

An Expectation of Privacy

Defining the line between appropriate surveillance and an accused's right to privacy

By Elliott Goldstein

Everyone has a right to privacy, and certainly everyone expects it. However, under the law, a person has a reasonable expectation of privacy when he or she has established a right to expect privacy and that expectation exists and is rational.

So how does an accused person establish that he or she had a "reasonable expectation of privacy" when surreptitiously recorded on a surveillance videotape? Canadian courts have considered seven relevant factors which, when present, establish that a reasonable expectation exists:¹

- the presence at the time of the search;
- possession or control of the property or place being searched;
- ownership of the property or place;
- historical use of the property or item;
- the ability to regulate access, including the right to admit or exclude others from the place;
- the existence of a subjective expectation of privacy; and
- the objective reasonableness of the expectation.

The first five factors address the right to have an expectation of privacy. "The last two address the existence [subjective] and rationality [objective] of that expectation. They come into play only after the first five have established a right to privacy."² Therefore, Canadian courts must consider both the accused's "subjective expectation of privacy" and its "objective reasonableness" in the eyes of society.

Just because an accused makes a claim that he or she expected privacy does not mean that society agrees his or her claim is reasonable in the circumstances. For example, an accused may claim an expectation of privacy when in his or her hotel room. That is reasonable. However, if the door to the hotel room is left wide open, then the expectation is not reasonable.

Why? Because anyone walking by in the hallway could look into the room and see the accused. Obviously,

if the accused truly expected privacy, he or she should have closed and locked the door, as well as drawn the curtains, drapes, window blinds, shades or shutters, and turned off lights inside the room at night.

The expectation of privacy would also not be objectively reasonable if the accused had distributed pamphlets inviting strangers to attend his or her hotel room to gamble, as happened in one particular case.³

Subjective Determinations

By their very nature, "subjective" expectations of privacy defy confirma-

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tion. There is no way to verify what thoughts are in the mind of an accused when committing a crime. Accused persons do not stop to discuss their expectation of privacy with co-accused.

Also, it is difficult to imagine a situation in which an accused would not claim privacy as a right. Especially if it meant getting the surveillance videotape excluded, thereby increasing the chances of acquittal.

Canadian cases have held that the accused must meet the threshold and prove, on the balance of probabilities, that at the relevant time, he or she had a "reasonable expectation of privacy."

It is for this reason that the Canadian courts have ruled that the "objective reasonableness of that expectation" must be shown.

It is only when one's assertion of a "subjective expectation of privacy" is confirmed by a finding on the facts that the expectation was "objectively reasonable" that an applicant will have been said to have established an expectation of privacy that is reasonable. The right to the expectation of privacy, coupled with the established expectation of privacy, will constitute the pre-condition to a claim for relief under section 8 of the *Canadian Charter of Rights and Freedoms* (the Charter), if it is proved by the accused based on the balance of probabilities.

Of course, the aforementioned seven-factor list is not exhaustive. There may be other factors the court will consider, such as the relationship between those persons conducting the surveillance (that is, the watchers) and the subjects of the surveillance (that is, the targets). For example, an employer/employee relationship is a factor to consider when analyzing an employee's reasonable expectation of privacy, just as a school/student relationship is also a relevant factor when a student's privacy is in issue.

If a person can demonstrate, on a balance of probabilities, that he or she had a reasonable expectation of privacy, he or she can claim relief under section 8 of the Charter, which says "Everyone has a right to be secure against unreasonable search or seizure."

The relief claimed might be to exclude a surveillance videotape and derivative evidence pursuant to section 24(2) of the Charter.⁴ If that surveillance videotape was the only evidence that the person had committed a crime, then the person would be acquitted if the court refused to admit the tape.

Testing the Law

But enough theory. Let's examine an actual case where a section 8 Charter defence was raised: the unusual case of *R. v. Hunt*.⁵

Hunt, a police officer at all relevant times, was charged with theft under \$5,000 contrary to section 334(b) of the *Criminal Code of Canada*. Prior to Hunt's trial, the Court heard a motion from Hunt's lawyer to exclude a sur-

veillance videotape that showed Hunt removing certain items from a supply room. To save time, the prosecutor and defence lawyer presented the presiding judge with an Agreed Statement of Facts. In it, Hunt made the following admissions:⁶

1. At the material time, Hunt was a serving police officer with the ... Police. He was stationed with the ... Detachment.
2. Beginning in December 1996, the [police] began experiencing a series of thefts. [Police] assets as well as property belonging to [police] personnel had gone missing. These thefts had occurred in and around the [police station] and ... from vehicles parked at these locations.
3. An investigation into the thefts was commenced in March 1998. As part of this investigation, on March 11, 1998, a video camera was installed in the ... stationery [supply] room.
4. The ... supply room is never locked and all of the uniform members and civilian staff of the detachment have 24-hour access to it. Among other things, administrative forms and supplies are kept in there. None of the missing items had been taken from the supply room.
5. On April 30, 1998, a ... VCR was placed in the stationery room as "bait."
6. On May 14, 1998, a box containing various computer components was placed on a bottom shelf in the room as "bait." Written in black magic marker on one end of the box was "computer stuff." The box was checked daily for signs of theft or tampering.
7. On June 25, 1998, at 6:36 p.m. on the camera clock (actual time 7:36 p.m.), Hunt is recorded entering the supply room. He is recorded removing four items from the box: The total value of these items is approximately \$300 and \$400. Hunt placed the other items in the carrying case. He is recorded leaving the room with the items at 6:43 p.m. on the camera clock (actual time 7:43 p.m.)
8. Hunt's removal of the components was discovered when the videotape was reviewed on June 26, 1998.
9. On June 30, 1998, Hunt was arrested by members of the ... Police.
10. The [stolen items] were recovered later on June 30, 1998, from Hunt's mother's residence (where Hunt was staying) when Hunt voluntarily re-

trieved them from his room. They were still in the same black carrying bag.

The Crown Prosecutor⁷ also admitted as additional evidence that earlier on the day of the alleged offence, June 25, 1998, "a uniformed officer of that detachment (not the accused, Hunt) and a civilian employee of the same detachment had a physical relationship in which some sex act occurred." This "sex act" occurred in the same stationery room from which officer Hunt is alleged to have stolen certain items.

The prior "sex act" was recorded but the couple turned off the light so that no image was captured. They also locked the door, which Hunt did not do. Regardless, it is clear that Hunt was not aware that the "sex act" had taken place.

The presiding judge dismissed the motion brought by Hunt's defence

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lawyer to exclude the surveillance videotape. Instead, Judge Humphrey admitted the surveillance videotape in evidence and made the following ruling:

"The evidence establishes that the applicant [Officer Hunt] had no 'right' to expect privacy in the supply room, even though it may well have been rational for him to expect it. Everyone who worked there [in the police station] had a right to enter the supply room. It was possessed and controlled by his employer, not by him. The employer had the right to regulate access by others. He did not. There is a certain right to expect privacy in one's own office or in a washroom cubicle in the workplace, but not the common supply room. The Court finds therefore that the applicant has not established the first pre-requisite to a finding of a 'reasonable expectation of privacy.'

The evidence that two other employees may have had an 'expectation of privacy' in the supply room sufficient to engage in a sexual act (had the applicant known), and the applicant's testimony that he did not expect anyone to come into the room while he was there, taken at its highest, is sufficient to establish only a 'subjective expectation of privacy.' It does not establish a 'right' to that expectation. ... Mr. Hunt had no greater right to occupy that room, than did any other employee in the [police station] including the civilian employees. He held no proprietary interest in either the room or its contents and thus the right to occupy the room in which his image was captured to the exclusion of others. The fact of having closed the door to the room, which might otherwise have been regarded as evidence that he wished to be alone, is of lesser evidentiary significance by reason of the appellant's own evidence, that no one else was in the detachment in any event.

"On the evidence of the applicant's own witnesses the storage room was selected for the installation by reason of its accessibility to all members of the workforce within the detachment. No one person was targeted by the placement of the video surveillance equipment and the tape was viewed only once the bait was determined to have been disturbed. Mr. Hunt at all relevant times was not aware of the untoward incident which had occurred earlier that day, when he himself entered the storage room. To his knowledge the stationery room had never been locked albeit that keys for it did exist.

"Having found no 'reasonable expectation of privacy,' this court notes that the applicant's case is further diminished by the fact that the surveillance was conducted by his employer having possession, control and the right to regulate admittance to the room, in connection with conduct contrary to the employer's interests. There was no right to privacy, particularly as against the employer. No one challenges an employer's right to conduct such surveillance. The fact that the employer is the police and thus, by definition, an agent of the State, is being relied upon in the case at bar to suggest the creation of a 'reasonable expectation of privacy' in the supply room that would not exist in a privately owned workplace. The logical extension of this argument would be to grant employees

of law enforcement agencies a far greater right to privacy than employees in civilian workplaces.

"Surely, having obtained evidence of theft from a supply room in this manner, a private employer would be entitled to turn it over to the police, who in turn could use it to investigate criminal activity and lay charges without violating the Charter. That is essentially what happened here.

"To borrow from and adapt the words of [the late Mr. Justice John] Sopinka in *R v. Plant*, supra, the visual recording of Mr. Hunt's image, as was done in the case at bar, cannot reasonably be said to 'reveal intimate details' of his life, 'personal lifestyle or private decisions' as might well have been the case had the recording occurred in the confines of his private office or home."

So what is to be learned from this case? This case teaches the following:

- Not every warrantless surreptitious video surveillance by agents of the State (for example, police) constitutes a violation of section 8 of the Charter.
- The initial onus is on the accused, as a pre-condition to a claim for relief under section 8 of the Charter, to

demonstrate on a balance of probabilities that he or she had, in all of the circumstances, "a reasonable expectation of privacy."

- The accused must establish that he or she has a right to expect privacy before establishing that he or she actually expected privacy (subjective test), and that it was reasonable for him or her to do so (objective test).
- The privacy expectations of other

workers do not establish a right to expect privacy.

- There is a greater expectation of privacy in private offices than in rooms accessible by all employees in the workplace (including, for example, supply rooms). ♦

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

Author's Notes

- 1 *R. v. Edwards* 104 C.C.C. (3d) 136 (S.C.C.) as cited in *R. v. Hunt*, unreported decision of Humphrey, J. (Ont. O.C.J.), released May 31, 2000, Sudbury, Ontario.
- 2 *R. v. Hunt*, supra, at p. 29 of the decision. All quotations in this article are from the Hunt decision, unless otherwise indicated.
- 3 See *R. v. Wong*, [1990] 3 S.C.R. 36, 60 C.C.C. (3d) 460.
- 4 Derivative evidence is "secondary" evidence discovered only because of the primary evidence contained in the surveillance videotape.
- 5 Special thanks to Mark T. Doubrough, Photographic Surveillance Unit, Technical Support Section, Investigation Support Bureau, Ontario Provincial Police, for bringing this case to the author's attention.
- 6 This is a partial list only. See *R. v. Hunt*, supra.
- 7 Crown Counsel in this case was Tom Fitzgerald. Special thanks to him for assisting the author with the Reasons for Decision. Hunt testified in his own defence. The trial judge held a reasonable doubt about his guilt. Hunt was acquitted following trial.

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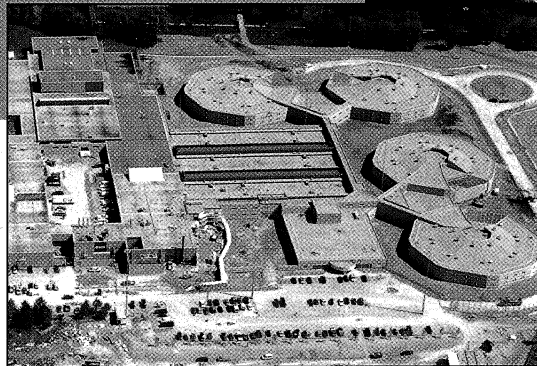
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