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LEGISLATIVE SUMMARY

Bill C-50:

An Act to amend the Criminal Code (interception of private communications and related warrants and orders)

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Legislative Summary of Bill C-50

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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LEGISLATIVE SUMMARY OF BILL C-50: AN ACT TO AMEND THE CRIMINAL CODE (INTERCEPTION OF PRIVATE COMMUNICATIONS AND RELATED WARRANTS AND ORDERS)

Bill C-50, An Act to amend the Criminal Code (interception of private communications and related warrants and orders) (short title: Improving Access to Investigative Tools for Serious Crimes Act) was introduced in the House of Commons on 29 October 2010 by the Minister of Justice and Attorney General of Canada, the Honourable Robert Nicholson.

1 BACKGROUND

1.1 PURPOSE OF THE BILL

Bill C-50 amends the *Criminal Code* (the Code) with respect to the interception of private communications,[1] tracking devices and telephone number recorders. It aims to facilitate the use of electronic surveillance techniques by law enforcement agencies and make such use more transparent, to a certain extent. Its provisions should be read in conjunction with those of bills C-51 and C-52, which also deal with electronic surveillance.

1.2 PRINCIPAL AMENDMENTS IN THE BILL

The principal amendments in the bill:

- provide that if an authorization to intercept communications is given, a related warrant, such as a search warrant, may be issued at the same time (clauses 2, 4 and 6);
- require the government to report annually on the interceptions of private communications made without prior authorization and to notify individuals who have been the object of an interception (clauses 7 and 8);
- permit the use of a telephone number recorder without a warrant and extend the maximum period for the use of this electronic surveillance technique in investigations into organized crime or terrorism (clauses 9 and 11); and
- extend the maximum period for the use of tracking devices in investigations of terrorism or organized crime (clause 10).

1.3 ELECTRONIC SURVEILLANCE UNDER THE *CRIMINAL CODE*

Criminal Code provisions regarding the interception of communications date back to 1974. In the 1980s and 1990s, Code provisions regarding search and seizure were amended to expressly include computers.

In 2005, a document published by the Department of Justice stated that Canadian legislation on electronic surveillance had not kept pace with the latest technologies.[2] Law enforcement agencies believe such gaps allow criminals and terrorists to more easily operate undetected by police forces.

1.3.1 BASIC RULES

Part VI of the Code ("Invasion of Privacy") is the centrepiece of federal legislation on electronic surveillance by law enforcement agencies.[3] Its scope is generally limited to the interception of oral communications and to certain offences set out in the Code,[4] including the wilful interception of private communications by means of a technical device (section 184). With a few exceptions, police forces can nevertheless intercept such communications as long as certain specific conditions are met and judicial authorization is obtained.[5]

Part VI sets out stricter conditions for the issuance of an authorization to intercept private communications than it does for the granting of a search warrant or a production order. It contains additional protection measures: there must, for example, be "investigative necessity" (because other investigative procedures have been tried and failed, are unlikely to succeed, or the urgency of the matter is such that electronic surveillance is necessary) (section 186(1)(*b*));[6] and the judge must be satisfied that giving the authorization is in the best interests of the administration of justice (section 186(1)(*a*)).

In 2001 and 2002, legislation regarding terrorism (Bill C-36) and organized crime (Bill C-24) amended Part VI with respect to applications for judicial authorization for the electronic surveillance of terrorist groups and criminal organizations. These amendments:

- eliminated the obligation to show "investigative necessity" (section 186(1.1));[7]
- extended, from 60 days to one year, the maximum period of an authorization of an interception (or the renewal of an authorization) (section 186.1); and
- extended, from 90 days to three years, the maximum period after which the person who was the object of the interception must be notified (section 196(5)).

Electronic surveillance techniques used to determine the location of any thing or person or to record telephone numbers or video images are excluded from Part VI. Three main provisions found elsewhere in the Code authorize electronic surveillance:

- a warrant authorizing video surveillance (in this case, however, most sections of Part VI apply) (sections 487.01(4) and (5));
- a warrant authorizing the use of a tracking device (section 492.1); and
- a warrant authorizing the use of a telephone number recorder (section 491.2).

The various warrants authorizing the use of electronic surveillance have one thing in common: they all allow the judge to determine the terms and conditions that he or she considers advisable. The peace officer's affidavit in support of the application must provide reasonable grounds justifying the use of this technique. The criteria on

which the judge relies are ranked. If an officer wants to intercept private communications or use video surveillance, the judge must be satisfied, under the Code, that there are reasonable grounds to *believe* that an offence has been or will be committed. However, if the officer wants to use tracking devices or number recorders, the judge can, under the Code, issue a warrant if he is satisfied that there are reasonable grounds to *suspect* that an offence has been or will be committed.[8] In general, then, the greater the invasion of privacy, the more rigorous the criteria.

1.3.2 Requirement to Present an Annual Report

Electronic surveillance under the Code is an effective investigative technique used primarily by law enforcement agencies, such as the Royal Canadian Mounted Police and municipal and provincial police forces, as well as the Competition Bureau. As an accountability measure, every year the federal minister of Public Safety and the attorney general of each province must prepare a public report on authorizations to intercept private communications under Part VI and on video surveillance warrants. Section 195 of the Code sets out the information to be contained in the report. Tables 1 and 2 and Figure 1 provide an overview of the statistics contained in the report of the minister of Public Safety for 2009.[9]

Table 1 – Number of Electronic Surveillance Applications and Renewals in Canada, 2005–2009[a]

Type of Application Made	*Criminal Code* Section	Number of Applications				
		2005	2006	2007	2008	2009
Audio	185	96	81	68	77	87
Video	487.01	17	16	36	11	21
Renewals	186	4	5	5	16	9
Emergency audio	188	1	0	1	1	1
Emergency video	487.01	0	0	0	0	0
Total		118	102	110	105	118

a. Two applications for an authorization or a renewal were refused for the 2005–2009 period.

Source: Table prepared by the author based on Public Safety Canada, *Annual Report on the Use of Electronic Surveillance – 2009*, Section III, “Statistics,” Table 1.

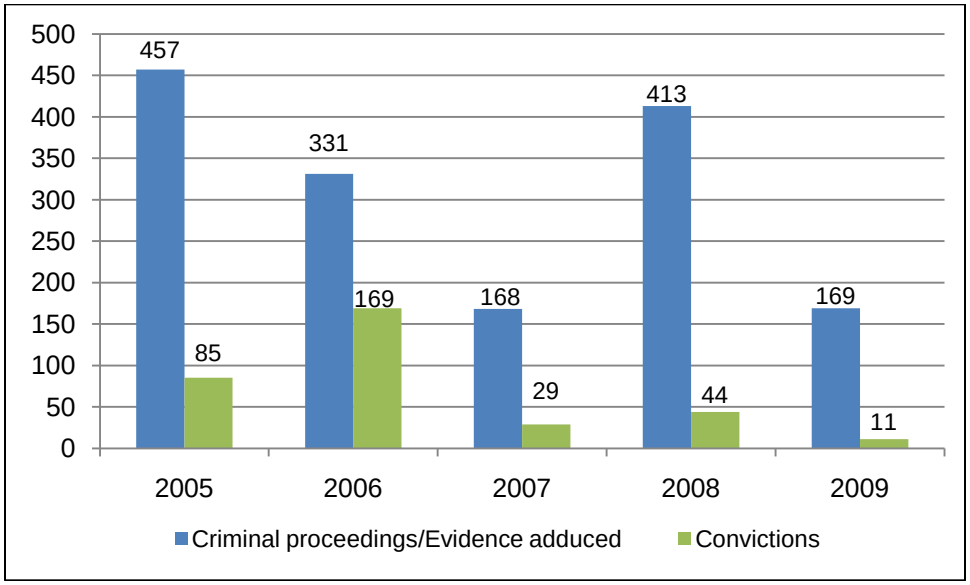
Table 2 – Number of Electronic Surveillance Authorizations in Canada According to Type of Offence, 2005–2009

Type of Offence	Number of Authorizations[a]
Drug-related offences (possession, trafficking, importing/exporting, production, etc.)	1,084
Conspiracy	471
Possession of property obtained by crime	281
Organized crime offences (participating, instructing, etc.)	208
Laundering proceeds of counterfeit money	203
Murder	72
Terrorism offences (funding, participating, facilitating, instructing)	9

a. Most authorizations apply to more than one offence.

Source: Table prepared by the author based on Public Safety Canada, *Annual report on the use of electronic surveillance – 2009*, Section III, “Statistics,” Table 4.

Figure 1 – Number of Cases in Which Electronic Surveillance Was Presented as Evidence (Adduced) in Canada, 2005–2009



Source: Public Safety Canada, *Annual report on the use of electronic surveillance – 2009*, Section III, "Statistics," Figure 3.

2 DESCRIPTION AND ANALYSIS

2.1 AUTHORIZATIONS AND RELATED WARRANTS (CLAUSES 2, 4, 5 AND 6)

Police forces often use electronic surveillance in conjunction with other investigative techniques. Given that an application for judicial authorization to intercept communications is sometimes based on the same information presented in support of an application for a warrant – a search warrant, for example – or may come from the same source, the bill allows the judge to authorize the interception of communications and issue the requested warrant at the same time.

Regardless of whether the interception is done with the consent of one of the parties to the communication (section 184.2 of the Code), without the consent of the parties (sections 185 and 186 of the Code) or, in an emergency, for a maximum period of 36 hours (section 188 of the Code), the judge can, in addition to giving an authorization, issue a search warrant, make an assistance order or issue a warrant to use a tracking device or a number recorder (clauses 2, 4 and 6 of the bill).[10] When the situation is not an emergency – that is, when sections 184.2, 185 or 186 apply – the judge can issue a general warrant, make a general production order or make a production order for financial information (clauses 2 and 4 of the bill).[11] In each case, these clauses allow police officers to more quickly investigate past or possible offences.

All documents relating to an application for authorization to intercept communications are confidential; that is why they are placed in a packet sealed by the judge (section 187 of the Code). Clause 5 of the bill provides that all documents relating to a request for a warrant or order in connection with an authorization are subject to the same rules as an authorization: they are generally kept secret until the trial.

2.2 Interceptions of Communications Without Judicial Authorization (Clauses 3, 7 and 8)

Currently, pursuant to section 184.4 of the Code, a peace officer can intercept private communications without judicial authorization if the following conditions are met:

- there are reasonable grounds to believe that the urgency of the situation is such that an authorization could not be obtained;
- an interception is immediately necessary to prevent an *unlawful act* that would cause serious harm to a person or to property; and
- one of the parties to the communication is the originator or intended victim of the *unlawful act*.[12]

The expression *unlawful act* is not defined elsewhere in the Code.

Clause 3 of the bill limits, to a certain extent, the scope of section 184.4 by replacing "unlawful act" with "offence," which is defined in section 183 of the Code.[13] Therefore, the interception of communications without authorization in the exceptional circumstances set out in section 184.4 is not permitted except in regard to the offences set out in section 183, as is the case for most other types of interception.

Section 195 of the Code currently requires the federal minister of Public Safety and the attorney general of each province to prepare an annual report on the use by police forces of warrants for video surveillance (subsections 487.01(4) and (5)) and on these authorizations to intercept private communications pursuant to Part VI: authorizations to intercept communications without the consent of the parties to the communication (sections 185 and 186 of the Code) and authorizations valid for a maximum period of 36 hours in emergencies (section 188 of the Code).

Clause 7 of the bill extends the requirement to present a public report on interceptions without judicial authorization in exceptional circumstances set out in section 184.4 of the Code. The clause also sets out new information to be included in the report. However, the following types of interception and electronic surveillance set out in the Code are still not subject to the requirement that governments present a public report on their use: interception without judicial authorization, to prevent bodily harm (section 184.1), interception with the consent of one of the parties to the communication (section 184.2) and use of a tracking device (section 492.1) or number recorder (section 492.2).

Lastly, as with interception without consent but with judicial authorization (sections 185 and 186 of the Code), clause 8 of the bill provides that, in the case of an interception without judicial authorization in exceptional circumstances set out in section 184.4 of the Code, the federal minister of Public Safety or the attorney general of a province must generally notify the person who was the object of the interception within 90 days of the interception. On application to a judge, this period may be extended to three years if the police investigation is continuing (section 196 of the Code). As is currently the case, this extension may be obtained more readily if the investigation relates to a terrorism or organized crime offence.

2.3 Number Recorders (Clauses 9 and 11)

Section 492.2 of the Code permits a peace officer with a warrant to covertly install a number recorder on a telephone or telephone line if there are reasonable grounds to suspect that an offence has been or will be committed and that information that would assist in the investigation of the offence could be obtained through the use of a number recorder. A law enforcement agency could therefore obtain the "incoming and outgoing" numbers from a telephone under surveillance.

Clause 9 of the bill contains a provision that was included in former Bill C-46:[14] it authorizes a police officer to use a number recorder without a warrant when the urgency of the situation makes it impracticable to obtain the warrant. It is already possible to act without a warrant in an emergency with respect to searches and the use of tracking devices (section 487.11 of the Code).

Clause 11 of the bill harmonizes the period of validity of a warrant relating to an organized crime investigation or terrorism offence with the period of validity that applies to the interception of private communications (section 186.1 of the Code). In such investigations, the maximum period of validity of a warrant is extended from 60 days to one year.

2.4 Tracking Devices (Clause 10)

Section 492.1 of the Code allows a peace officer with a warrant (or without a warrant, in an emergency) to covertly install a "tracking device"[15] (e.g., GPS device) on any thing if there are reasonable grounds to suspect that an offence has been or will be committed and that information that would assist in a police investigation, including the whereabouts of a person, can be obtained through the use of a tracking device.

Clause 10 of the bill extends the maximum period of a warrant for the use of a tracking device from 60 days to one year in the case of investigations relating to a terrorism offence or a criminal organization. This maximum period would therefore be identical to the period that applies to authorizations to intercept private communications and warrants for the use of number recorders.

NOTES

1. This type of interception is commonly called "wiretapping."
2. Department of Justice Canada, *Summary of Submissions to the Lawful Access Consultation*, 2005.

3. Other Acts also allow for wiretapping in certain circumstances. For example, since 1984, the *Canadian Security Intelligence Service Act* has permitted the Canadian Security Intelligence Service (CSIS) to lawfully intercept private communications, on the issuance of a judicial warrant, if on reasonable grounds it is suspected that the activities in question constitute a threat to the security of Canada (sections 12 and 21). Moreover, pursuant to the *National Defence Act*, Communications Security Establishment Canada (CSEC) may, after obtaining ministerial authorization, intercept private communications for the purpose of obtaining foreign intelligence (section 273.65).

4. See the offences listed in section 183 under the definition of "offence." This list includes a large number of offences and continues to grow as new legislation relating to criminal law adds offences to the Code.

5. Under Part VI, the procedure police officers must follow to use electronic surveillance varies according to the circumstances. In the following cases, judicial authorization is not required: interception to prevent bodily harm and protect undercover police officers (section 184.1) or an emergency interception to prevent an unlawful act that would cause serious harm to any person or to property, in a case in which one of the parties to the communication is the originator or potential victim of the act (section 184.4). In other cases, however, police officers must obtain judicial authorization: interception with the consent of one of the parties to the communication (section 184.2), interception for a maximum period of 36 hours because of an emergency (specially designated judges give this authorization) (section 188) or interceptions for other purposes (sections 185 and 186).

6. For the interpretation of this condition by the Supreme Court of Canada, see *R.* v. *Araujo*, [2000] 2 S.C.R. 992.

7. The constitutional validity of this provision was recognized in *R.* v. *Doiron* (2007), 221 C.C.C. (3d) 97 (Court of Appeal of New Brunswick).

8. Emphasis added to *believe* and to *suspect*. The criteria on which the judge relies include a concrete evaluation of the particular circumstances of each case. Theoretically, there is no clear dividing line between reasonable grounds to *believe* and reasonable grounds to *suspect*.

9. For more information, see Public Safety Canada, *Annual report on the use of electronic surveillance – 2009*. The report covers a five-year period, from 2005 to 2009.

10. These clauses refer to sections 487, 487.02, 492.1 and 492.2 of the Code.

11. These clauses refer to sections 487.01, 487.012 and 487.013 of the Code.

12. Emphasis added to *unlawful act*.

13. See note 4.

14. Former Bill C-46: An Act to amend the Criminal Code, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act, introduced in the 2nd Session of the 40th Parliament, had passed second reading in the House of Commons when it died on the *Order Paper* following the prorogation of Parliament on 30 December 2009.

15. For the purposes of section 492.1(4), "tracking device" means "any device that, when installed in or on any thing, may be used to help ascertain, by electronic or other means, the location of any thing or person."