



# Tracking in Transit

A look at the legal implications of using tracking devices in company vehicles

By Elliott Goldstein

**Q** What are the legal implications for a company that covertly installs a tracking device — for example, GPS or cellular — in a company-owned (fleet) vehicle to monitor its movements?

**A** Tracking devices are used to determine where objects are or have been, and to track their movements in real time. Most tracking devices are based on cellular or GPS technology.<sup>1</sup> Some are “active” and can provide real-time tracking on screen; others are “passive.”

This writer recently received, via e-mail, a copy of an advertisement for a passive GPS recording device that can be attached to any object, including a motor vehicle. The device records where it has been and reports the travel activities of the object to which it is attached. Travel data includes the number and location of stops, the duration of each stop, speed, mileage and so on.

Used with accompanying computer software, this recording device produces a colour-coded map of its travel route, indicating location and speed. The software permits viewing of actual street names and consecutive stops in order of their occurrence. The device is small enough to be easily hidden. But is its use “legal” in Canada?

Let’s look at what the Canadian *Criminal Code* says about tracking devices. The Code defines a “tracking device” as “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.”<sup>2</sup> Section 492.1 of the *Criminal Code*, enacted in 1993, permits a justice to issue a warrant authorizing a peace officer or a public officer<sup>3</sup> (not a private citizen) named in the warrant to:

- (a) install, maintain, and remove a tracking device in or on any thing, including a thing carried, used or worn by any person; and
- (b) to monitor, or to have monitored, a tracking device installed in or on any thing.

Before issuing the warrant, the justice must be satisfied “that there are reasonable grounds to suspect that an offence [under the *Criminal Code*] ... has been or will be committed and that the information that is relevant to the commission of the offence, including the whereabouts of any person, can be obtained through the use of a tracking device.”

Greenspan and Rosenberg, authors of *Martin’s Annual Criminal Code 2000*, have commented that “because of the perceived diminished expectation of privacy, the grounds for granting the warrant differ somewhat from the traditional grounds for authorizing a search or seizure in that the justice need only be satisfied that there are grounds to ‘suspect’ that an offence has or will be committed and that relevant evidence can be obtained.”<sup>4</sup>

Prior to 1993, the police were not required to obtain a warrant to use a tracking device. Section 492.1 was enacted in response to the 1992 decision of the Supreme Court of Canada in *R. v. Wise*.<sup>5</sup>

Wise was charged with mischief to property after a communications tower was damaged in August of 1987. At trial, in September 1988, the Crown tried to introduce evidence of the whereabouts of the accused obtained through the use of an electronic tracking device (a “beeper”) installed in the accused’s car by the police without the accused’s knowledge or consent. The beeper was a low-power, battery-operated radio transmitter that emitted periodic signals that could be picked up by a police radio receiver.

The court held that “although there remains an expectation of privacy in

automobile travel, it is markedly decreased relative to the expectation of privacy in one’s home or office.”<sup>6</sup> So, you have less privacy in your car than in your home or office. No surprise there!

In *Wise*, the Supreme Court also commented on the nature of the tracking device used and its minimal intrusion. (Compare these comments with the capabilities of present-day cellular or GPS systems.)

“It must be remembered that the tracking device used in this case was unsophisticated and indeed simplistic. It did not provide a visual record of the movement or position of the vehicle. ... Rather, it was capable of giving only a very rough idea of the vehicle’s location. Certainly, it could not be said that the device was capable of tracking the location of a vehicle at all times. ... This particular beeper was a very rudimentary

## A company ... is not breaking any criminal laws. But what about the privacy of its employees?

extension of physical surveillance. How very different a device such as this is, in its operation and in its effect on the individual, from a hidden video camera or an electronic monitor that surreptitiously intercepts private communications.”<sup>7</sup>

There is no offence created by this section, therefore, it is not a criminal offence to install a tracking device on a motor vehicle and to monitor it. Private citizens (including private investigators and security personnel) do not need a warrant to use a tracking device.

Therefore, a company that covertly installs a tracking device in a company-owned (fleet) vehicle to track that vehicle’s movements is not breaking any criminal laws. But what about the privacy of

its employees?

An argument could be made that when a company has a cellular/GPS unit covertly installed in its own vehicle, it is tracking its property and not tracking its employee(s). An employee who uses a company-owned vehicle for personal purposes on company time is most likely violating company policy. Most companies prohibit the personal use of company equipment (including vehicles) and the misuse of company time.

However, some companies permit their employees to drive company-owned vehicles to and from work, or use such vehicles on evenings and weekends for company-related work. Monitoring the use of vehicles in those situations (that is, outside of regular office hours) does raise privacy concerns.

In some provinces, there is privacy legislation that makes it "a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another."<sup>8</sup> The words "without a claim of right" may provide a defence to a company that is sued by its employee for monitoring the employee's movements while driving a company-owned vehicle. The company would have a "claim of right" if it could

meet the test for the granting of a tracking warrant. In other words, the company could show that it had reasonable grounds to suspect that an offence had been or would be committed, and that relevant evidence could be obtained using the tracking device.

A company may also have a "claim of right" if it could show that it warned its employees against using company-owned vehicles for personal purposes, whether on company time or not. After all, a company does have the right to investigate suspected (or actual) abuses of company policy.

Of course, the company could always argue that the covert installation of the tracking device was necessary to recover stolen or missing vehicles. So perhaps the best strategy is to inform employees in writing that all company vehicles are equipped with tracking devices. That alone may deter unauthorized use. ♣

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## Author's Notes

1 GPS is an acronym for a global positioning system, which uses satellites in orbit around the earth to determine, with great precision, where an object is located. See "Tracking with Telematics," *Canadian Security*, November/December 1999, p. 34.

2 See section 492.2(4) of the *Criminal Code*, R.S.C. 1985, c. C-46, [as amended].

3 A public officer includes RCMP officers, customs or excise officers, Canadian Forces officers and "any officer while the officer is engaged in enforcing the laws of Canada relating to revenue, customs, excise, trade or navigation."

4 See *Martin's Annual Criminal Code* 2000, at p. 816 (Canada Law Book, Aurora, Ontario, 2000).

5 *R. v. Wise* (February 27, 1992), 70 C.C.C. (3d) 193 (S.C.C.).

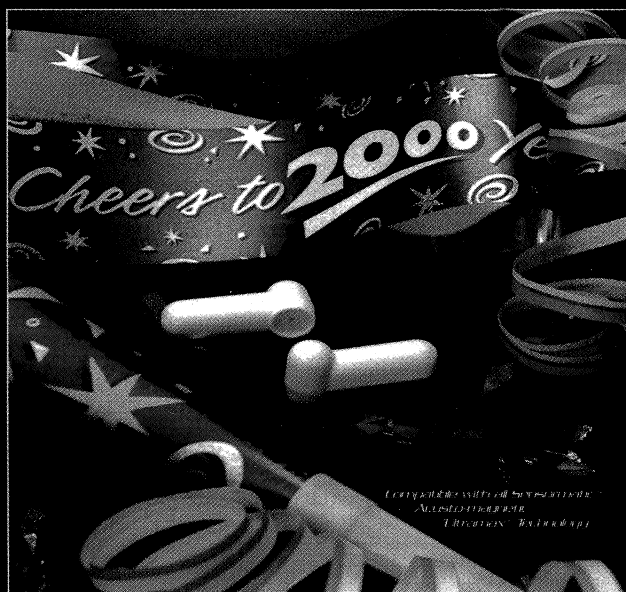
6 *Ibid.*, at 218.

7 *Ibid.*, 218 and 219.

8 For example, British Columbia's Privacy Act, R.S.B.C. 1979, c. 336, s. 1(1).

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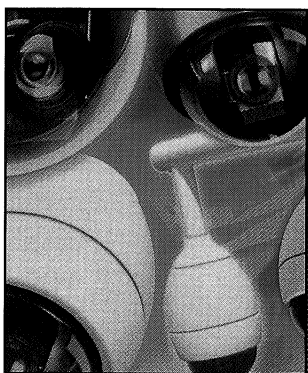
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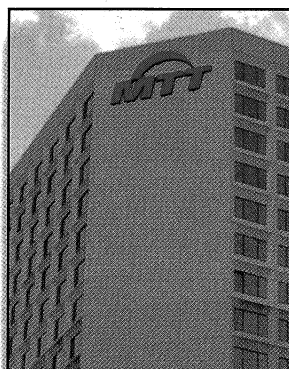
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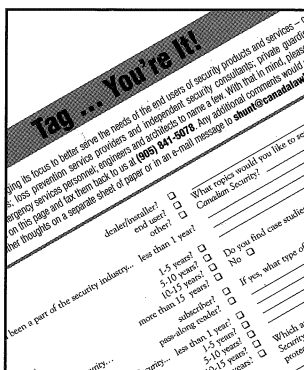
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