hid an iPod under the dining room table of the family home. It captured a discussion Curtis had with the other woman, Angela, when no one else was home—about killing Angela's spouse. Brigitte brought the device to the police station, gave a statement, and handed an officer the iPod.[72] She testified to wanting to give the device to police, but also that the officer had said to her "I'm going to have to take this from you. Going to be keeping this, until we get it, at a minimum, get a copy made"[73] Three days later, Curtis and Angela were arrested and charged with conspiracy to commit murder.

In an agreed statement of facts on the *voir dire* into the admissibility of the recording, Crown conceded that the officer had seized the recording from Brigette.[74] But the court highlighted further facts in support of this. At the time she met with Brigette, the officer

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in the subject matter?; Did the claimant have a subjective expectation of privacy in the subject matter? If so, was the claimant's subjective expectation of privacy objectively reasonable?" (numbering removed).

[70] See the statutes cited *supra* note 1 and the cases canvassed in Part I.

[71] *Vey*, *supra* note 4.

[72] *Ibid* at para 36.

[73] *Ibid* at paras 37 and 39.

[74] *Ibid* at para 64.

consulted another officer (familiar with interceptions) who advised her to take the recording into custody.[75] He assumed police were authorized to obtain the recording without a warrant because Brigitte provided police the iPod voluntarily and there was "a little bit of exigency here" given "a plan in place for two people to be murdered."[76] Other officers in the RCMP's major crime's unit, consulted later, also believed a warrant was unnecessary.[77]

The accused argued that police violated section 8 in seizing the recording from Brigette and reviewing it without a warrant.[78] Justice Dawson began the analysis by assessing whether the accused had a reasonable expectation of privacy in the recording. Applying the test in *Marakah*,[79] she held the subject matter of the search to be the conversation captured on the recording; the couple had a direct interest in it as its only participants; they could be inferred to have had a subjective expectation that it was private since no one was at home and Curtis had sought to conceal the relationship from his wife; and it was objectively reasonable given that it occurred in his home, it was a private conversation, and it was recorded surreptitiously and illegally. The couple's lack of control over the recording did not vitiate their privacy interest since they did not "voluntarily relinquish control" over it at any point.[80]

Turning to whether the seizure was reasonable, Dawson J rejected the Crown's submission that police had not themselves "intruded" on the privacy interest because the complainant had brought them the recording.[81] This was contrary to both the Crown's admission about the police seizure and the testimony of the officers involved.[82] Nor could the Crown rely on Brigitte's consenting to police having taken it. Brigitte did not have a shared interest in the conversation.[83] Citing *Reeves*, Dawson J suggested that even with a shared

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[75] *Ibid* at para 42.

[76] *Ibid* at para 49.

[77] *Ibid* at para 53.

[78] *Ibid* at para 68.

[79] *Marakah*, *supra* note 31 at para 11, applied in *Vey* at paras 75-114, from which the following summary draws.

[80] *Vey*, *supra* note 4 at para 106.

[81] *Ibid* at paras 116-147.

[82] *Ibid* at para 125.

[83] *Ibid* at para 128.

interest, Brigitte's consent could not have had the effect of waiving the accused's privacy interest.[84] There were no exigent circumstances that would justify listening to the recording before obtaining a warrant, as evidenced by the lack of urgency in arresting the accused.[85] The search and seizure of the recording were unreasonable and the evidence was excluded under section 24(2), given the finding that police ought to have known the conversation on the iPod was private and required a warrant, and also that its creation was illegal.[86] It formed the crux of the Crown's case, resulting in an acquittal once excluded.[87]

As a final point, in the course of her reasons on the reasonableness of the seizure, Dawson J made a notable reference to a passage in *Duarte*,[88] which she took to stand for the proposition that "recording of conversations must be viewed as a search and seizure in all circumstances save where all parties to the conversation have expressly consented."[89] Justice La Forest in *Duarte* held:

> A conversation with an informer does not amount to a search and seizure within the meaning of the *Charter*. Surreptitious electronic interception and recording of a private communication does. Such recording, moreover, should be viewed as a search and seizure *in all circumstances save where all parties to the conversation have expressly consented to its being recorded*. Accordingly the constitutionality of 'participant surveillance' should fall to be determined by application of the same standard as that employed in third party surveillance, i.e., by application of the standard of reasonableness enunciated in *Hunter v. Southam*.[90]

If La Forest J intended to refer here to surreptitious recording by civilians, which is not clear, the assertion would be *obiter*. *Duarte* dealt with a recording an informant agreed to make at the behest of an officer, not one a civilian makes on their own. But the assertion is consistent

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[84] *Ibid* at para 135.

[85] *Ibid* at para 145.

[86] *Ibid* at paras 152.

[87] The verdict is reported in Guy Quenneville, "She secretly recorded her husband's alleged plot to kill her. A judge threw out the tape" (29 May 2019) *CBC News*.

[88] *Duarte*, *supra* note 35.

[89] *Vey*, *supra* note 4 at para 131. Justice Dawson does not quote or pinpoint the passage in *Duarte*.

[90] *Duarte*, *supra* note 35 at 57, emphasis added; La Forest J citing *Hunter v Southam Inc.*, [1984] 2 SCR 145.

with the general thrust of the Court's jurisprudence on surveillance and police seizure of evidence.

R v Vey ties many of the threads in this jurisprudence together. Yet it does not settle an important question: do police conduct a seizure in receiving from a complainant who volunteers to them a surreptitious but lawful recording they make—one in which the complainant *is* a party to the conversation? The overview in this part of the paper was intended to show that such a scenario would give rise to a seizure, given the other party's persisting privacy interest. And without a warrant, taking it and maintaining custody of it (to preserve it while obtaining a warrant) for more than a short period of time, or listening to it, would violate section 8.

Conclusion: the rationale for a warrant

One might reasonably ask what possible purpose does insisting on a warrant serve here? By the time a civilian has made a recording and described its illicit content to police, has the damage not already been done? What mischief on the part of the state would we avoid by insisting that police obtain a warrant?

In a number of cases, the Supreme Court has affirmed that even if police know what an item contains, on the basis of what a third party has told them, an accused may still retain a privacy interest in the item against the state.[91] The need to obtain a warrant in these cases is not a formality, because the Court recognizes a significant difference between a third party violating a person's privacy and the state doing so. Holding the state to a higher standard protects everyone's privacy in at least two important ways.

In *Reeves*, Justice Karakatsanis held that "[w]hen police seize a computer, they not only deprive individuals of *control* over intimate data in which they have a reasonable expectation of privacy, they also ensure that such data remains *preserved* and thus subject to potential future state inspection."[92] This is true of a surreptitious recording. State possession of it deprives a person of control over the fate and possible dissemination of it. Insisting police

[91] See, *e.g.*, *Buhay*, *supra* note 52 (guards having told police what the locker contained); *Cole*, *supra* note 31 and *Reeves*, *supra* note 31 (in the one case, the principal having told police what the computer contained; in the other case, the spouse having done so).

[92] *Reeves*, supra note 31 at para 30.

obtain a warrant here would mean that police would have to report the seizure of a recording to a justice and comply with post-seizure requirements in the *Criminal Code*, including the provisions for returning or destroying the evidence in the event of a stay or after the proceeding has ended.[93]

Justice Karakatsanis provided a broader rationale in *Reeves* that also applies here. The requirement that police obtain a warrant to render a search presumptively reasonable "more accurately accords with the expectations of privacy Canadians attach to their use of personal home computers and encourages more predictable policing."[94] As the Court held in *Hunter*, predictable policing and protecting privacy are both supported in turn by clear rules and objective standards that help to avoid unreasonable searches before they occur.[95]

The concerns set out here may be remote or abstract. But the prospect of police listening to or seizing an invasive recording on the basis of a civilian report about it *possibly* containing incriminating content is out of step with our general expectations. We assume that police will not intrude on us in this way unless a civilian's report is credible, an officer's belief in the probability of an offence having occurred is reasonable, and an independent third party confirms this. Given the ease with which recordings can be made, stored, and shared—and their common use in criminal trials—the failure to provide this vital safeguard imperils everyone's privacy and security.

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[93] *Criminal Code*, *supra* note 32, ss 489.1 and 490.

[94] *Reeves*, *supra* note 31 at para 35.

[95] *Hunter*, *supra* note 42, Dickson J, as he then was, noted at 160 that the purpose of s 8 is "to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation." (Emphasis in the original.)