

LEGAL BULLETIN
Issue No. 50

Admission of Surreptitious Recordings in Family Violence Cases
Power v. Power, 2025 NSSC 236

Introduction

Surreptitious recordings are those in which one party records the conversation without the knowledge or consent of the other party. While such recordings do not contravene the Criminal Code, they are used with caution in legal proceedings because of their potential to increase conflict and diminish trust. The Nova Scotia Supreme Court in *Power v Power* (2025), described surreptitious recordings of family members as “an odious practice that should not be encouraged” given the “core values of family law of assuring the best interests of the child, of reducing conflict and maintaining, restructuring and encouraging family relationships” (para 20).



In *Power v. Power*, twelve surreptitious recordings were taken by the mother between December 2024 and April 2025 and submitted as evidence in support of her application for court approval to relocate with the child. Eleven of these recordings were taken during scheduled one-hour video calling appointments between the father and son, while the son was at his mother’s house. The other was filmed in the parking lot of a hockey arena during a parental exchange. The mother sought to introduce the recordings as evidence of the father’s coercive and controlling behaviour. The father objected to the admission of the recordings and the accuracy of the transcripts the mother had produced of the recordings. The case was a *voir dire* to determine the admissibility of the evidence.

VOIR DIRE HEARING

A *voir dire* hearing is often referred to as a trial within a trial. It allows the parties to make arguments about whether a piece of evidence should be admitted or not. The term *voir dire* originates from a Latin oath that jurors were required to take: *verum dicere*, meaning “to speak the truth” or “to say what is true” (*Black’s Law Dictionary*, 12th ed, 2024). During a *voir dire* hearing, no members of the jury are present. This prevents them from hearing evidence that might ultimately be determined to be inadmissible. In the case of a trial by a Judge alone, the Judge is bound by the outcome of the *voir dire*, meaning that if a piece of evidence is ruled inadmissible, it cannot be referred to or used in the court’s later decision.

Case Background

Mr. Power and Ms. Power separated in January 2022 following a seven-year marriage. Ms. Power was seeking court approval to relocate from Timberlea to Colby Village, Nova Scotia with the couples' 7-year-old son, "J". Ms. Power alleged that Mr. Power had engaged in ongoing coercive and controlling behaviour, facts that were relevant to the court's assessment of the best interests of the child. As evidence of such behaviours, Ms. Power submitted twelve recordings of interactions with Mr. Power that she had taken without his knowledge, along with transcripts she had prepared of these recordings. Mr. Power objected to the admission of both the recordings and the accompanying transcripts on the bases of inaccuracy and irrelevance. The court ruled that the transcripts "were not verbatim transcriptions of the recordings" and could therefore not be relied upon as an accurate record of the conversations. The judge deemed the transcripts untrustworthy and omitted them as evidence in the mother's relocation application. The twelve recordings were then played for the court during the *voir dire* to determine the admissibility of the recordings alone. "This process consumed two and a half days of court time" (para. 8).

Central Issues

The recordings in *Power v Power* (2025) were submitted by the mother as evidence of the father's coercive and controlling behaviour, in support of her relocation application. The presence or absence of coercive control, however, was not the central issue in the *voir dire*. Rather, as stated by Justice Ingersoll, the court's key concern was the admissibility of the surreptitious recordings:



The question to be answered at this Voir Dire is not whether coercive or controlling behaviour between these parties occurred but whether the impugned evidence is trustworthy evidence relevant to the relocation issue generally and specifically relevant to the child's best interest and in that regard relevant to whether coercive or controlling behaviour has occurred and finally whether the probative weight of this evidence exceeds its prejudicial effect (para 30).

Evaluating Criteria for Admissibility of Surreptitious Recordings

Producing surreptitious recordings is not in contravention of the *Criminal Code*, as the party who records the conversation is considered to have consented to the recording taking place. Canada's *Criminal Code* makes it an offence under s.184(1) to intercept a private communication *without* consent. However, s.184(2)(a) creates an exception allowing a party to lawfully record a private conversation if they are a party to that communication. This reflects the one-party consent rule, in which the single consenting party can be the party making the recording. When the recording party is a participant in the communication (and not a member of the state), the recording is lawful. Although Canadian courts treat one-party consent evidence circumspectly, it remains admissible.

CRIMINAL CODE: ONE PARTY CONSENT FOR RECORDINGS

S.184(1) Every person who, by means of any electro-magnetic, acoustic, mechanical or other device, knowingly intercepts a private communication is guilty of

- (a) an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b) an offence punishable on summary conviction.

Saving prohibition (2) Subsection (1) does not apply to

- (a) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it (Criminal Code, RSC 1985, c C46).

Courts must also consider the probative value of the evidence and whether it outweighs the potential prejudicial effect on the opposing party, the proceeding, the court, and/or the administration of justice. The court in *Power v Power* (2025) summarized these consideration factors using a four-part test, previously considered by Justice Gibb-Carsley in *CC v. S.P.R 2022 BCSC 1057*, and Justice Shehan in *Dostzada v. Marshal, 2023 NLSC 78*, for determining the admissibility of “secretly recorded evidence” (para. 16–17):

- 1) The recording must be relevant;
- 2) The participants must be accurately identified;
- 3) The recording must be trustworthy; and
- 4) The court must be satisfied that the probative value of the recordings outweighs its prejudicial effects.

The four parts of the test inform one another in a court’s assessment of the admission of surreptitious recordings. When secretly recorded evidence will have prejudicial effects (on the parties or the administration of justice), the bars for relevance, accuracy, and probative value are raised. As the court in *Power v Power* (2025) noted, the “evidence must be more than marginally relevant... [and] must have a high or strong probative value [that] outweighs the prejudicial effect of its admission” (para. 20). Many courts adopt a conservative view with respect to the admission of secret recordings, with courts in British Columbia and Ontario adopting a model of “presumptive prejudice” with surreptitious recordings that must be overcome before they can be used as evidence. As one British Columbia Supreme Court judge noted:

“*This presumptive prejudice arises from the impact that such recordings have on the parties, their children, and the administration of justice, including undermining the... objectives of modern family law through the tendency of such recordings to erode relationships and increase conflict (C.C. v. S.P.R., 2022 BCSC 1057, para 38).*”

Admission of the Recordings

The court ruled that the parties were identifiable in each of the recordings, and none of the recordings were believed to be edited, provoked, orchestrated, staged, or manipulated to have the father appear aggressive, unreasonable, or to be acting against the best interests of their son. Rather, the judge assessed the recordings as offering an undistorted “picture of the parties’ relationship [and] of Mr. Power’s engagement with Ms. Power in the presence of his son” (para. 41). The recordings therefore satisfied the criteria of accuracy and trustworthiness. The transcripts, however, were determined to be inaccurate representations of the recordings and were not admitted.

All twelve of the recordings were alleged by the mother to contain evidence of the father’s coercive controlling behaviour, including framing her as an incompetent parent in conversations with their son. The court noted commonalities in speech and attitude by the father across several of the recordings which related to a pattern of coercive control. Three of the recordings were not found to have sufficient probative value to override the prejudicial effect of their admission and one recording was not found to contain relevant information. The court did allow eight of the twelve recordings to be admitted as evidence in the mother’s relocation application.

Identification of Coercive Control in Recorded Interactions

Permission to relocate is determined based on the best interests of the child assessment, which includes a consideration of family violence and coercive control. Ms. Power alleged that Mr. Power had engaged in coercive and controlling behaviour during the interactions that she had secretly recorded. Specifically, she argued that the recordings showed Mr. Power “undermines her in her role as a parent, refuses to collaborate on key decisions, controls and overrides decisions unilaterally, escalates conflict when she does not agree with him and creates loyalty pressures for” their child (para. 26). Additional behaviours that courts have recognized can create a pattern of coercive and controlling behaviour include:

- Engaging in verbal abuse, name calling and insults
 - Making unsubstantiated allegations against the other party
 - Unilaterally changing court-ordered parenting time term without justification
 - Behaviours that undermine the other parent’s authority or influence and alienate the child from that parent (para. 25).
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The Recordings

Importantly, the purpose of the *voir dire* was not to determine the existence of coercive and controlling behaviour, but whether the recording provided evidence of such behaviour that was trustworthy, reliable, and relevant to the best interests of the child, specifically in terms of Ms. Power’s relocation request.

Of the twelve recording files produced by Ms. Power, the court admitted eight into evidence. Examples of content within each of these recordings that was deemed relevant to the best interest of the child assessment and the presence of coercive control are highlighted below. In each case, the probative value of the evidence was ruled to outweigh any prejudicial effect of allowing its admission.

December 20, 2024:

During a phone call over breakfast, Mr. Power tells J that “Mama is not being honest with him several times during the recording. Mr. Power tells J that what his mother is saying to him is not true” (para 37).

January 22, 2025:

Ms. Power briefly rescheduled a call between Mr. Power and J because J was ill. During their later conversation “he tells the child he thinks Ms. Power’s behaviour was rude and not very respectful [...] The child is crying while Mr. Power makes these comments. Later in the recording Mr. Power tells J that it does not matter what he says or what he wants as Ms. Power will dismiss him” (para 58).

January 23, 2025:

Phone calls between Mr. Power and J usually lasted one hour; however, Ms. Power had alerted Mr. Power to the fact that the call on this date would only take place for 20 minutes. During the phone call, “Mr. Power says to J that ‘Mama doesn’t care about what you want’ [...] Mr. Power asks his son, who is seven, if he thinks his mother’s behaviour is fair” (para 67).

January 27, 2025:

J had a dental device placed into his mouth to aid in stopping him from sucking his thumb. Ms. Power was concerned the device was bothering J and suggested they may need to revisit the dentist. Mr. Power “responds by saying the device is not coming out and that Ms. Power can promise whatever the child wants but she is 100% wrong” (para 73).

February 28, 2025:

Mr. Power had previously proposed several hockey camps for J to participate in during the summer months. Ms. Power had not agreed to all options. In response, Mr. Power said “Mama takes a long time to answer and then when she does, she just says no. So that’s why you’re not playing in these hockey camps” (para. 80). When Ms. Power attempted to interject and explain her position during the call, Mr. Power continued to dismiss her response.

March 4, 2025:

Following J’s hockey practice, J refused to get into Ms. Power’s car. Although this took place during Ms. Power’s parenting time, Mr. Power did not encourage J to go with his mother. J asked Ms. Power why she dismisses him. “Ms. Power tells J that she does not dismiss him, and J responds by saying that she does. Mr. Power raises the issue of lying and encourages J to stand up to his mother. He goes on to say to Ms. Power that she ‘should not lie to our son’” (para 92).

April 1, 2025:

Ms. Power had not agreed to enroll J in optional hockey training. Mr. Power says “Ms. Power has done a lot of things recently to prevent J from playing hockey and that it was wrong. Mr. Power tells J he is going to fight for what J wants and for what is right and do everything he can to make sure J gets a chance to play hockey as much as he likes and that in the meantime ‘Mama’s gonna stop you from playing hockey’” (para 99)

April 2, 2025:

Following the previous day’s conversation about the optional hockey training, Ms. Power advised J that she would speak with him further once the call with his father has ended. Mr. Power “tells J that his mother is trying to manipulate him, dismiss him and that that is not OK. He tells the child his mother is trying to isolate him and manipulate him” (para 107).

This case highlights the importance of a comprehensive approach to family violence. Although physical harm is often readily highlighted by courts as evidence of family violence, more subtle forms of coercive and controlling behaviour were identified in the recordings by the court. Unsubstantiated claims and undermining behaviours are evidenced by the father’s continued encouragement to “stand up to” his mother or by asking his son, who is seven, “if he thinks his mother’s behaviour is fair” (para 67). The father’s undermining behaviours and their impact on J’s relationship with his mother were also evidenced by his support of the child’s decision to “side” with him after the hockey game and by the father’s encouragement to the child to “express himself” when refusing to get into the mother’s car on her parenting time (para 91).

A holistic approach to the best interest of the child analysis allows these behaviours to be understood within a larger context of coercive control. Such a pattern would not be identifiable were each recording considered in isolation, nor would the cumulative impact of these behaviours be as easily understood. Establishing a *pattern* of intimidating or undermining behaviours intended to manipulate and exert control is key to identifying coercive control. This is often accomplished post-separation through a series of actions and remarks that attempt to sway or ‘weaponize’ the children against the other parent. In *Power v Power* (2025), for example, some of the father’s actions amount to coercive control because they were used as a demonstration of his power to manipulate the other parent’s relationship with their son. Ultimately, Justice Ingersoll found that the recordings contained evidence of verbal abuse, unsubstantiated allegations, and the undermining of the other parent’s authority and influence. They were therefore relevant and admissible as evidence in the mother’s application for permission to relocate with her son.¹

¹ The outcome of the relocation hearing could not be determined.

Case Significance & Impact

Power v Power (2025) contributes to a growing body of case law addressing the role of surreptitious recordings as evidence in legal proceedings. The case has been cited positively in subsequent court decisions to admit secretly recorded or shared conversations into evidence in family law proceedings. In *Day v Day* (2025 NSSC 236), the court referred to the case when deciding to admit text messages that had been sent between the parents but then shared by the father with the children. In *d’Entremont v d’Entremont* (2025 NSSC 270), the court cited *Power v Power* (2025) when deciding to admit a recording of a “disturbing” conversation between two parents that had been secretly recorded by a child. These cases highlight the necessity of provisional circumstances such as 184(2)(a) to permit consent recordings. Verbal descriptions of some coercive controlling behaviours (e.g. repetitive undermining) can be greatly enhanced by the firsthand narratives found in surreptitious recordings. However, assessing the accuracy, relevance, and probative value of this recording evidence is crucial to keeping its prejudicial effect below the minimal threshold.

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