The Right to Silence

A look at whether video and audio surveillance affects a person's right to remain silent

By Elliott Goldstein

Q Does video and audio surveillance infringe accused persons' right to silence when in police custody?

A No. Recently, the Manitoba Court of Queen's Bench ruled that police do not infringe an accused's Charter right to silence by putting him or her together with others in a police cell and intercepting (by audio and video) what transpired among them.

For example, in *R. v. Pangman*,[1] the accused Pangman and 34 others were indicted on various gang-related, drug-related and weapons-related charges. After their arrest, the police informed the accused of their Charter rights and afforded them every opportunity to exercise those rights. After being separately interviewed, the accused were lodged in a holding cell that was equipped with a surreptitiously placed video camera containing a microphone.

None of the accused was subject to surreptitious electronic surveillance before he had the opportunity to exercise his right to counsel or before being interviewed by the interview team. At all times throughout the day during which the electronic surveillance was conducted, the accused were alone in the cell with fellow co-accused, except for the brief periods when a guard opened and closed the door to the cell to place another of them into the cell or to remove one of them from the cell for purposes of transportation elsewhere.

No one was lodged in the cell who was not a prisoner in this investigation. None of the accused in the cell is alleged to have been a state agent or to have been, in any way, assisting the police. And the audio and video surveillance was conducted pursuant to judicial authorizations and warrants.

At trial, the Crown served notice on each accused of its intention to produce the intercepted private communications and video observations of the accused at the trial together with copies of the videos taken; a transcript of the private communication; and a statement of time, place and date of the observations and intercepted communications in accordance with section 189(5) of the *Criminal Code*.

The first issue that the presiding judge had to decide was whether the police conduct infringed the accused's right to silence. The judge analyzed that right and concluded the police did not breach the accused's right to silence because they did not "directly or through a state agent conduct the functional equivalent of an interrogation. They placed the accused in a room together. They expected the accused would choose to speak to one another. And they listened mechanically to what transpired. But they did not actively elicit the comments."

Another issue the Court decided was whether the surveillance conducted on the accused was a breach of their Charter right to be secure from unreasonable search and seizure. Here the Court ruled the test differs between audio and video surveillance. "Where video surveillance is concerned, unauthorized electronic surveillance constitutes a violation of section 8 of the Charter only if the accused has a reasonable expectation of privacy in the place where the video surveillance takes place."[2] The limiting feature of reasonable expectation of privacy in a place does not apply to audio surveillance because persons in custody have a reduced expectation of privacy.

In Pangman, the Court did not concern itself with whether the accused has a reasonable expectation of privacy in a cell in a police station because, without the audio component of the interception, the video is irrelevant. However, the Court did compare the law that applies to the judicial review of an (audio surveillance) authorization to intercept private communications (section 184 and higher) versus the law that applies to the judicial review of a general video warrant (issued under section 487.01).

The Manitoba Court of Queen's Bench ruled that the same test governs a judicial review of an (audio) authorization and a general video warrant. The test was set out by the late Justice Sopinka of the Supreme Court of Canada in the Garofoli case:[3]

"If the trial [reviewing] judge concludes that, on the material before the authorizing judge, there was no basis upon which he could be satisfied that the pre-conditions for the granting of the authorization exist, then, it seems to me that the trial judge is required to find that the search or seizure contravened section 8 of the Charter."

In Pangman, the application for electronic surveillance was for criminal organization offences. The group known as the Manitoba Warriors was alleged to be a criminal organization. Therefore, the statutory pre-conditions found in section 186(1)(a) and 186(1.1) of the *Criminal Code* had to be considered. The Supreme Court of Canada has held that before these sections of the *Criminal Code* can be met, the authorizing judge must be satisfied by the affidavit in support of the application (for an authorization or warrant) that there are reasonable and probable grounds to believe the following:

- that a specified crime has been or is being committed; and
- that the interception of the private communication/video observation in question will afford evidence of the crime.

In Pangman, the first requirement was not in issue. The defence acknowledged that, based on the contents of the affidavit of the police officer seeking the authorization/warrant, the authorizing judge could have concluded he had reasonable and probable grounds to believe the specified crimes, including an offence "committed for the benefit of, at the direction of or in association with a criminal organization," had been committed.

The defence argued that the second requirement was not satisfied. So the issue became whether the judge who granted the authorization/warrant could have concluded there were reasonable and probable grounds to believe the interception in question would afford evidence of the crime.

The trial judge in Pangman reviewed the facts and reasoned: "There was evidence before [the authorizing judge] on which he could reasonably conclude that these were all people who were involved with one another, who trusted one another and who were associated with one another (to a greater or lesser individual degree) in an organization. There

was evidence before him on which he could conclude that the Warriors organization was a structured organization with executive officers, with members of different ranks, and with associates. There was evidence before him on which he could conclude that Lawrence Dumontelle had been a high-ranking member of the Manitoba Warriors and that, for the previous few months, Dumontelle had given a considerable amount of information to the Winnipeg Police Service regarding the structure and activities of the Manitoba Warriors. There was evidence before him upon which he could have concluded that Dumontelle's past and prospective cooperation with the police would come as an unwelcome surprise to the accused.

"It is a reasonable inference that persons who are known to one another and who trust one another are likely to speak to one another about areas of mutual interest and concern. It is a reasonable inference that individuals finding themselves arrested and charged with the types and numbers of offences that these accused were charged with [including trafficking in narcotics and participating in a named criminal organization] are likely to be concerned about what has just happened to them. It is a reasonable inference that learning that a formerly trusted, high-ranking member of the organization was now cooperating with the police about the activities of the organization and its members is likely to be of concern to those connected to the organization. It is a reasonable inference that such affected individuals are likely to talk about their common areas of concern. The very argument used by the defence itself to allege state manipulation of the accused in the previous section of this judgment — namely, that if they are put together, of course they are going to talk, notwithstanding their expressed choice not to speak to the state — serves to underpin just how very reasonable was the inference drawn by [the judge who authorized the surveillance]. In addition, it is a reasonable inference that observation of the dynamics of the interaction amongst 35 people connected to a structured organization and holding different positions within that structure is likely to provide evidence of that structure, regardless of the specific topic of discussion amongst them."

The trial judge in Pangman concluded that he was satisfied that the authorizing judge could have issued the authorization and a general video warrant based upon the police officer's affidavit. Therefore, both parts of the test had been met and the audio and video surveillance evidence was admissible.

So what can we learn from the Pangman case? First, the "reasonable expectation of privacy" test applies to make unauthorized electronic surveillance a Charter violation only where video surveillance is involved; it does not apply where the electronic surveillance is audio. Secondly, the same legal test governs a review of an authorization to conduct audio surveillance as a review of a general video warrant. Thirdly, a judge must be satisfied that, before granting an authorization/warrant, there are reasonable and probable grounds to believe the interception of the private communication or video observation in question will afford evidence of the crime.

Elliott Goldstein, BA, LL.B, is a lawyer, visual evidence consultant and author based in Toronto, Ontario.

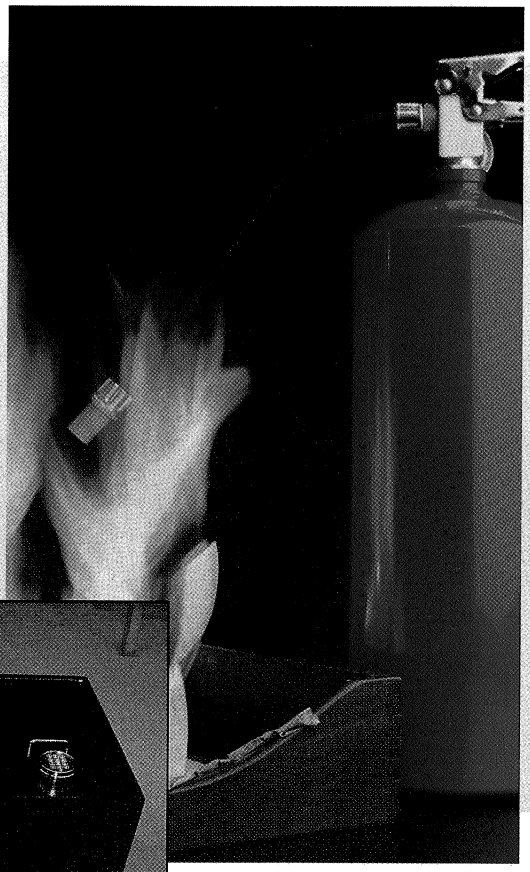
Author's Notes

1 All quotes from 147 Man. R. (2d) 93 (QB) unless otherwise stated.
2 *R. v. Wong* (1990), 60 C.C.C. (3d) 460 (S.C.C.).
3 (1990), 60 C.C.C. (3d) 161 (S.C.C.).

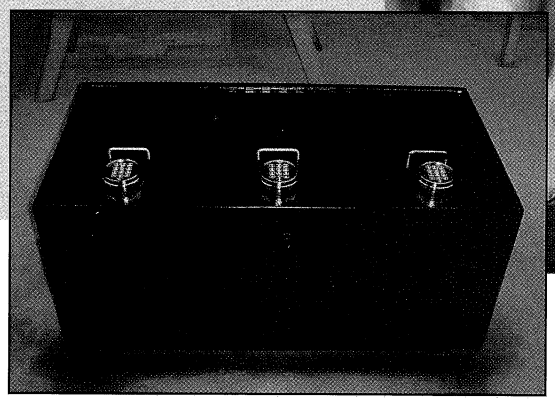
CANADIAN Security
The Publication for Professional Security Management

Contents

May 2001 Volume 23 Number 4



page 20



page 24

In Each Issue