



Sexual Spying

Taking a closer look at the proposed new offence of criminal voyeurism

By Elliott Goldstein

Q What is "criminal voyeurism," and why and how is it going to be dealt with in legislation in Canada?

A Criminal voyeurism is the proposed name for a new offence that the federal government is considering creating in response to "the proliferation of mini-webcams and other high-tech tools of electronic age Peeping Toms."¹

The call for legislation in this area has come from the Uniform Law Conference (ULC), a group of federal and provincial justice officials involved in policy-making. Last year, the ULC asked the federal government to legislate a specific offence prohibiting "surreptitious, non-consensual viewing, photographing or videotaping of another person in a dwelling house or business premises where there is an expectation of privacy and if the viewing, photographing or videotaping is done for a sexual purpose."

At a meeting held in Toronto, Ontario, in August 2001, the ULC debated where and when invasions of privacy ought to be criminalized. The Federal Justice Department has privately circulated an "options" paper to ULC members, but this paper is not available for release to the general public at this time.²

The movement to criminalize video voyeurism is a response to the perceived increase in electronic invasions of privacy. In the past, video voyeurs have been prosecuted using the criminal laws such as "mischief" or "trespass at night" as there is no Canadian criminal law that makes it an offence to conduct video surveillance.

Section 487.01 of the *Criminal Code*, which authorizes the issuance of "video search warrants" to peace officers, contains no sanctions for unauthorized video surveillance.³ There is, of course, a law that makes it a criminal offence to conduct audio surveillance, provided the consent of one or more of the persons involved in the private communication has not been given.⁴

In a 1999 column that appeared in *Canadian Security* (see "A Room With a View" *Canadian Security*, Vol. 21, No. 7, November/December 1999, page 22), the point was made that there is no legislation that specifically addresses the problem of the misuse of video surveillance in modern society.

In an article appearing in a national lawyers' newspaper earlier this year, numerous examples were given of cases

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in which surveillance was misused by non-professionals (persons who do not conduct surveillance as part of their jobs). Many of these individuals were charged with, or convicted of, mischief for the following reasons:

- hiding a Webcam in an air vent in the bedroom of a female tenant;
- secretly videotaping nude clients at a tanning facility using a camera hidden in a smoke detector;
- videotaping up women's skirts us-

ing a camera hidden in the toe of a man's shoe and underneath office desks; and

- surreptitiously videotaping persons in locker rooms and shower rooms.

Canada is not alone in trying to legislate against the misuse of video surveillance. Many American states — Alaska, Delaware, Florida, Georgia, Indiana, Louisiana, Mississippi, North Carolina, Ohio, South Dakota, Washington, Tennessee and Virginia — have outlawed "voyeurism." However, the wording in their legislation differs greatly.

In North Carolina, for example, "secretly peeping into a room occupied by a female person" is banned. But in the State of Washington it is an offence to "knowingly view, photograph, film, for sexual purposes, another person, without that person's consent or knowledge, in a place where a reasonable person would believe that he or she can disrobe in privacy without being concerned about being filmed or photographed," or "in a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance."⁵

There are many questions that must be considered by Canadian lawmakers when drafting this legislation. Among them are the following:

- Should a new criminal offence be restricted to "voyeurism for sexual purposes" or should it be more all-encompassing and prohibit surreptitious invasions of privacy for other purposes?
- Just when exactly is a person's privacy invaded?
- To what activities, places and circumstances should the new offence of criminal voyeurism apply?
- Should there be any defenses or exemptions? And for whom (police, the media, employers)?
- When does a person have a reasonable expectation of privacy?
- What should be the mental element required of the crime?
- What should be the penalties for breaking this law?

In addition, our legislators will have to be careful to ensure that the criminal voyeurism offence does not infringe fundamental rights, such as the right to freedom of expression and freedom of the press and other media of communication.

"As sexual spying moves from the

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bedrooms of the nation to its locker rooms, toilet cubicles and even under its desks, the issue of voyeurism has also moved onto the political agenda."⁶ It will be interesting to watch and "record" what happens as a result of this move. In the meantime, keep those cameras rolling and your eyes on this column. 🍁

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Author's Notes

- 1 As quoted from a newspaper article by Cristin Schmitz entitled "Federal government eyes new office, 'criminal voyeurism'" that appeared in *The Lawyers Weekly*, Vol. 21, No. 18, at p.1 (hereinafter "the article in *The Lawyers Weekly*").
- 2 A request was made to the Justice Department of the Federal Government for a copy of this paper, however it was refused on the ground that "... the paper has not been approved for wider distribution [than ULC delegates]."
- 3 Refer to p. 776 of Greenspan & Rosenberg: *Martin's Annual Criminal Code 2001* (Aurora, Ontario, Canada: Canada Law Book Inc., 2002) (hereinafter "*Martin's Annual Criminal Code 2001*").
- 4 See p. 298, *Martin's Annual Criminal Code 2001* re: s. 184 of the Criminal Code of Canada.
- 5 Quoted from the article in *The Lawyers Weekly*.
- 6 Quoted from the article in *The Lawyers Weekly*.



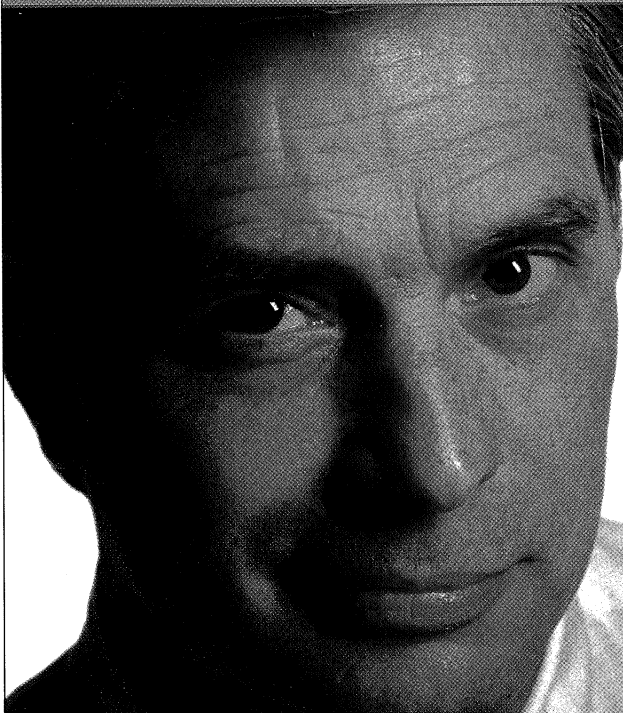
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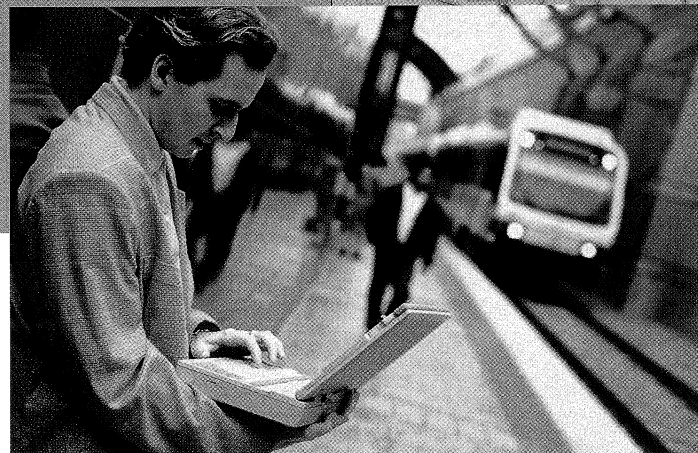
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