SURREPTITIOUS VIDEO SURVEILLANCE AND THE PROTECTION OF PRIVACY

by

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I. INTRODUCTION

Surreptitious video surveillance ("S.V.S.") – the observation of persons, places, and things using a hidden video camera – is used by law enforcement agents to:

(a) establish the identity of suspects;

(b) detect and record illegal acts;

(c) provide tactical information necessary to conduct an efficient and safe search or raid; and

(d) explain the motives of suspects and ensure that no other persons are involved.[1]

Recent advances in video surveillance technology have produced low-light-level video cameras that can operate using just moonlight, infrared cameras that can function in total darkness, and miniature cameras with pinhole lenses that can easily be held in the palm of one's hand.[2] These cameras can be remotely controlled or automatically triggered by motion, sound, pressure or heat detectors.[3] Some video cameras have built-in time-date generators that super-

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[1]E. Goldstein, "Video Evidence in Court" (1983), 4 Professional Protection Magazine, No. 4, p. 12.

[2]See c. 2 of the Report to the Attorney General by the Police Commission on the Use of Video Equipment by Police Forces in British Columbia (28th November 1986) (hereinafter cited as the "B.C. Police Commission Report"). This well-researched report is available from the British Columbia Police Commission, 405 - 815 Hornby Street, Vancouver, British Columbia, Canada V6Z 2E6.

[3]B.C. Police Commission Report, ante, note 2: see appendices for illustrations of equipment.

impose the time and date on the recorded images.[4]

Surreptitious video surveillance was conducted by the police in both *Asencios v. R.*, ante, p. 344, and *R. v. Wong*, ante, p. 352. However, only in the *Wong* case was a videotape tendered that had been recorded using a video signal from the surveillance camera.[5]

In *R. v. Asencios*, Que. S.P., Montreal, Bonin J.S.P., 15th May 1985 (not yet reported), reversed supra, the police conducted S.V.S. to gather evidence in support of a charge of possession of drugs for the purpose of trafficking. At trial, the Judge of the Sessions of the Peace held that the police acted illegally when they installed a surveillance camera in the garage to find out who had hidden the drugs there. The trial judge ruled that the accused had no right to the protection of s. 8 of the Canadian Charter of Rights and Freedoms because the accused had used the garage exclusively for criminal purposes. The (criminal) use made of the garage created no reasonable expectation of privacy, and therefore the accused was deprived of any protection against unreasonable search or seizure. The accused was convicted.

On appeal by the accused, the Quebec Court of Appeal overruled the lower court by holding that s. 8 applies to "everyone", and not merely to persons who do not use their premises for purposes of criminal activity.[6] Therefore the protection against unreasonable search or seizure should not have been denied the accused.

In *R. v. Wong*, Ont. Prov. Ct., York, Paris Prov. J., 15th September 1985 (not yet reported), reversed supra, the police conducted S.V.S. to gather evidence in support of a charge of keeping a common gaming house. At trial, the Provincial Judge held that the videotaping of the accused's activities constituted a search and seizure notwithstanding that no physical trespass occurred. His Honour excluded the videotape and acquitted all accused.

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[4]The time-date code (usually recorded as H:M:S and Y:M:D) establishes when the tape was made, verifies the tape speed, and provides some protection against editing: see E. Goldstein, "Using Videotape to Record Evidence" (1986), 12 J. of Evidence Photography, No. 4, p. 14.

[5]This procedure is discussed in E. Goldstein, "How CCTV Surveillance Can Serve Us in Court" (1987), 9 Cdn. Security Magazine: J. of Protection & Communications, No. 2, p. 30.

[6]The fact that the premises were used exclusively for a criminal purpose is a factor that should be considered when determining whether the administration of justice would be brought into disrepute by the admission of the evidence.

On appeal by the Crown, the Ontario Court of Appeal decided that s. 8 of the Charter of Rights applies to video surveillance and the proper test to use when deciding whether the rights of the accused were infringed by the S.V.S. is: Did the accused have a "reasonable expectation of privacy"? (p. 361).

The purpose of this article is to assess the importance and implications of the *Wong* and *Asencios* decisions.

II. The History of S.V.S. Evidence

The first criminal case in which an attempt was made to introduce a visual record of persons under police surveillance happened in 1950 in Winnipeg, Manitoba. In *R. v. Kissick*, Man. Q.B., Montague J., 18th October 1950 (unreported),[7] the Crown tendered R.C.M.P. motion picture surveillance films of a drug transaction and the subsequent arrest of the alleged traffickers. The surveillance film was ruled inadmissible by the trial judge because it was cumulative of other evidence previously presented.

In the mid-1970s Canadian police forces began using video cameras during surveillance operations. These cameras – connected to video recorders, which store optical images on videotape – were used to record criminal activities such as illegal picketing,[8] gambling,[9] drug trafficking,[10] conspiring to commit murder,[11] attempting to com-

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[7]Briefed in Goldstein on Videotape and Photographic Evidence: Case Law and Reference Manual (1986), at p. 8-7 (hereinafter cited as "Goldstein on V. & P.E.").

[8]*R. v. Lewis*, Ont. Prov. Ct., Graham Prov. J., 14th February 1974 (unreported), briefed in Goldstein on V. & P.E. at p. 12-8.

[9]*R. v. Irwin* (1976), 32 C.R.N.S. 398 (Ont. C.A.), briefed in Goldstein on V. & P.E. at p. 12-12.

[10]*R. v. Napoli*, Ont. H.C., Parker J., 3rd July 1981 (unreported), briefed in Goldstein on V. & P.E. at p. 12-70; *R. v. Biasi* (1981), 66 C.C.C. (2d) 566, [1982] B.C.D. Crim. Conv. 5450-01, 6 W.C.B. 446 (S.C.), briefed in Goldstein on V. & P.E. at p. 12-77; and *R. v. Porter* (1983), 6 C.R.D. 850.60-01 (B.C. Co. Ct.), briefed in Goldstein on V. & P.E. at p. 12-88.

[11]*R. v. McQuirter*, Ont. H.C., O'Driscoll J., 9th February 1983 (unreported), briefed in Goldstein on V. & P.E. at p. 12-96.

mit murder,[12] theft,[13] fraud,[14] acts of gross indecency,[15] and mischief.[16]

Surveillance videotapes have been admitted in Canadian criminal courts if they are shown to be relevant, are true and accurate, are fair, and are verified on oath by a capable witness.[17] These same criteria govern the admission of surveillance videotapes and films in the criminal courts of England,[18] Scotland,[19] Australia,[20] South Africa,[21] and the United States.[22]

Prior to the Charter of Rights, objections to the admission of these videotapes were based on evidentiary, not constitutional, grounds: for example, distortion of tape speed, colour or sound affected the weight afforded the videotape by the trier of fact.[23] Misrepresentation (e.g., editing of picture or sound track) usually rendered a videotape inadmissible.[24]

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[12] *R. v. Chattha* (1984), 12 W.C.B. 428 (Ont. Co. Ct.), per Cusinato Co. Ct. J., briefed in Goldstein on V. & P.E. at p. 12-163, and *R. v. Demeter*, Ont. Co. Ct., Smith Co. Ct. J., 20th June 1985 (unreported), briefed in Goldstein on V. & P.E. at p. 12-201.

[13] *R. v. Marchessault*, Que S.C., Ryan J., No. 500-27-003670-835, 10th November 1983 (unreported), briefed in Goldstein on V. & P.E. at p. 12-122.

[14] *R. v. Buric*, Ont. Dist. Ct., 26th March 1985 (unreported), briefed in Goldstein on V. & P.E. at p. 12-193.

[15] *R. v. Peterson*, Ont. Dist. Ct., Higgins D.C.J., Guelph, 5th November 1985 (not yet reported); *R. v. LeBeau*, Ont. Dist. Ct., Higgins D.C.J., Guelph, 16th February 1986 (not yet reported); *R. v. Lofthouse* (1986), 27 C.C.C. (3d) 553, 16 W.C.B. 196 (Ont. Dist. Ct.). All three cases are now before the Ontario Court of Appeal.

[16] *R. v. Taylor* (1984), 4 C.R.D. 425.60-08 (Ont. Prov. Ct.), briefed in Goldstein on V. & P.E. at p. 12-98.

[17] *R. v. Maloney* (1976), 29 C.C.C. (2d) 431 (Ont. Co. Ct.), briefed in Goldstein on V. & P.E. at p. 12-14.

[18] See E. Goldstein, "Photographic and Videotape Evidence in the Criminal Courts of England and Canada", [1987] Crim. L. Rev. (in press).

[19] *Bowie v. Tudhope*, [1986] S.C.C.R. 205.

[20] *R. v. Smith* (1983), 33 S.A.S.R. 558, 10 A. Crim. R. 358 (S.C., F.C.).

[21] See E. Goldstein, "Videotape and Photographic Evidence" (1985), 102 South African L.J. 485.

[22] G.P. Joseph, Modern Visual Evidence (1984), New York, Law Journal-Seminars Press Inc.

[23] See E. Goldstein, "Videotape Evidence in Canadian Military Courts" (1987), 2 Cdn. Forces Judge Advocate Gen. Journal (in press), and *Simpson Timber Co. (Sask.) Ltd. v. Bonville*, [1986] 5 W.W.R. 180 at 188, 49 Sask. R. 105 (Q.B.).

[24] See E. Goldstein, "The Admissibility Of and Weight Given To Motion Picture and Videotape Evidence in Canadian Courts" (1981), 45 Sask. L. Rev. 319, and E. Goldstein, "Police Videotapes as Evidence" (1987), 6 Cdn. Police Chief Newsletter, No. 5 (in press).

With the coming into force of the Canadian Charter of Rights and Freedoms there arose new grounds for objecting to the admission of surveillance videotapes. One such ground is "invasion of privacy".

Section 7 of the Charter of Rights, which contains the phrase "right to . . . security of the person", has been interpreted to provide such a right to privacy in some circumstances.[25] If that right is infringed in a manner which brings the administration of justice into disrepute, then an accused could apply under s. 24(2) of the Charter of Rights to have the videotape evidence excluded.[26]

Section 8 of the Charter of Rights, which contains the phrase "right to be secure against unreasonable search or seizure", could also be interpreted as providing a right of privacy.[27] The effect of s. 8 on the admissibility of videotapes recorded by police during surveillance operations was first considered in the *Porter* case, supra, note 10, decided by the British Columbia County Court in 1983.

In *Porter*, defence counsel argued that the surveillance videotape was inadmissible because an unlawful entry was made to install the equipment that recorded it. The surveillance was called a " '1984' form of search", in that it captured or seized images and reduced them to a videotape for presentation as evidence. The presiding County Court Judge rejected defence counsel's arguments and held that the installation of video equipment does not constitute a search as that term has come to be understood, nor does the capture or seizure of images constitute a seizure as that term is understood.

His Honour remarked:

> . . . seizure, in my view, contemplates the taking of land or possessions of a person, forcible taking, grasping, holding, fastening. I do not think the recording of images falls within that definition.

In the *Porter* case the court assumed that the protection guaranteed by s. 8 of the Charter of Rights was limited to searches and seizures of tangible property which involve a physical intrusion in the nature of a trespass. The court took a "protection against

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[25] *R. v. Taylor*, supra, note 16.

[26] Goldstein on V. & P.E. at p. 12-101.

[27] See *R. v. Rao* (1984), 46 O.R. (2d) 80, 40 C.R. (3d) 1, 12 C.C.C. (3d) 97, 9 D.L.R. (4th) 542, 10 C.R.R. 275, 4 O.A.C. 162, leave to appeal to S.C.C. refused 40 C.R. (3d) xxvi, 10 C.R.R. 275, 4 O.A.C. 241, 57 N.R. 238, and *R. v. Rowbotham* (1984), 13 W.C.B. 105 (Ont. H.C.), neither of which are video surveillance cases.

trespass" approach and concluded that the surreptitious recording of images on videotape is neither a search nor a seizure, therefore no right under s. 8 had been infringed.

An approach that could have been taken by the court in the *Porter* case is based on the premise that s. 8 offers *protection of privacy* rather than *protection against trespass*. The protection of privacy approach holds that "a search is not limited to a physical incursion onto the property of another, and a seizure need not involve the taking of anything tangible".[28]

The "privacy approach" was endorsed by the Supreme Court of Canada in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 41 C.R. (3d) 97 (sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.*), [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 27 B.L.R. 297, 84 D.T.C. 6467, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 55 A.R. 291, 55 N.R. 241. Dickson J. cited *Katz v. U.S.*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967), a decision of the United States Supreme Court, where the trespass and privacy approaches were distinguished and discussed. In *Katz*, Stewart J. held that people, not places, are protected by the Fourth Amendment.[29] Stewart J. "rejected any necessary connection between the protection afforded by the Fourth Amendment and the law of trespass".[30]

In *Hunter v. Southam Inc.*, the present Chief Justice of Canada held, in effect, that the protection of privacy approach is equally appropriate in construing the protections in s. 8 of the Canadian Charter of Rights and Freedoms. Referring to the *Katz* decision, Dickson J. commented at p. 114 (C.R.):

> Like the Supreme Court of the United States, I would be wary of foreclosing the possibility that the right to be secure against unreasonable search and seizure might protect interests beyond the right of privacy, but for the purposes of the present appeal I am satisfied that its protections go at least that far.

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[28]W.F. Ehrcke, "Privacy and the Charter of Rights" (1985), 43 Advocate 53, at p. 57.

[29]The Fourth Amendment to the United States Constitution states:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

[30]Ehrcke, ante, note 28, p. 55.

Interpreting s. 8 of the Charter of Rights as providing protection of privacy implies that it is intended to protect a "reasonable" expectation of privacy, because s. 8 protects against only "unreasonable" searches or seizures.

III. The Turning Point

A. *Surreptitious Video Surveillance is a Search*

In *R. v. Wong*, the Ontario Court of Appeal decided that s. 8 of the Charter of Rights provides a protection of privacy which may be infringed by surreptitious video surveillance. The court concluded at p. 359 that:

> . . . surreptitious video surveillance must constitute a search in circumstances where the person observed by the camera has a reasonable expectation of privacy.

It reached this conclusion after reviewing a number of American cases that found video surveillance to be more intrusive than wiretapping and a "search" within the meaning of the Fourth Amendment to the Constitution of the United States.[31] The Ontario Court of Appeal reasoned that, if audio surveillance constitutes a search, then so must video surveillance.[32] In other words, if "eavesdropping" is intrusive of privacy, then "peeping" must also be. This is certainly valid reasoning, because the purpose of s. 8 is to protect the privacy of the individual's words and acts.[33] It doesn't matter that different technologies are involved in the recording of sound and light.

B. *Surreptitious Video Surveillance and the Criminal Code*

Before deciding whether the accused had a reasonable expectation of privacy, the Ontario Court of Appeal determined whether the police could have obtained either:

(a) an order under Pt. IV.1 of the Criminal Code;[34] or

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[31]See *U.S. v. Torres* (1984), 751 F. 2d 875, certiorari denied 105 S. Ct. 1853, and *People v. Teicher*, 395 N.Y.S. 2d 587, 90 Misc. 2d 638 (1977).

[32]Under Pt. IV.1 (s. 178.11 [en. 1973-74, c. 50, s. 2]) of the Criminal Code of Canada, R.S.C. 1970, c. C-34, audio surveillance ("bugging") and telephone surveillance ("wiretapping") constitute interceptions of private (oral) communications: see *R. v. Finlay* (1985), 48 C.R. (3d) 341, 23 C.C.C. (3d) 48 at 61, 23 D.L.R. (4th) 532, 18 C.R.R. 132, 11 O.A.C. 279, leave to appeal to S.C.C. refused 50 C.R. (3d) xxv, 15 O.A.C. 238, 65 N.R. 159.

[33]B.C. Police Commission Report, ante, note 2, at p. 75.

[34]That is, an authorization under s. 178.12 [en. 1973-74, c. 50, s. 2; am. 1976-77, c. 53, s. 8] to intercept a private communication.

(b) a search warrant authorizing the video surveillance.[35]

This determination was necessary because the trial judge had decided that:

(a) a Pt. IV.1 authorization was not needed because "there was no interception of communications by audio equipment" (pp. 2 and 4); and

(b) a search warrant was required and the police had ample time to obtain one (p. 5).

The Ontario Court of Appeal applied the reasoning in *R. v. Biasi*, supra, note 10, which held that videotapes with no soundtrack do not infringe Pt. IV.1 of the Code. Part IV.1 controls telephone surveillance ("wiretapping") and audio surveillance ("bugging"), not electronic visual surveillance ("video peeping").[36] The Court of Appeal determined, therefore, that the police could *not* have obtained an order under Pt. IV.1 of the Code to permit them to carry out the surreptitious video surveillance.[37]

The Ontario Court of Appeal also determined that a search warrant could *not* be issued to authorize video surveillance pursuant to the provisions of s. 443 of the Code because "a search warrant cannot be issued for intangible objects" (p. 361). Their Lordships apparently viewed "the ephemeral, flickering video reproduction of human action" to be an "intangible object" (p. 361). Support for this view is found in the aforementioned *Porter* case, supra, note 10, wherein a British Columbia County Court held that the recording of "optical images" did not fall within the definition of "seizure". In that court's opinion, seizure contemplates "the taking of land or possessions of a person".

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[35]When the trial judge spoke of a "search warrant", he referred to s. 181 of the Criminal Code. However, the Ontario Court of Appeal dealt with a search warrant obtained under s. 443 [am. 1985, c. 19, s. 69] of the Code. This discrepancy may not be important, because the decision in *Re Vella and R.* (1984), 14 C.C.C. (3d) 513, 12 C.R.R. 292 (Ont. H.C.), rendered s. 181(1) of no force and effect. It is not clear what effect, if any, the *Vella* case has on s. 181(2), which permits a search without a warrant.

[36]The American equivalent of Pt. IV.1 is the Omnibus Crime Control and Safe Streets Act of 1968. An American case that is similar to *Biasi* in both name and reasoning is *U.S. v. Biasucci*, 786 F. 2d 504 at 508 (U.S.C.A., 2nd Circ., 1986).

[37]The court remarked in passing that, had Pt. IV.1 of the Code been applicable, the circumstances of the case met the requirements for an authorization to intercept an oral communication.

In the *Asencios* case, the Quebec Court of Appeal considered whether s. 10 [am. 1985, c. 9, ss. 200, 206(1)] of the Narcotic Control Act, R.S.C. 1970, c. N-1, would have permitted the police officers to enter the garage for the purpose of installing the video surveillance camera.[38] It was held not to give such permission.[39]

C. *The Test – "Reasonable Expectation of Privacy"*

After deciding that video surveillance must constitute a search so long as there is a reasonable expectation of privacy on the part of the person photographed, the Court of Appeal in *Wong* had to ascertain whether there was a reasonable expectation of privacy in that case.[40] In the opinion of the Court of Appeal, what constitutes a reasonable expectation of privacy will depend upon a number of factors, including a person's location (e.g., public office or private home), the time of the intrusion (e.g., high noon or midnight), and other relevant circumstances (e.g., how the location is being used or the presence of others).[41] In addition, two requirements must be met for there to be a reasonable expectation of privacy:[42]

> . . . first that a person had exhibited an actual (*subjective*) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable". [Emphasis added.]

The Ontario Court of Appeal found that Santiago Wong and his co-accused did not have a subjective expectation of privacy. None of them testified that he had such an expectation. Using a publicly-distributed leaflet, Wong invited would-be gamblers to his hotel room. Many accepted his invitation and attended. There could not have been any reasonable expectation of privacy by anyone in that hotel room, least of all Santiago Wong, who stood to benefit financially from a large turnout.

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[38]Section 10(1) provides that:

"10. (1) A peace officer may, at any time,

"(*a*) without a warrant enter and search any place other than a dwelling-house . . ."

[39]See *R. v. Colet*, [1981] 1 S.C.R. 2, 19 C.R. (3d) 84, 21 C.R. (3d) 86, [1981] 2 W.W.R. 472, 57 C.C.C. (2d) 105, 119 D.L.R. (3d) 521, 35 N.R. 227 [B.C.]; *R. v. McCafferty* (1985), 16 C.C.C. (3d) 224 at 230, 6 O.A.C. 5 (C.A.); and *Re Bell Telephone Co. of Can.* [1947] O.W.N. 651, 4 C.R. 162, 89 C.C.C. 196 at 198 (H.C.).

[40]It is the target of the surveillance (i.e., the accused) whose privacy "expectation" is examined.

[41]See *Rakas v. Ill.*, 439 U.S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421 at 441 (1978), rehearing denied 449 U.S. 834, 66 L. Ed. 2d 40, 101 S. Ct. 107:

". . . there comes a point when use of an area is shared with so many that one simply cannot reasonably expect seclusion."

[42]*Katz v. U.S.*, supra, at p. 588, quoted and cited with approval in *Hunter v. Southam Inc.*, supra.

IV. The Future

The Ontario Court of Appeal borrowed from American jurisprudence when it adopted the "reasonable expectation of privacy" test. It remains to be seen whether the doctrines that accompany this test (e.g., the plain view doctrine) will also be incorporated into Canadian constitutional law. However, the many American decisions that have interpreted the Fourth Amendment, on which s. 8 was modeled, are now directly relevant to our understanding of the Charter of Rights.

At present, there is no federal or provincial legislation that governs video surveillance. The door is wide open for Parliament to legislate in this area. The British Columbia Police Commission has proposed federal legislation that would create a system of prior authorization for video surveillance similar to Pt. IV.1 of the Criminal Code: B.C. Police Commission Report, ante, note 2, at p. 153. This system would place limits on the nature and type of offence for which intrusive video surveillance is authorized: p. 153.

Another option would be for the provinces to pass legislation to create a detailed structure of controls for internal use by provincial and municipal police forces when using video equipment. How these provincial controls would apply to federal law enforcement agents (e.g. R.C.M.P., customs, excise, immigration, etc.) is a topic for another paper!

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