TALE OF THE TAPE
Policing Surreptitious Recordings in the Workplace

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> [T]he law recognizes that we inherently have to bear the risk of the "tattletale" but draws the line at concluding that we must also bear, as the price of choosing to speak to another human being, the risk of having a permanent electronic recording made of our words.
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> *R. v. Duarte* (1990), 1 S.C.R. 30 at 48

Last week the President of the United States appeared to suggest that he may have surreptitiously recorded then FBI Director James Comey at a private meeting when he tweeted that Comey "*better hope that there are no 'tapes' of our conversations before he starts leaking to the press!*" The tweet was made by the President in response to Comey possibly speaking to the media following his dismissal, suggesting there might be tapes of the conversations between the two men that could contradict his account of what transpired between them. [1]

The comment is not entirely surprising given the apparent history of the President in surreptitiously recording conversations in his past private life. [2] In fact ABC News has reported that workplaces are commonly the site of secretly record conversations. While the frequency of surreptitious workplace recordings is unknown, the article suggests that it happens often enough that employers should assume that all meetings with employees are being recorded. [3]

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[1] "Donald Trump refers to 'tapes' that may exist of James Comey conversations" Thomson Reuters (12 May 2017), online: CBC <http://www.cbc.ca/news/world/trump-comey-warning-1.4112508>.

[2] "Former associates: Trump has a long history of secretly recording calls" Washington Post (13 May 2017), online: Providence Journal < http://www.providencejournal.com/news/20170513/former-associates-trump-has-long-history-of-secretly-recording-calls >.

[3] "Are you being secretly recorded at work?" ABC News (19 April 2011), online: ABC <abcnews.go.com/Technology/secretly-recorded-work/story?id=13409126>.

Indeed this President would not be the first and probably not the last to record his conversations with others. Richard Nixon is a prime example. However, far from preserving the record of what was said, Nixon was also *"in a position to manipulate and distort the historical record with self-serving or misleading statements."* [4] This is one of the concerns with clandestine recordings.

However, what makes this story interesting is not the fact a recording may have been made; it is the position of the two individuals. The President is both the head of state and head of government of the United States and, under Article II of the Constitution, is responsible for the execution and enforcement of all laws created by Congress. The Director of the FBI oversees the nation's prime federal law enforcement agency. The chief law enforcer recording another law enforcer.

Federally, and in the state of New York where the President is from, covertly recording conversations one is a party to, is neither prohibited by federal or state law. A law enforcement officer may covertly record or intercept any private communications to which he or she is a party. This has been the case since at least 1971. [5] As a result, in those jurisdictions, an officer may secretly record another without their knowledge or consent and any information gathered is generally usable.

Federally, at least, the argument in favor of recording a conversation one is a party to in the United States, is that the speaker risks the indiscretion of his listeners and holds no superior legal position simply because a listener elects to record his statements rather than subsequently memorializing or repeating them.

> Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them,

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[4] The History That Makes President Trump's 'Tapes' Tweet Controversial, Lily Rothman, May 12, 2017, Time, http://time.com/4777068/white-house-tapes-trump-comey/

[5] See *United States v. White*, 401 U.S. 745 (1971) [White]. Although there is a policy exception in the United States Attorneys' Manual where it is known that one of the parties to the conversation will be certain political or government officials such as a member of Congress, federal judge, Governor, or Attorney General of any State or Territory.

> without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights … For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, or (2) carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks". [6]

However, the Court in *White* was not unanimous. Both Justices Douglas and Brennan dissented. Justice Brennan stating that "the threads of thought running through our recent decisions are that these extensive intrusions into privacy made by electronic surveillance make self-restraint by law enforcement officials an inadequate protection, that the requirement of warrants under the Fourth Amendment is essential to a free society." [7]

A similar sentiment was echoed almost 130 years ago future United States Supreme Court Justice Louis Brandeis and Samuel Warren warned that "*numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.*"' [8] The right to privacy espoused by Brandis and Warren was that each individual had the right to choose to share or not to share with others information about their 'life, habits, acts, and relations.'

The mechanical device at the heart of the article was the advent of the 'detective camera' that could take instantaneous pictures. Advances in photography made it possible to instantaneously and surreptitiously take pictures and distribute those to the world at large through newspapers,

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[6] *Ibid,* at p. 751.

[7] *Ibid,* at p. 761-62.

[8] Louis Brandeis and Samuel Warren, "The Right to Privacy", (1890) 4 Harvard L.R. 193.

magazines or other forms of media. [9] Warren and Brandeis argued that the right to privacy was the right of each individual to exercise some control over information recorded about them by others which both reflected and affected their image or personality.

The law in Canada is opposite that of the United States, and is more closely aligned with the privacy concerns of Brandis and Warren and the dissenting Justices in *White*. While there are no reported cases of law enforcement officers secretly recording other officers without court order while working in Canada, there are analogous cases from other sectors that suggest covert or surreptitious participant surveillance by law enforcement officers in the workplace without a court order may not be admissible in any proceedings principally because they may be against the law, but also because they would undermine the spirit of trust and confidence between the parties.

While the *Criminal Code* of Canada does not necessarily prohibit people from surreptitiously recording their own conversations, where a law enforcement officer is involved in making those recordings, a one-party consent application must be made to a judge under. s. 184.2. [10] There is an exception under s. 184.1 where there is a fear of bodily harm and the purpose is to protect against bodily harm; however any recordings made under this section must be destroyed where the bodily harm or threat of bodily harm did not occur (usually applies to undercover officers or agents wearing the devices as a 'safety-line').

> The reason for this protection is the realization that if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance. The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private. A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our

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[9] Until 1889 taking photographs was a complicated process. However on September 4, 1888 George Eastman patented his photographic apparatus known as the improved 'detective camera', making it simple for amateur photographers to take pictures. The cameras went on sale in 1889 for $25.00. US patent No. 388,850.

[10] *Criminal Code of Canada,* R.S.C., 1985, c. C-46, s. 184.2.

> words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning. [11]

Justice La Forest continued that if a person's right to be left alone included their right to determine for himself when, how, and to what extent he will release personal information about himself, then clandestine recordings should only be made upon satisfying a detached judicial officer that an offence has been or is being committed and that interception of that communications stands to afford some evidence of it.

Where the instrumentality of the state is involved, without the consent of the originator or intended recipient thereof, without prior judicial authorization, the Court was clear that a person's rights and freedoms guaranteed by the Constitution are infringed. [12] *Duarte* firmly established that electronic surveillance by the state falls under the rubric of section 8 of the *Charter*. The untrammeled discretion by state officials to intercept anyone they want without limitation has been found to be an unlawful delegation of a judge's function. The police cannot simply be 'walking microphones'. [13]

Using the police and legal professions as a backdrop, the discussion on surreptitious workplace recordings is further developed in a future issue of *Manitoba Law Journal, RobsonCrim Edition,* where the usefulness (or lawfulness) of individuals recording each other, surreptitiously, in the workplace and the possible consequences of doing so in terms of criminal, privacy, labour and public law.

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[11] *R. v. Duarte* (1990), 1 S.C.R. 30, at para. 44. Per La Forest J. for a unanimous court [Duarte].

[12] *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]. Section 8 states that "*Everyone has the right to be secure against unreasonable search or seizure*".

[13] See *R. v. Monte,* [1993] O.J. No. 4174 (Ont. S.C.) at para. 23 and *R. v. Lee*, 2002 BCSC 1912 at para. 7, applying *R. v. Paterson* (1985), 18 C.C.C. (3d) 137 (Ont. C.A.) at p. 148, affirmed [1987] 2 S.C.R. 291.