ELECTRONIC SURVEILLANCE AND THE POLICE:
A COMPARATIVE STUDY OF THE CANADIAN AND JAPANESE SYSTEMS

by
SHOICHIRO ISHIKAWA
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Department of Law

The University of British Columbia
1956 Main Mall
Vancouver, Canada
V6T 1Y3

Date November 17, 1986
ABSTRACT

"Electronic Surveillance", the mechanical technique to monitor private communications of the suspect is one of the most powerful weapons of the police in modern crime-prevailing societies. In Canada the attempt to set up a legal framework to balance the police need for electronic surveillance against the citizen's right to privacy resulted in the Protection of Privacy Act proclaimed on June 30, 1974. In Japan, in contrast, with no specific legislation governing electronic surveillance, the police refrain from resorting to this enchanting method of criminal investigation. The purpose of this study is to propose a desirable electronic surveillance law in Japan, taking advantage of the Canadian precedent in this field.

The introductory portion of this study focusses on the concept of privacy in the West and Japan. Despite the vast difference in traditional privacy consciousness between Canada and Japan, privacy has been recognized as a legally protected interest in both countries.

In the first half of the main portion, the study analyzes the Canadian electronic surveillance legislation from the standpoint of the police. While providing the most powerful investigative tool, the law also has had a negative impact upon the Canadian police in that it brought about undue interference,
judicial or otherwise, in the operation of criminal investigation.

In the last half of the main portion, the study deals with the Japanese system for electronic surveillance. The conclusion reached is that the Canadian legislative precedent can, with some necessary modification, be an appropriate model for Japan, and that Japan should introduce an electronic surveillance system with less intrusive power than in Canada while preserving the traditional independent authority of the police in criminal investigation.
# TABLE OF CONTENTS

I. INTRODUCTION  

II. PRIVACY IN THE WEST AND JAPAN  
   A. Privacy in Canada and Other Western Countries  
   B. Privacy in Japan  

III. ELECTRONIC SURVEILLANCE IN CANADA  
   A. Electronic Surveillance before the Enactment of the Protection of Privacy Act  
      1. Police Behaviour  
      2. Legislation and Court Decisions  
      3. Advent of the Protection of Privacy Act  
   B. Analysis of the Protection of Privacy Act  
      1. Introduction  
      2. General Outline of the Protection of Privacy Act  
      3. Scope of the Protection of Privacy Act  
         a. Meaning of Private Communication  
            (i) General Definition  
            (ii) Suspicion of the Originator  
            (iii) Knowledge of the Originator  
            (iv) Consent of the Originator  
            (v) Originator of Communication  
         b. Meaning of Interception  
            (i) Requirement of Third Party  
            (ii) Requirement of Use of Artificial Device  
      4. Lawful Electronic Surveillance  
         a. Electronic Surveillance with Consent  
         b. Electronic Surveillance with Judicial Authorization
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>Ordinary Authorization</td>
<td>44</td>
</tr>
<tr>
<td>(ii)</td>
<td>Known Person and Primary Target</td>
<td>48</td>
</tr>
<tr>
<td>(iii)</td>
<td>Renewal of Authorization</td>
<td>53</td>
</tr>
<tr>
<td>(iv)</td>
<td>Emergency Authorization</td>
<td>54</td>
</tr>
<tr>
<td>(v)</td>
<td>Post-Authorization Notice</td>
<td>54</td>
</tr>
<tr>
<td>5.</td>
<td>Evidential Rule</td>
<td>55</td>
</tr>
<tr>
<td>a.</td>
<td>Primary Evidence</td>
<td>56</td>
</tr>
<tr>
<td>b.</td>
<td>Derivative Evidence</td>
<td>57</td>
</tr>
<tr>
<td>C.</td>
<td>Impact of the Protection of Privacy Act on the Police</td>
<td>57</td>
</tr>
<tr>
<td>1.</td>
<td>Positive Aspect to the Police</td>
<td>57</td>
</tr>
<tr>
<td>2.</td>
<td>Negative Aspect to the Police</td>
<td>61</td>
</tr>
<tr>
<td>3.</td>
<td>Conclusion</td>
<td>65</td>
</tr>
<tr>
<td>D.</td>
<td>Constitutionality of the Protection of Privacy Act</td>
<td>65</td>
</tr>
<tr>
<td>IV.</td>
<td>ELECTRONIC SURVEILLANCE IN JAPAN</td>
<td>72</td>
</tr>
<tr>
<td>A.</td>
<td>Necessity of Electronic Surveillance</td>
<td>72</td>
</tr>
<tr>
<td>B.</td>
<td>Legitimacy of Electronic Surveillance</td>
<td>78</td>
</tr>
<tr>
<td>1.</td>
<td>Court Decision</td>
<td>78</td>
</tr>
<tr>
<td>2.</td>
<td>Legislation</td>
<td>80</td>
</tr>
<tr>
<td>3.</td>
<td>Constitution</td>
<td>83</td>
</tr>
<tr>
<td>4.</td>
<td>Conclusion</td>
<td>87</td>
</tr>
<tr>
<td>C.</td>
<td>Desirable Contents of Electronic Surveillance Law in Japan</td>
<td>88</td>
</tr>
<tr>
<td>V.</td>
<td>CONCLUSION</td>
<td>96</td>
</tr>
<tr>
<td>CONTENTS</td>
<td>PAGE</td>
<td></td>
</tr>
<tr>
<td>---------------</td>
<td>------</td>
<td></td>
</tr>
<tr>
<td>NOTES</td>
<td>99</td>
<td></td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td>121</td>
<td></td>
</tr>
</tbody>
</table>
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I. INTRODUCTION

The development of modern technology has provided the police with various advanced methods to collect criminal information, identify suspects and survey their activities. Among them, "electronic surveillance", the mechanical technique to listen to and record private communications of the suspects is one of the most powerful weapons of the police in their performing the crime-fighting duty. On the other hand, it could create a continuous threat to the citizen's right to privacy if performed without reasonable and necessary control.

Thus, in the context of electronic surveillance it is important to set up a framework to balance the two conflicting social interests, namely, the need of the police to obtain information on criminal activities and the protection of the individual's right to privacy. In Canada, the attempt to set up this framework resulted in the Protection of Privacy Act proclaimed on June 30, 1974, which has decided the scope of lawful interception by the police of private communications under restricting conditions. After a decade of confusing practice, the law now seems to have furnished the police with the most effective method of both evidence-gathering and intelligence-gathering in major crime investigation, while protecting the constitutional right to privacy of the citizens by virtue of judicial control over the police conduct.
In Japan, on the other hand, with no specific legislation governing electronic surveillance the police refrain from resorting to this enchanting method of criminal investigation, with the result that it is getting difficult for them to deal with the deteriorating crime situation in the country. Especially, it seems impossible for the police to suppress, only by means of the traditional methods of investigation, the escalating activities both of "Boryokudan", the traditional organized crime, and of "Kageki-ha", the ultra-leftwing terrorists.

The purpose of this study is to propose a desirable electronic surveillance law in Japan, taking advantage of the Canadian precedent in this field. This will be done through analysis of the legal situations concerning electronic surveillance in Canada and Japan, and examination of the difference in crime situation and police accountability between the two countries.
Before starting the discussion on the main topic of this study, namely, electronic surveillance per se, I would like to briefly examine the concept of privacy in Japan as compared with that in the West, because electronic surveillance is inseparably related to the intrusions into the privacy of suspects and other citizens concerned. The Protection of Privacy Act is a legal framework by the Canadian legislature to balance the police need against the privacy right. If there exists a fundamental difference in the concept of privacy as a legally protected interest between both countries, the Canadian legislative precedent might be irrelevant to the electronic surveillance law in Japan which is to be proposed in this study.

A. Privacy in Canada and Other Western Countries

It goes without saying that people in Canada and other Western countries place much value on privacy. According to a survey conducted by Bell Canada in May, 1982, "privacy and confidentiality of personal information is the key public issue surrounding the spread of new technologies."2 The London Privacy Survey, which polled a random sample of 210 households in London, Ontario in 1982, showed that ninety percent of respondents cited the protection of privacy as important or very important, and that sixty-two percent of them were very concerned or somewhat concerned about the threats to their own privacy.3
Although it was in 1890 when the legal right to privacy was claimed for the first time, privacy had long been an important concept in Western thinking. It is maintained that the existence of the private realm "can be found, marked off, hinted at, or groped for in some of [the] oldest legal codes and in the most influential philosophical writings" in the West, such as the Bible, Socrates, Plato, Thomas More and Locke. For instance, Lubor Velecky points out that Aquinas' *Summa Theologiae*, a typical medieval encyclopedia of moral problems, contains several discussions germane to privacy. Aquinas recognized the distinction between the sphere of the private individual and that of the community, and his "discussion of the supremacy of individual conscience implies that a high value is set upon the individual's interiority and autonomy."

Modern appreciation of privacy diffused in European and North American societies during the third quarter of the nineteenth century, when a huge number of the urban working classes, who were free from the oppressive moral opinion of village and rural society and from the daily scrutiny of others in the small communities, emerged as a result of the industrial revolution. In *Privacy: Its Constitution and Vicissitudes*, Professor Edward Shils detailed the reasons for the increase in the amount of privacy enjoyed during this period. According to the article, in addition to the basic ecological and economic changes associated with urbanization and industrialization, the emergence of the concept of respectability among the urban working classes of the industrial countries, the puritanical
ethos which "not only emphasized each man's responsibility for his own soul and the well-being and property of his own family but also encouraged him to be ambitious"9 and thereby "focused his attention on a remote goal and ... diverted his attention from his neighbors",10 the growth of individuality, the growth of literacy and increased education, and the respect by the increasingly liberal and constitutional governments for private economic activities were the main factors contributing to the efflorescence of privacy in the third quarter of the nineteenth century, which is called "the golden age of privacy".

However, the golden age was not long-lived. By the end of the nineteenth century, people in the West had begun to be much concerned about the threats to their privacy. Their private lives became more and more vulnerable to intrusions by "popular journalism, private police and investigators, the specialist of personnel recruitment in large-scale private business, and the practitioners of psychological and ... sociological research."11 In 1890 a personal outcry of a Boston lawyer Samuel Warren against the yellow journalism which had published detailed gossipy stories about Mrs. Warren's private affairs turned out an articulated entitled "The Right to Privacy"12 by Warren himself and his colleague, Louis Brandeis. The article in the Harvard Law Review examined a number of common law precedents in which relief had been afforded on several different grounds such as defamation, breach of confidence, invasion of property right, etc., and concluded that they were in reality based upon a broader principle entitled to separate recognition, to wit, the
right to privacy. The new right proposed by the article was later described by Brandeis as a Supreme Court Justice as "the most comprehensive of rights and the right most valued by civilized men", and has been an increasingly important legal issue in Western countries, where the enlarged government bureaucracy demands intimate details about many aspects of the private lives of the citizens in exchange for various public services provided to them, and where the collection of private information both by the law enforcement agencies and by various organizations in the private sector is getting more and more intrusive in proportion to the development of modern technology.

In fact, the article by Warren and Brandeis, which recognized for the first time the legal right to privacy, succeeded in having a tremendous impact upon American jurisprudence. "It enjoys the unique distinction of having synthesized at one stroke a whole new category of legal rights and of having initiated a new field of jurisprudence." Within a year after the publication the first reported case appeared which expressly recognized, citing the Warren and Brandeis article, the right to privacy. In 1902 the existence of the new right was in issue for the first time before a court of last resort in Robertson v. Rochester Folding Box Co., where the defendant made use of the picture of a young lady to advertise its merchandise without her consent. The plaintiff asked for an injunction to stop the publication of her picture as well as compensation for damages. The New York Court of Appeal in this
case rejected the plaintiff's request, declining to recognize the right to privacy. The decision brought about a storm of public disapproval, which eventually forced the New York legislature to pass laws protecting privacy. In 1905 the Supreme Court of Georgia dealt with essentially the same question in *Pavesich v. New England Life Insurance Company*, where the defendant used the plaintiff's name and picture in its newspaper advertisement without his consent. In this case the court refused to follow *Robertson* and recognized the existence of a distinct right of privacy proposed by Warren and Brandeis. This became the leading case thereafter, and the right to privacy came to be recognized in virtually all jurisdictions in the United States.

In contrast to the American counterparts, the Canadian courts have been reluctant to recognize a general right to privacy. Instead, the term of privacy has been used as a statement of principle in support of some other already recognized right or cause of action. Like the English courts, the Canadian courts "have been content to grope forward, cautiously along the grooves of established legal concepts ... rather than make a bold commitment to an entirely new head of liability." However, privacy interests had long been legally protected by various causes of action recognized at common law, such as defamation, breach of contract, interference with a property right, trespass and nuisance, as well as by miscellaneous statutes remedies such as Section 173 and Section 381(1)(f) of the Criminal Code. Further, prior to the enactment of the *Protection of Privacy Act* in 1973, which was the
first federal legislation whose main object was to protect the right to privacy, the Provinces of British Columbia, Manitoba and Saskatchewan had adopted general Privacy Acts and thereby created civil liability for unreasonable invasions of privacy. According to the description by Professor Peter Burns in 1976, "the combined effect of the extant common law, and provincial and federal legislation, grants Canadians a fair measure of protection against invasions of privacy."26

The concept of privacy covers a wide range of human activities. It is said that the law of privacy is directed at four kinds of invasion: "intrusions upon the plaintiff's physical seclusion or solitude, public disclosure of private facts, publicity which places the plaintiff in a false light and appropriation for the defendant's benefit of the plaintiff's name or likeness." Also, it is maintained that psychological surveillance and data surveillance be added to the categories of invasion of privacy. The exploration of developments of case law on each of multifarious aspects of the privacy right is not a task of this study. However, in the context of electronic surveillance, we should note that both in the United States and Canada it has been recognized by the courts that the privacy right is not merely protected by a civil action in tort, but also guaranteed by the Constitution. In Katz v. United States, the Supreme Court of the United States held:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.
Similarly, the Supreme Court of Canada in Hunter et al. v. Southam Inc.31 declared, as detailed later in this study, that Section 8 of the Canadian Charter of Rights and Freedoms32 guaranteeing "the right to be secure against unreasonable search or seizure" protects the right of privacy. Thus, the constitutional protection of privacy in Canada is to be one of the primary considerations in this study.

B. Privacy in Japan

The notion of privacy in any society is profoundly affected by culture and traditions. Therefore, value of privacy varies from society to society. It is widely known that the traditional Japanese society placed little value on privacy of individuals. Indeed, Japanese language used to contain no precise equivalent to "privacy". Therefore, the English word "privacy" (phonetically spelled "puraibashi") is used in current literature. The opinion survey of privacy consciousness conducted by the Prime Minister's Office in February, 1981, which polled a random sample of 3,000 adults in the country, shows a striking contrast to the London Privacy Survey, supra. Ten percent of respondents did not know the concept of privacy. Only twenty-five percent of them were concerned about the protection of privacy. The ratio of those who had experienced any intrusion into their own privacy was no more than nineteen percent.33

It seems that the emphasis in Western culture on the value of privacy is greatly related to the Christian principles,
upon which Western civilization has been built, advocating the importance of individuality. According to the Christian concept of human being, Man, made in the image of God, is "above all a spiritual being, intelligent and free, endowed with an immortal soul; in short, a person, and as such, exceeding in value all the material universe while having charge and responsibility for his own destiny."34 And in order to ensure the individual's integrity and the development of personal identity, it is essential to protect a zone of privacy within which the ultimate secrets of one's core self remain inviolable against unwanted intrusion or observation.35 Despite the considerable disagreement about the definition of privacy right among Western legal students (e.g. "right to be let alone",36 "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others",37 "control over when and by whom the (physical) part of us (as identifiable persons) can be seen or heard (in person or by use of photographs, recordings, T.V., etc.), touched, smelled or tasted by others"38), there seems to be no dispute that privacy is an essential means to guarantee individual autonomy and personal freedom as well as a fundamental element of the respect and dignity that individuals are owed as human beings.39

In contrast, Japanese culture has no tradition emphasizing the autonomy of individuals, from which the value of privacy is derived in Western culture. The tradition of Buddhism, which has had a profound influence upon the Japanese mentality,
"recognizes the temporal, passing, impermanent, changing nature of ego, and by so doing is led to find the true self through identification with universal oneness." Thus, according to the Buddhist tradition, the ideal state of mind of a human being is Muga no Kyochi (state of no-ego), which means "the rejection of the self as an independent agent separate from the web of interconnected conditioned causes." Also, Confucianism, which had long dominated the traditional moral consciousness of Japanese people, emphasizes collectivism as opposed to individualism. According to the Confucian concept of Man and society, Men are not equal and the individual has significance only as a member of a hierarchical group to which he belongs. An inferior in a hierarchical social order must, as duty, obey his superior who has the authority to lay down rules and orders. Sacrificing oneself in the interests of the group to which an individual belongs (family, community, nation, etc.) is highly advocated and often compelled (Messhi Hoko). The group insists upon the individual's loyal maintenance of the group's good name before outsiders, and often exercises a moral right to know about the private life of the individual. Thus, it seems that there used to be little, if any, room in the traditional Japanese society for the development of individualism and norms of privacy. The result of the opinion survey by the Prime Minister's Office, supra, indicates that in spite of the full-scale democratic reformation of the Japanese society, which took place immediately after World War II, the privacy consciousness of Japanese people has not fully developed yet.
An interesting example which illustrates the difference in privacy consciousness between the West and Japan is the unique activity by the Japanese police called "Junkai Renraku" (routine visit to the residents). In Japan each patrol officer is responsible for routine visits to four or five hundred households so that all the residents in the jurisdiction of a police station shall be called upon every six months on average. On each visit the police officer interviews the resident and fills out the residence card containing such information as home address, permanent address, date and place of birth, occupation, school, plate number of automobile, family members, etc. And those cards are filed in each police post. This activity is not authorized by law but supported by tradition which stresses voluntary cooperation with the police. No doubt such activities, if conducted by Canadian police forces, would be totally rejected as invasion of privacy. Indeed, I was told by a senior police officer in one of the major police stations in Hyogo Prefecture five years ago; "In the jurisdiction of this police station several households reject the routine visits. They are all Western foreigners (Gaijin)."

The question arises: is it necessary to consider the protection of privacy in proposing an electronic surveillance law in Japan? There seem to be several convincing reasons for answering "yes" to this question.

First of all, the right to privacy has acquired a universality that transcends national boundaries by virtue of the
No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

The second reason is the democracy of Japan itself, which has been firmly established by the 1947 Constitution of Japan. The post-war Constitution, which was passed, under heavy American influence, by the Diet as an amendment to the 1889 Meiji Constitution, embodied a veritable constitutional revolution in the locus of sovereignty and in legitimized public values and institutions. Above all, it established a strong parliamentary democracy, with extensive individual rights and freedoms. Sovereignty was placed in the hands of the people, and the fundamental human rights in the sense of "rights possessing a prestate and preconstitutional character that derives logically and inevitably from human nature" was recognized for the first time. Thus, the idea of the dignity of individual, the fundamental concept of Western tradition from which the value of privacy is derived, has been incorporated into the Japanese legal system. Article 13 of the Constitution of Japan proceeds (translation):

All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.
The difference between democracy and totalitarianism in relation to the protection of privacy has been described as follows:

Totalitarian systems deny most privacy claims of individuals and non-governmental organizations to assure complete dedication to the ideals and programs of the state, while the totalitarian state's own governmental operations are conducted in tight secrecy. Democratic societies provide substantial amounts of privacy to allow each person widespread freedom to work, think, and act without surveillance by public or private authorities, and to provide similar breathing room for organizations; but they try to strike a delicate balance between disclosure and privacy in government itself.46

If the Japanese people and their government are to keep the distasteful memories of pre-war totalitarianism in mind, and are to firmly commit themselves to the present democratic regime, there should be no arbitrary interference by the state with the privacy of citizens.

Therefore, it was quite appropriate that the Tokyo District Court on September 28, 1964, recognized the right to privacy in the Utage no Ato (After the Banquet) Trial,47 in which the existence of the new right was in issue for the first time in the country. This case arose with the publication of Yukio Mishima's model novel concerning a famous politician, who was unhappy about the book and therefore sued for his mental distress. The court comprehended the privacy right in this context as the right not to have one's private life wantonly opened to the public, and ruled that "to respect the privacy right is no longer only a matter demanded by ethic, but it is proper to consider it as a human interest which is elevated to
the point of being accorded legal relief against unlawful infringement and although the privacy right is subsumed in the so-called right of personality, this does not preclude referring to it as a right" (translation). Also, it should be noted that the judgment considered the dignity of individuals guaranteed by Article 13 of the Constitution, supra, as the fundamental basis of the new right. The court stated (translation):

The idea of the dignity of the individual, which is one of the fundamental concepts of modern law and one on which the Constitution of Japan stands firmly, can only be secured by mutual respect for personality and by protection from improper interference, and for this reason it cannot be permitted to publicize another's personal affairs without suitable reason.

This constitutional approach to the privacy right was followed by the Supreme Court in the Shozoken (Right to Likeness) Trial on December 24, 1969, in which the Grand Bench of the court recognized the right of a person to his own likeness as an aspect of the privacy right. The court ruled (translation):

Now, Article 13 of the Constitution provides that all of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs. It can be said that this provides that the people's freedom with respect to their private lives should be protected against the exercise of state powers such as the police power. As one of the freedoms of the individual with respect to private life, it should be said that every man has the freedom not to have his face or physical appearance (hereinafter, "face") photographed involuntarily and without permission.49

To sum up, despite the traditional indifference of the people thereto, privacy has been recognized as a legally
protected interest in Japan, and has been given constitutional value by the courts. Thus, the protection of privacy should be one of the major considerations in the context of electronic surveillance in Japan as well.
III. ELECTRONIC SURVEILLANCE IN CANADA

A. Electronic Surveillance before the Enactment of the Protection of Privacy Act

1. Police Behavior

Since long before the enactment of the Protection of Privacy Act, electronic surveillance had been widely used as an investigative technique by the Royal Canadian Mounted Police (hereinafter referred to as "the RCMP") and other police forces in Canada. According to the report of McDonald Commission, the RCMP started the use of wiretapping in the 1930's, and both wiretapping and electronic eavesdropping became common among Canadian police forces in the years following the Second World War. During the ten year period from 1963 to 1973, the RCMP conducted 1,912 electronic intrusions including wiretapping with one-party consent and electronic eavesdropping. The Montreal Urban Community Police used 355 wiretaps during the sixteen month period from January, 1972 to April, 1973. Clearly, electronic surveillance had been considered by the police personnel to be a "necessary business" in coping with ever-increasing sophisticated organized crimes.

In the absence of relevant legislation, the policy on electronic surveillance - when it should be resorted to - was to be decided by the individual police forces, and one thing in common was that electronic surveillance had been used only with the permission of a high police authority because of its
Let us see an example of the Metropolitan Toronto Police Department. In March, 1969, the Board of Commissioners of Police for Metropolitan Toronto decided the policy concerning electronic surveillance as follows: "The use of [wiretapping and electronic listening] equipment by any member of the Metropolitan Toronto Police will only be with the approval in each case of the Chief of Police and only when in his opinion there is reasonable and probable cause to believe that a criminal offence has been or is about to be committed." As to the RCMP the situation was somewhat chaotic, because since March, 1959, the RCMP Headquarters in Ottawa had taken the policy forbidding the use of wiretapping by members of the force in the investigation of criminal matters, except where the consent of a party to the conversation was obtained. Although electronic eavesdropping other than wiretapping was not referred to in it, this policy was clearly contrary to the practical demands of field operations. As a result, wiretapping was being carried out in the field in defiance of the policy, and this practice was withheld from top officers of the force who were responsible for the Headquarters' policy.

One important aspect of the electronic surveillance prior to the Protection of Privacy Act is that its primary purpose was not the gathering of evidence, but the gathering of intelligence. In other words, the police used electronic surveillance "not as a tool to gather evidence for presentation at trial, but as an aid to investigation - to keep under
surveillance those they suspect of crime." What we should note here is that the police had been using it not only for "tactical intelligence gathering", that is to say, event-specific surveillance in an investigation of particular offences, but also for "strategic intelligence gathering", that is to say, panoptic surveillance to monitor activities and association of criminal figures apart from investigation of specific offences. The electronic surveillance was able to be performed without firm knowledge on the part of the police of what kind of offence had been or was to be committed.

On the other hand, the police deliberately refrained from adducing the intercepted conversation as evidence at trial, unless to do so was really inevitable in the circumstances. This was the established behavior common not only to the RCMP, which had the formal policy prohibiting wiretap, but also to the municipal police forces such as those in Toronto, Montreal and Vancouver. The fact that "there [were] less than a dozen reported cases in Canada where evidence obtained electronically [had been] introduced in court" before the enactment of the Protection of Privacy Act eloquently illustrates this aspect. We can infer some shady mental state or dilemma on the part of the police from the reluctance to use the intercepted conversation as evidence: the electronic surveillance is a necessary business, but it must be performed secretly. The disclosure of its use would alert the criminals about the police technique of
investigation. Above all, the disclosure might invoke unnecessary reaction of the citizens who would feel a threat to their own right to privacy. -- The electronic surveillance had been regarded, consciously or unconsciously, as a "dirty business".67

2. Legislation and Court Decisions

Prior to the passage of the Protection of Privacy Act, there was no federal statute adequately dealing with electronic surveillance by the police. Section 25 of the Act incorporating the Bell Telephone Company of Canada68 reads:

25. Any person who shall wilfully or maliciously injure, molest or destroy any of the lines, posts or other material or property of the company or in any way wilfully obstruct or interfere with the working of the said telephone lines or intercept any message transmitted thereon shall be guilty of a misdemeanour.

Though it had not been clear for a long time whether this provision makes the wiretapping by the police illegal or not, the decision of the Ontario Court of Appeal in Re Copeland and Adamson69 in 1972 held that wiretapping is not a violation of the section unless the audio surveillance creates any disturbance of the conversation.

At provincial level, there was no legal prohibition against electronic surveillance except in Alberta and Manitoba.70 The Manitoba Telephone Act71 and The Alberta Government Telephone Act72 specifically prohibited the interception and clandestine
recording of telephone communications by any means.73 Doubts were pointed out, however, as to whether provincial legislation could constitutionally control conduct of law enforcement officers in investigation of criminal offences.74 In Regina v. Foil,75 where admissibility of tape recording of telephone conversations was contended, Manitoba Queen's Bench held, obiter: "[I]t is difficult to see how the provision of The Manitoba Telephone Act, a statute of a provincial legislature, can affect the question of the admissibility of evidence in a criminal prosecution of this kind, since criminal law and criminal procedure are within the exclusive jurisdiction of the Dominion."76

In the absence of sufficient statutory regulations, both primary evidence and derivative evidence obtained by electronic surveillance had been successfully introduced to Canadian courts; although it did not often happen, as mentioned before, that primary evidence, to wit, the intercepted conversation itself, was adduced.

In Silvestro v. The Queen,77 the Supreme Court of Canada admitted primary evidence obtained by wiretapping. In this case, the accused was charged with keeping a common betting house and engaging in book-making, and the recorded telephone conversation of the accused was adduced as evidence. It was held that the telephone conversation which had been accurately recorded by the police was admissible to prove the nature,
character and atmosphere of the premises. The intercepted conversation alone was not enough evidence to convict under the circumstances, but it was evidence of some value tending to prove the charge.

Further, it was held by the Ontario Court of Appeal in Regina v. Steinberg,78 a room bugging case, that "the method of the obtaining of evidence does not affect its admissibility, the question in such cases being the relevance of the tendered evidence."79 In this case the police surreptitiously installed a recording device while executing a search warrant of the premises of the accused. The tape recording of the accused's voice obtained from the device was, thus, admitted, and the conviction was secured though the court "[was] not satisfied that that which [had] occurred [had] the appearance of justice."80 This was a natural conclusion, because prior to the enactment of the Protection of Privacy Act there was no rule restricting the admissibility of evidence on the basis that it had been obtained by illegal means,81 as the same court held, one year after the coming into force of the law, in Regina v. LeSarge:82

There is not in Canada, apart from the rule which governs the admissibility of statements made by an accused to a person in authority, any general rule which excludes evidence which is relevant and otherwise admissible, on the ground that such evidence was illegally obtained. On the contrary, the general rule is that such evidence is admissible. Section 178.16(1) [of the Criminal Code] creates a limited exception to the general rule....83
3. Advent of the Protection of Privacy Act

The enforcement of the Protection of Privacy Act in 1974 completely changed the situation above. The legislation purports to protect the privacy of individuals by prohibiting with criminal sanction the wilful interception of private communications by artificial devices, and also by excluding primary evidence obtained by the illegal interception. As an exception, the law sets out a scope of lawful interception by the police of private communications subject to strict judicial scrutiny.

Without any deep analysis of the contents of the Protection of Privacy Act, we can see that the legislation has affected the attitude of the police toward electronic surveillance in two opposite ways.

On one hand, the law prohibited the "strategic intelligence gathering" by virtue of electronic surveillance, by tying the judicial authorization to intercept private communications to specific offences under investigation, and also by requiring post-interception notice to the objects of electronic surveillance. It is no longer possible for the police to resort to this enchanting investigative method without reasonable and probable ground to believe that the interception may assist the investigation of a particular offence.

On the other hand, as a positive aspect to the police, the law acknowledged the electronic surveillance by the police as
a legitimate method of criminal investigation. The electronic surveillance is no longer a "dirty business", something to be concealed from the eyes of the public. Thus, it eliminated the self-imposed limitation on the part of the police in using the intercepted private communications as evidence at trial. The result was, as Professor Peter Burns stated five years after the proclamation of the law, this: "No other recent piece of legislation has spawned such a plethora of case law in such a short period of time."88

B. Analysis of the Protection of Privacy Act

1. Introduction

The Protection of Privacy Act was enacted on December 4, 1973, and came into effect on June 30, 1974. It amended the Criminal Code by adding Part IV.1, "Invasion of Privacy", which created new offences of wilful interception of private communications by means of an electromagnetic, acoustic, mechanical or other device, wilful disclosure of the intercepted communications, and possession, sales and purchase of any device or component thereof designed primarily for the interception of private communications. At the same time, it set up a scope of lawful interception by the police of private communications as a means of criminal investigation. The law also codified the rules governing the introduction of evidence gathered by the electronic surveillance.
This structure of the legislation reflects a deliberate effort of the Parliament to set up a framework to balance two conflicting social interests; the protection of the society from ever-increasing sophisticated crimes; and the protection of individuals' right to privacy. As explained by Zuber J.A. in Regina v. Welsh and Iannuzzi (No. 6),\textsuperscript{95} the law clearly has two objectives. "The first was to protect private communications by prohibiting interception and to render inadmissible evidence obtained in violation of the statute. The second objective, which balances the first, was to recognize the need to allow the appropriate authorities, subject to specific controls, to intercept private communications in the investigation of serious crime, and to adduce the evidence thus obtained."\textsuperscript{96}

The Protection of Privacy Act also amended the Crown Liability Act\textsuperscript{97} by adding Part I.1 which provided for civil liability of the Crown in circumstances where a private communication is unlawfully intercepted or disclosed by government employees.\textsuperscript{98} It also amended the Official Secrets Act\textsuperscript{99} to permit electronic surveillance to be carried out for the prevention or detection of subversive activities directed against Canada or detrimental to the security, or for the gathering of foreign intelligence information essential to the security of Canada.\textsuperscript{100}

This study will focus on the electronic surveillance as a method of criminal investigation by the police, and therefore

2. General Outline of the Protection of Privacy Act

The components of Part IV.1 of the Criminal Code as amended to date have been briefly described as follows:

(a) the definition section, section 178.1, which defines the principal words and phrases used in Part IV.1 and by such definitions, delimits the scope of the Part;

(b) the offence-creating sections, sections 178.11, 178.18, and 178.20, which not only create three new indictable offences, but also provide for exemptions from the liability thus created;

(c) the procedural sections, sections 178.12 to 178.15, inclusive, which define the procedural steps to be followed to obtain judicial authorization both to initiate and to continue electronic surveillance;

(d) the evidentiary rule sections, sections 178.15(3); (5), 178.16 and 178.17, which enact a complete code of evidentiary rules both in respect of evidence of intercepted private communications and evidence obtained directly or indirectly as result of information acquired by means of such interceptions;

(e) the additional penalty sections, sections 178.19 and 178.21 which permit orders of forfeiture and awards of punitive damages to be made in addition to other penalties provided for in respect of contraventions of the offence-creating sections of the enactment; and,

(f) the reporting sections, sections 178.22 and 178.23, which demand that notice be given to the objects of interceptions carried out in accordance with authorizations and further that yearly public disclosure of the extent of court-ordered electronic surveillance activities be made by the political functionary under whose auspices such surveillance was conducted.

From the standpoint of criminal investigation performed by the police, a general outline of the law may be given in the
following way:
1. The police can lawfully intercept private communications of the suspects only when consent of the originator or intended recipient thereof is obtained, or when an authorization by a superior court judge is obtained.106
2. The offences in respect of which the authorization can be obtained are limited to those serious offences or those committed by organized crime as described in the definition section.107
3. An application for the authorization is ex parte and must be in writing and signed, if pertaining to a Criminal Code offence, by a designated agent of the provincial Attorney General, or if pertaining to a federal offence, by a designated agent of the Solicitor General of Canada.108
4. An authorization may be given only when the judge to whom the application is made is satisfied, on the basis of the police officer's affidavit, that it would be in the best interests of the administration of justice to do so,109 and one of the following conditions has been met;
   a. other investigative procedures have been tried and have failed.
   b. other investigative procedures are unlikely to succeed.
   c. the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.110
5. An authorization should;
   a. state the offence in respect of which private communications may be intercepted,111
b. state the type of private communication that may be intercepted

c. state the identity of the persons, if known, whose private communications are to be intercepted

d. generally describe, if possible, the place at which private communications may be intercepted

e. generally describe the manner of interception that may be used

f. set forth the period of validity, not exceeding sixty days

In addition, the judge may include such terms and conditions as he considers advisable in the public interest.

6. An authorization is subject to renewal from time to time on ex parte application. A renewal shall not be for a period exceeding sixty days.

7. In case of emergency, an authorization may be given without going through the regular application procedure. In this case, a police officer specially designated by the Solicitor General of Canada or the provincial Attorney General, as the case may be, can apply ex parte for an emergency authorization which may only be given for a period of up to thirty-six hours.

8. A private communication secured by lawful interception is admissible as evidence. However, in order for the lawfully intercepted private communication to be received in evidence, prior notice of the Crown's intention accompanied by the details of the communication has to be given to the accused.

9. A private communication secured by unlawful interception is prima facie inadmissible, unless the originator or intended
recipient has consented to its introduction in evidence. However, this is subject to a discretion of the trial judge to admit such evidence where the evidence is relevant and the unlawfulness of the interception was due only to a defect of form or irregularity in procedure.

10. Derivative evidence secured by reason of electronic surveillance is *prima facie* admissible. However, this is subject to a discretion of the trial judge to exclude such evidence where the admission of it would bring the administration of justice into disrepute on account of the unlawfulness of the interception.

11. The person who became the object of the electronic surveillance pursuant to the authorization is to be notified of the fact of the interception within ninety days of the date when the interception was lawfully terminated. This ninety day period may be replaced for a longer period of up to three years upon application, either at the pre-authorization stage or before the expiry of the notice period. This notice is irrelevant to the admissibility of the intercepted private communication in evidence.

3. **Scope of the Protection of Privacy Act**

As seen above, the *Protection of Privacy Act* is a legislation package regulating the "interception" of "private communications". If the investigative measures conducted by the police do not fall within the meaning of the "interception" of "private communications", it will be neither prohibited as an offence created by the law nor regulated by its evidential
rules. Therefore for the purpose of finding the scope of the Protection of Privacy Act, it is essential to find out the meaning of the two key words; private communication and interception.

a. Meaning of Private Communication

(i) General Definition

Section 178.1 of the Criminal Code defines "private communication" as; "any oral communication or any telecommunication made under circumstances in which it is reasonable for the originator thereof to expect that it will not be intercepted by any person other than the person intended by the originator thereof to receive it."

The above wording suggests that the criterion of private communication is partly subjective and partly objective. On one hand the subjective expectation of privacy on the part of the originator is essential for the communication to be a private one. On the other hand the expectation of the originator must be reasonable, and the reasonableness is to be judged objectively with all the circumstances taken into account such as "the location, content and purpose of the communication, the means by which it is transmitted, and the nature of the means, or techniques, if any, employed by the originator to prevent being overheard."

(ii) Suspicion of the Originator

It should be noted that even if the originator of the
communication suspects that the communication might be intercepted by a third party, his communication can be protected by the law as a "private communication" where his expectation of privacy is justified in the light of all the relevant facts and circumstances.

In Regina v. Watson, the accused was placed in an otherwise empty cell block with another related suspect, and a police officer secretly placed in a cell between those occupied by them listened to their conversation. The contents of the monitored conversation indicated that the accused was suspicious that the cell block might be "bugged". It was held by Mossop Co.Ct.J:

The conversation itself indicates that they were aware of the danger that the cell block might be "bugged" and while they may have exercised more caution having regard to this possibility, the very nature of the conversation suggests that they did not expect, nor was it reasonable for them to expect, that their conversation would be overheard. It being admitted by the police witnesses that the remaining five cells were unoccupied, I think it might be inferred that the accused and Martin had reasonable grounds to believe they were alone in the absence of a sound from any of the other cells. So I think it was reasonable for them to expect that their communication would not be intercepted and that the conversation therefore falls within the statutory definition of a "private communication".

On the other hand, there are a number of cases to the effect that the suspicion of interception on the part of the originator automatically takes his communication out of the ambit of the Protection of Privacy Act. For example, Brooke J.A. in Regina v. Samson et al. held in obiter:
...I think there is a serious question as to whether or not the communications of the respondent Samson tendered in evidence were private communications within the meaning of s. 178.1 ....

There was evidence on a voir dire of a statement of the respondent Samson which was clearly to the effect that he knew that there was a real danger that the telephone lines would be the subject of an authorization to intercept a private communication. In the circumstances, I question that it could properly be said that these communications were made under circumstances in which it was reasonable for Samson as the originator to expect that they would not be intercepted by any person other than the person whom he intended should receive it.136

The fallacy of this kind of reasoning is that it is clearly against the main objective of the Protection of Privacy Act, namely, the protection of the individual's right to privacy. In these days, Canadians who are involved in serious criminal activities such as drug trafficking normally suspect, at least to some extent, that their telephones might be tapped by the police.137 If the above reasoning is correct, the police can freely intercept their lines outside of the law.

Therefore the approach taken by Mossop Co.Ct.J. in Watson, supra, is essential in light of the protection of privacy.

(iii) Knowledge of the Originator

Cases are almost unanimous in holding that if the originator of the communication "knows" that his communication will be intercepted by a third party, it is not a "private communication".138
When he knows of the interception, there can be no expectation of privacy on the part of the originator. In this sense the originator's state of mind is decisive.

(iv) Consent of the Originator

Further it is now settled law that when the originator "consents" to the interception, his communication is not a "private communication", because in such a case he clearly knows that the communication will be intercepted by a third party. The Supreme Court of Canada, on the face of it, made this point clear in Goldman v. The Queen. In this case, recordings of both a telephone conversation and a face-to-face conversation between the accused and one Dwyer, a police informant, were introduced into evidence. Dwyer had consented to the police interception of the conversations. McIntyre J. held for the majority of the court:

Prior to the telephone call and the meeting with the appellant, Dwyer had signed a form of consent to the interception of his conversations with the appellant. 

...[I]t was abundantly clear that, during both the telephone conversation and the personal conversation which followed, Dwyer was fully aware that the police were intercepting and recording the words spoken. Dwyer then had no reasonable expectation that the conversations would not be intercepted.

...It will be observed at once that under the definition of "private communication" it is the originator's state of mind that is decisive. It follows, in my opinion, that if Dwyer was the sole originator of the communications they were not private communications within the meaning of the Act. They would not be subject to the terms of Part IV.1 of the Criminal Code.
However, it should be noted that this view is against the plain wording of Subsection 178.11(2)(a) of the Criminal Code. As Professor Peter Burns pointed out, Subsection 178.11(2)(a), dealing with one class of unprohibited interception of a "private communication", envisages an originator consenting to such an interception.141 The subsection reads:

(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;

Moreover, the above reasoning is also contrary to the authoritative interpretation of Section 178.16 of the Criminal Code, which acknowledges the interception made with consent of the originator as one class of lawful interception of a "private communication". In Goldman, supra, McIntyre J. also dealt with the interpretation of Section 178.16. He quoted the following judgment of Brooke J.A. in Regina v. Cremascoli and Goldman142 for the Ontario Court of Appeal:

Section 178.16 provides for the admissibility in evidence of an interception of a private communication in two circumstances. The evidence of the interception is admissible, first, if the interception was lawfully made and, second, evidence of all other interceptions is admissible with the consent specified in s.178.16(1)(b). An interception of a private communication is lawfully made if one of the parties to it consented to the interception.143 [emphasis added]

Then McIntyre J. proceeded:

I am in full agreement with Brooke, J.A., in his comments above quoted .... Section 178.11(1) makes it an indictable offence to intercept a private
communication by means of the devices described and in s-s.(2) provides that s-s.(1) which created the offence will not apply to a person who has the consent, express or implied, of the originator of the private communication or of the person intended to receive it. This consent is a consent to interception and its effect is to preserve from illegality, in other words, to render lawful, an interception of a private communication made with consent. It is important to note as well that the consent may be express or implied and may be given by either the originator of the private communication or the intended recipient.144

[emphasis added]

These statements of McIntyre J. clearly suggest that even when the originator has consented to the interception his communication is a private one: The interception here is a lawful interception of a "private communication".

I think that this manifest contradiction in the judgment of the Supreme Court of Canada in Goldman should be resolved by virtue of a proper interpretation of the words "the person intended by the originator thereof to receive it" (hereinafter referred to as "intended recipient") in the definition of "private communication". I again quote the definition in Section 178.1 of the Criminal Code:

"private communication" means any oral communication or any telecommunication made under circumstances in which it is reasonable for the originator thereof to expect that it will not be intercepted by any person other than the person intended by the originator thereof to receive it;

In my opinion, when the originator of a communication consents to the interception and therefore not merely knows but also positively accepts the fact that a specific third party will listen to his communication, then the third party should fall within the category of "intended recipient". (The point of my
argument is to create a class of persons belonging to both "third party" and "intended recipient".) It follows that the communication intercepted with consent of the originator is still a private communication. This train of thought would be sensible, because in such a case the originator apparently intends the third party to listen to his communication.

In addition to resolving the above contradiction in Goldman, this interpretation has another practical advantage. Assume parties of a conversation give the consent to a specific acquaintance; e.g., one makes a telephone call to his friend while his wife is listening to it with their consent on an extension telephone.145 If my argument is accepted, their privacy is protected under Part IV.1 of the Criminal Code; otherwise not.

(v) Originator of Communication

Since the state of mind of the originator of communication is a decisive factor in determining whether it is a private communication or not, the question of who is the originator is essential in considering the scope of the legislation.

This issue was also authoritatively settled by the Supreme Court of Canada in Goldman, supra.146 According to the decision, the originator is the person who makes the remark or series of remarks. A "conversation" is divided into a series of component "communications", and the originator flips back and
forth depending upon whose lips are moving at any moment during the conversation.147

b. Meaning of Interception

Section 178.1 of the Criminal Code broadly defined the term "interception" as follows:

"intercept" includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof,

Here, two questions arise:
1. Can there be an interception without interference by a third party?
2. Can there be an interception without the use of an electromagnetic, acoustic, mechanical or other device?

(i) Requirement of Third Party

As to the first question above, authorities are divided. This issue was initially dealt with in Regina v. McQueen.148 In this case, the accused was charged for keeping a common gaming-house and unlawfully engaging in book-making, and several telephone conversations between a police officer and unidentified customers who called to the betting house during the raid by the police were introduced into evidence. McDermid J.A. held for the Alberta Court of Appeal, referring to the dictionary definition of the word "intercept", that there had been no interception in the absence of any interference by a third party between the place of origin and the place of destination of the communication. The Protection of Privacy Act is aimed at
preventing a third party from intercepting a private communication and therefore Section 178.16 of the Criminal Code doesn't apply to the case where there are only two people involved even if the originator is mistaken as to the identity of the recipient of his communication.

In Regina v. Bengert, Robertson et al. (no.2),149 however, Berger J. for the British Columbia Supreme Court took the view that McQueen was wrongly decided. In this case, Air Canada located a missing bag which was found to contain cocaine. The RCMP arranged with Air Canada that anyone calling to inquire about the bag should be given a number to call. At the number, the RCMP officers are ready to answer and record the call in the disguise of an employee of Air Canada. It was held that where the originator is mistaken as to the identity of the actual receiver of the communication because of his "impersonation or fraud", the receiver cannot be an "intended recipient" in the definition of "private communication" in Section 178.1 of the Criminal Code. Therefore the police officers' answering and recording the telephone calls amounted to an "interception", though there was no interference by a third party.

In my view, the ruling in Bengert pays little attention to the aim of the Protection of Privacy Act which was accurately explained in McQueen,150 and also pays little attention to the practical needs of everyday police investigation. In criminal investigations there are numerous occasions where a police officer has to disguise his identity. Assume a kidnapper
secretly and repeatedly calls the parents of the kidnapped child. If this ruling is correct, when a police officer answers and records the kidnapper's call in the disguise of the child's parent this investigative activity turns out to be a offence under Section 178.11 of the Criminal Code. Moreover this ruling would make all the recordings of an undercover police officer's conversation illegal.

Naturally, recent cases are refusing to follow Bengert. In Regina v. Newall et al (No.1) the British Columbia Supreme Court held, per Bouck J.:

R. v. Bengert, supra, holds that if Hughes was representing himself as a drug dealer when he was actually a police undercover agent, then he was not the "the person intended" by Erven to receive the oral communication. With respect I have some difficulty reading that interpretation into the legislation.

Parliament does not say the originator must know the identity of the receiver before the interception of the communication is admissible on the consent of the receiver. What the statute means to protect is the admission of interceptions on the consent of a third person or eavesdropper who is neither the originator nor the person intended to receive the call from the originator.

(ii) Requirement of Use of Artificial Device

The next question is whether or not listening to a private communication through the medium of the naked ear constitutes an "interception" for the purpose of Section 178.16 of the Criminal Code, which regulates the evidential rule concerning electronic surveillance. This issue arises because the words "by means of an electromagnetic, acoustic, mechanical
or other device" used in the offence-creating section 178.11 are not adopted in Section 178.16.

In Regina v. Beckner154 Dubin J.A. held for the Ontario Court of Appeal that Section 178.16 doesn't apply where the communication is merely overheard by a third party without the aid of any electromagnetic, acoustic, mechanical or other device. There is no "interception" without using any artificial device. This view has been supported by the majority of the cases,155 and seems to be a natural conclusion since the Protection of Privacy Act was designed to protect the individual's right to privacy which had been endangered by artificial surveying devices produced by modern technology.156

4. Lawful Electronic Surveillance

Once electronic surveillance by the police falls within the scope of an "interception" of "private communications" as seen above, Part IV.1 of the Criminal Code is applicable to both the surveillance itself and the evidence obtained thereby. The law acknowledges two categories of legitimate electronic surveillance by the police:

1. electronic surveillance with consent of a party of private communications;157
2. electronic surveillance in accordance with a judicial authorization.158

In order for the intercepted communications to be introduced into
evidence at trial, the electronic surveillance by the police, as a general rule, must fall within either of the two categories. 159

a. Electronic Surveillance with Consent

As ruled by the Supreme Court of Canada in Goldman, supra, 160 an interception by the police of private communications is lawful when prior to the interception the police have obtained the consent to do so, express or implied, from one of the parties of the communications.

It seems that persons who consent to the interception by the police of their private communications can be classified into three categories;
1. undercover police officer, 161
2. police informant who himself is involved in the crime which the police are investigating,
3. other persons who are somewhat related to the crime, such as victims.
Several legal issues arise depending upon which categories the consenting party belongs to.

Where the consenting party is an undercover police officer, the other parties who communicate with him do not know his true status. Therefore the legal effect of the originator's mistaken belief as to the intended recipient's identity might be contended at trial. According to the reasoning of Berger J. in Bengert, supra, 162 an undercover police officer cannot be an "intended recipient" because of his impersonation, and thus his
consent cannot render the interception lawful. However, this result would be clearly contrary to the common sense, as seen before. In Regina v. Newall et al. (No.1), where the admissibility of recorded conversations between the accused and an United States drug enforcement undercover officer was in issue, Bouck J. for the British Columbia Supreme Court refused to follow Bengert, and held that the originator's mistake as to the identity of the undercover officer does not change the officer's legal status as an intended recipient. Therefore, the consent given by the undercover officer makes the interception lawful inspite of his impersonation.

Until recently, where the police wanted their informants or other cooperators belonging to the second or third category mentioned above to wear a "body pack" for the purpose of monitoring their conversations, it had been necessary to let them obtain a temporary licence for the possession of the device issued by the Solicitor General of Canada, so that they might be exempted from criminal liability for the offence under Section 178.18 of the Criminal Code. The Criminal Code amendment in 1985, however, acknowledged lawful possession of the device without the licence by those persons acting under the direction of the police.

Where the consenting party belongs to the first or third category, the consent given to the police would usually be a genuine one. However, where the consentor belongs to the second category, namely, the informant who himself takes part in the
crime which the police are investigating, it often happens that
the informant barters his privacy in return for lenient treatment
by the police at the expense of his accomplice. Therefore, the
nature of the consent under Subsection 178.11(2)(a) had been
contended at trial. The Supreme Court of Canada also discussed
this issue in Goldman, supra,167 and ruled that even if the
consent is given because of promised or expected leniency or
immunity from prosecution the consent is valid so long as it is
the conscious act of the consentor doing what he intends to do
for reasons which he considers sufficient. His consent will not
be vitiated notwithstanding that his motive to consent may be
selfish or even reprehensible. McIntyre J. stated for the
majority of the court as follows:

The consent given under s. 178.11(2)(a) must be
voluntary in the sense that it is free from coercion.
It must be made knowingly in that the consentor must be
aware of what he is doing and aware of the significance
of his act and the use which the police may be able to
make of the consent. The test to be applied in
considering the admissibility of a statement or
confession made by an accused person in custody to
police officers or others in a position of authority is
not applicable here.

... If the consent he gives is the one he intended to give
and if he gives it as a result of his own decision and
not under external coercion the fact that his motives
for so doing are selfish and even reprehensible by
certain standards will not vitiate it.

... The consent must not be procured by intimidating
conduct or by force or by threats of force by the
police, but coercion in the sense in which the word
applies here does not arise merely because the consent
is given because of promised or expected leniency or
immunity from prosecution.168
b. **Electronic Surveillance with Judicial Authorization**

Where it is impossible for the police to obtain the consent to intercept a private communication from one of the parties thereof, the police must seek judicial authorization for the intended electronic surveillance. Part IV.1 of the Criminal Code provided for two types of judicial authorization:

1. ordinary authorization granted for a period not exceeding sixty days,
2. emergency authorization granted for a period not exceeding thirty-six hours.

(i) **Ordinary Authorization**

The law limits the crimes in respect of which a judicial authorization can be obtained to those provided for by the definition section 178.1 of the Criminal Code. Electronic surveillance without consent can be performed only where the police are investigating these definition offences which are either of a serious character or "part of a pattern of criminal activity planned or organized by a number of persons acting in concert."

An application for an authorization must be made *ex parte* and in writing to a judge of a superior court of criminal jurisdiction or a judge as defined in Section 482 of the Criminal Code by:

1. the Solicitor General of Canada,
2. the Attorney General of the province,
3. an agent specially designated in writing by the Solicitor General of Canada personally, if the offence under investigation is one in respect of which proceedings, if any, may be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney General of Canada, or
4. an agent specially designated in writing by the Attorney General of the province personally, in respect of any other offence in that province.

To be practical, where the police need an authorization for the purpose of investigating Criminal Code offences other than conspiracies to violate other federal statutes, they shall apply to the agent designated by the Attorney General of the province, while where the police need an authorization for the purpose of investigating the federal statute offences they shall apply to the agent designated by the Solicitor General of Canada for the application. Where the police are investigating both a Criminal Code offence and a federal statute offence in respect of the same suspect, they have to seek two separate authorizations for both offences respectively.

Although the application itself is made in the name of an agent of the Solicitor General of Canada or the Attorney General of the province, the material supporting the application is made by a police officer in the form of affidavit, and the judge who receives the application decides whether he should grant or refuse the authorization on the basis of the information contained in the police officer's affidavit. The police officer must disclose the following information therein:
1. the facts relied upon to justify the belief that the authorization should be given, 179
2. particulars of the offence, 180
3. the type of private communication proposed to be intercepted, 181
4. the names, addresses and occupations, if known, of all persons, the interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence, 182
5. a general description of the nature and location of the place, if known, at which private communications are proposed to be intercepted, 183
6. a general description of the manner of interception proposed to be used, 184
7. the details of prior applications, 185
8. the period for which the authorization is requested, 186
9. whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures, 187

In order to issue an authorization, the judge to whom the application has been made must be satisfied, on a balance of probabilities, 188 from the information disclosed in the affidavit that it is in the best interests of the administration of justice to grant the authorization, 189 and one of the following conditions has been met: 190
1. other investigative procedures have been tried and have failed,
2. other investigative procedures are unlikely to succeed,
3. urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

The issued authorization must include the following items in order to be valid:

1. the offence in respect of which private communications may be intercepted,
2. the type of private communication that may be intercepted,
3. the identity of the persons, if known, whose private communications are to be intercepted,
4. general description of the place at which private communications may be intercepted, if a general description of that place can be given,
5. general description of the manner of interception that may be used,
6. the period, not exceeding sixty days, for which the authorization is in effect.

In addition to the above requirements, the authorization may contain such terms and conditions as the judge considers advisable in the public interest.

In most cases the terms or conditions considered advisable in the public interest by the authorizing judge are of restricting character as to the scope, manner or places of the
proposed electronic surveillance. For example, in case of an authorization to intercept a public pay-phone or a telephone outside of the primary residence of the target person, such terms requiring concurrent physical surveillance of the person or live monitoring of the recording device for the purpose of minimization of interception are usually inserted therein. Also a clause prohibiting surreptitious entry by the police into the residence of the target person for the purpose of installing room bugging equipment will be contained, where the judge thinks that the room bugging is not appropriate under the circumstances.

(ii) Known Person and Primary Target

Section 178.12 of the Criminal Code rules that the police should provide, in the affidavit supporting the application for an authorization, "the names, addresses and occupations, if known, of all persons, the interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence." This provision has been taken by the majority of the authorities to require that the police disclose the identities of all the "known suspects" who are believed to be involved in the offence, regardless of whether or not those suspects are the "primary targets" in the sense that the police are actively pursuing and are intent on intercepting private communications thereof. For example, in Regina v. Burns et al. Anderson Co.Ct.J., while making a distinction between "known suspect" and
"primary target", held: "As my brother Spencer observes in the unreported decision in *Regina v. Carothers*, under subsection (12), the investigating officer must disclose all the known suspects (in the sense mentioned therein)...."205

However, this interpretation is difficult to accept, because it has an effect contrary to the purpose of the legislation, to wit, the protection of individual privacy through restricted operation of electronic surveillance. Assume the police are investigating a drug trafficking ring. At the time of the application for an authorization, the police have found that Suspect A is a central figure of the crime organization, and that A is usually communicating with lower ranked suspects, B, C, D and some other unidentified persons through the telephone at his own residence. In such a case, it is natural that the police consider only A as a primary target and intend to wiretap the telephone in his residence. Then, in my opinion, it should be permitted that the police name only A in the affidavit for the purpose of intercepting private communications on the very phone in A's residence. According to the majority interpretation, however, the police, in this case, have to disclose all the identities of A, B, C and D as the "persons the interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence", with the result that the authorizing judge would permit to wiretap all the telephones in the premises of the four persons. This consequence is clearly against the object of the *Protection of Privacy Act*. "The unique character of electronic surveillance
is that its network intrudes upon the lives of many innocent persons as well as the guilty."206 Therefore, an interpretation that would bring about a plethora of electronic surveillance should be avoided.

From the practical point of view, as well, some selectivity by the police as to the target is highly desirable, because the electronic surveillance requires vast amounts of money and manpower in order to be effectively and faithfully conducted. In 1984 "E" Division of the RCMP paid to the telephone company over $300,000 for renting about 460 telephone lines.207 Interception of a single telephone line or operation of a single room-bugging device requires lengthy, painstaking efforts of a large number of police personnel to install the device, monitor the conversations, analyze and corroborate the information therein, and prepare for adducing them in evidence at trial. Therefore, the police try to apply for an authorization only when the importance of the target person and his suspected criminal activities warrant the expense and when sufficient manpower and resources are available to execute the measure.208 And such occasions are not in the least usual. The majority interpretation would prevent the effective and restricted use of electronic surveillance, and moreover would make it impossible for middle or small size police forces to make use of electronic surveillance in the investigation of large-scale organized crime activity.
For the reasons above, I am of the opinion that the relevant part of Section 178.12 should be taken to require that the police disclose the identities of all the "primary targets" (not all the known suspects), as if it read; "... of all persons, the intended interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence."

There is some support for my interpretation. In Regina v. Blundell, Street and Read (No. 2),209 the defence counsel contended that one Street, who was not named in the authorization, was actually known to a police officer at the time of the application, and that his communications are not covered by the basket clause provided for "unknown" persons. Cartwright Co.Ct.J. held as follows:

There is no provision in Part IV.1 [enacted 1973-74, c.50, s.2] of the Criminal Code, R.S.C. 1970, c. C-34 as amended to date [by 1976-77, c.53] that requires either that the authorizing Judge must be informed of every person known or unknown suspected in the criminal affair, except for s. 178.12 [am. idem. s.8] requiring particulars of the offence, or that an authorization must be issued for every known criminal participant whether the law officers of the Crown wish it or not. The latter situation would be ludicrous and would lead to a plethora of authorizations; just the exact opposite of the course upon which Parliament has embarked. The language of s. 178.12(e) requiring in the peace officer's affidavit:

(e) the names and addresses, if known, of all persons, the interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence...

(my emphasis) makes it clear that even though Street may have been known, that still does not say that an interception installation upon Street's communication system would "assist the investigation" in this alleged enterprise in which the Crown has alleged that Blundell
was the supplier. I note that s.178.13(2) only sets forth mandatory contents of an authorization and again in conformity with s.178.12(e), supra, s.178.13(2)(c) requires that the authorization shall:

(c) state the identity of the persons, if known, whose private communications are to be intercepted...

As I said above, nowhere in Part IV.1, and especially in ss.178.12 and 178.13 is there any requirement that all known suspects to the alleged offence must be both disclosed and specifically subjected to an authorization to intercept their private communications.210

Section 11 of the Interpretation Act211 reads:

11. Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its object.

I think that the approach taken by Cartwright Co.Ct.J. in Blundell is sound in the light of the said object of the Protection of Privacy Act, and therefore should prevail.

Recently, the Alberta Court of Appeal delivered a relevant judgment on this point. In Regina v. Chesson and Vanweenan212 the court held that evidence that a particular person may be a party to an offence under investigation is not necessarily proof that the interception of his private communications may assist the investigation. Thus, the police are not required to disclose the identities of all the suspects in the affidavit. On the other hand, this case also implied that an innocent third party can be a known person within the meaning of Section 178.12(1)(e) if his private communications may assist the investigation. In practice, however, the police will not
name an innocent third party as a target in the affidavit on any occasion.213

(iii) Renewal of Authorization

Where the police need to prolong the period of electronic surveillance under an authorization, a renewal thereof can be repeatedly obtained,214 before the expiry of the former authorization.215 The status of the applicant, the authorizing judge and the procedure of application for renewal are similar to those for the original authorization.216 The information required in the affidavit of the police officer supporting the application is the reason and period for which the renewal is required,217 the full particulars of previous interceptions,218 the information obtained by the interceptions,219 and the details of previous renewal applications if any.220 In addition, the authorizing judge may require further information if he thinks it necessary.221 In order to grant the renewal, the judge must be satisfied that the same conditions as those required for the original authorization have been met.222

It often happens that during the period of the original authorization the police find out the identity of a new target who was unknown at the time of granting of the authorization, or that the police found that the suspects are involved in other serious crime than those in respect of which the original authorization was granted.223 However, it has been held by the courts that a renewal can only extend the time of the original authorization; it cannot "extend, modify, add to or otherwise
deal with any feature of the authorization beyond simply extending the period."224 Therefore, in these cases the police shall apply for a fresh authorization as to the newly identified target,225 or new offences that they intend to investigate;226 otherwise the renewal would be substantively defective.

(iv) **Emergency Authorization**

In case of emergency, a specially designated police officer can make an *ex parte* application for authorization without consulting the Crown agents.227 If the concerning offence is one in respect of which proceedings, if any, may be instituted by the Government of Canada and conducted by or on behalf of the Attorney General of Canada, the police officer must be designated in writing by the Solicitor General of Canada.228 In respect of any other offence in the province, the designation must be made by the Attorney General of the province.229 Unlike the application for ordinary authorization, the emergency application is not required to be in writing.230 Also it must be made to a judge of a superior court of criminal jurisdiction, or a judge as defined in Section 482 of the Criminal Code, designated from time to time by the Chief Justice.231 The judge may grant an emergency authorization for a period of up to thirty-six hours when he is satisfied that the urgency of the situation requires that interception of private communications commence before the ordinary authorization could be obtained.232

(v) **Post-Authorization Notice**

As a general rule the person who became the object of
the electronic surveillance pursuant to an authorization must be notified in writing of the fact of the interception within ninety days next following the period for which the authorization was given or renewed, by the Attorney General of the province or the Solicitor General of Canada on whose behalf the application was made. The ninety-day period can be substituted for a longer period not exceeding three years by an order of a judge of a superior court of criminal jurisdiction or a judge as defined by Section 482 of the Criminal Code, upon application for deferment by the concerning Minister either at the pre-authorization stage or before the expiry of the original notice period.

In practice, the contents of the post-authorization notice is merely the fact that the person was the object of an interception pursuant to an authorization, without any further detail. Also, the objects of the notice are limited to the persons who were named in the authorization and whose private communications were in fact intercepted. Therefore, those who became the objects of interception under a basket clause are not to be notified.

5. Evidential Rule

There are two types of evidence that the police can obtain by means of electronic surveillance:

1. primary evidence, to wit, evidence of intercepted private communications,
2. derivative evidence, to wit, evidence obtained directly or
indirectly as a result of information acquired by interception of private communications.

Section 178.16 of the Criminal Code provides the rule on both types of evidence.

a. **Primary Evidence**

The general evidentiary rule is stated as follows: "A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless (a) the interception was lawfully made; or (b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof."\(^{239}\) Therefore, the primary evidence secured by the electronic surveillance with consent of a party of the conversation or by the electronic surveillance pursuant to a valid judicial authorization is admissible. On the other hand, the primary evidence secured by unlawful electronic surveillance is *prima facie* inadmissible unless one of the parties of the conversation has expressly consented to the admission thereof. However, the judge or magistrate has a discretion to admit the primary evidence obtained by unlawful interception where such evidence is relevant to a matter at issue, and is inadmissible solely because of a formal defect or procedural irregularity in the application for or the giving of the authorization.\(^{240}\)

Before the primary evidence obtained by lawful electronic surveillance is received in evidence, the accused must
be notified of the Crown's intention, together with: 241

1. a transcript of the private communication, where it will be adduced in the form of a recording, or a statement setting forth full particulars of the private communication, where evidence of the private communication will be given *viva voce*; 242 and

2. a statement respecting the time, place and date of the private communication and the parties thereto, if known. 243

On the other hand, compliance with the requirement of post-authorization notice 244 is irrelevant to the admissibility of evidence. 245

b. **Derivative Evidence**

The proviso of Subsection 178.16(1) states: "evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence." Therefore, the derivative evidence is *prima facie* admissible regardless of whether it is derived from lawful electronic surveillance or not. However, a judge or magistrate has a discretion to refuse the derivative evidence secured by virtue of unlawful electronic surveillance where he is of the opinion that the admission thereof would bring the administration of justice into disrepute. 246

C. **Impact of the Protection of Privacy Act on the Police**

1. **Positive Aspect to the Police**

As I pointed out earlier, the *Protection of Privacy Act*
acknowledged, for the first time, electronic surveillance as a legitimate method of police investigation, and thus eliminated the self-imposed limitation on the part of the police upon using the intercepted communications as evidence at trial. Since then, the electronic surveillance has been one of the most important measures of the police to secure evidence in major crime investigation. For instance, in the case of drug trafficking conspiracy controlled by a sophisticated organized crime group, usually there can be no evidence to show the involvement of the criminals standing on the upper echelons of the hierarchy, except for the oral communications of their own. Since it is extremely difficult to get the confession from such professional criminals through interrogation, the only method to secure this critical evidence is the electronic surveillance.

As to the intelligence gathering side, I have also pointed out that the Protection of Privacy Act prohibited the "strategic intelligence gathering" by virtue of electronic surveillance, by tying the authorization to specific offences under investigation. However, the later practice has shown its remarkable usefulness as an intelligence gathering method as well.

First of all, limitation as to the offence was disclaimed by the Ontario Court of Appeal in Regina v. Welsh and Iannuzzi (No.6). Zuber J.A. authoritatively ruled that it is legitimate for the police to intercept under an authorization all the target person's communications regardless of whether or not
they are concerned with the offence specified in the authorization. The police can lawfully intercept all the communications concerning any offence, once the interception has been commenced in respect to the specified offence.248

On the other hand, it was held in the same case, Welsh, supra, that where the authorization does not include a basket clause it is not lawful for the police to intercept private communications between unnamed persons, in other words, to intercept private communications to which none of the named persons are party.249 Since then, however, it has become common to insert in an authorization a basket clause permitting the interception of private communications of
1. unknown persons who are in concert with the named person with respect to the specified offence (offence-relating basket clause); or
2. unknown persons who resort to the premises of the named persons (place-relating basket clause).

And the "unknown persons" have been taken by the courts to include not only
1. those who were known to be involved in the offence but not identified at the time of the application; but also
2. those whose existence was then completely unknown.250

Moreover, according to the opinion of the Ontario Court of Appeal, the second type of basket clause mentioned above can cover even an innocent person who is not personally involved in
the offence. In *Regina v. Samson*, the relevant authorization included a place-relating basket clause as follows:

3. The identities of the persons whose private communications may be intercepted are:
   
i. Douglas John Graham  
   46 Greenwich Circle  
   Brampton, Ontario  
   Occupation: Unknown  
   
ii. Donald Allan Graham  
   46 Greenwich Circle  
   Brampton, Ontario  
   Occupation: Unknown  
   
iii. ...
   
iv. Any Other Person/s at any of the locations shown in this paragraph.

[emphasis added]

Brooke J.A. held as to the scope of the basket clause:

I think this would include anyone who may live there and indeed could include a casual visitor. For example, a trademan who attends at the residence and while using the telephone discloses that the occupant will be out until a fixed time, or who answers an incoming telephone call and relays a message as requested by the occupant, may well have information which assists in the investigation of the offence.

Thus, under this kind of basket clause, to wit, those provided with respect to specific premises, any innocent person can be the object of electronic surveillance so long as he is resorting to the premises.

In addition to the basket clause, it has also become customary to insert in an authorization an "itinerant interception clause" which permits the police to perform
Thus, as a positive aspect to the police, the Protection of Privacy Act has provided the police with a most powerful weapon for both evidence gathering and intelligence gathering, which is indispensable in their never-ending fight against crime.

2. Negative Aspect to the Police

In my opinion, the Protection of Privacy Act also has a negative aspect to the police. That is undue interference, judicial or otherwise, in the operation by the police of criminal investigation.

Firstly, the law did not furnish the police with the authority to make an ordinary application for electronic surveillance. Except on rare occasions such as hostage or barricade situations which would justify an emergency application,256 the police have to ask an "outsider", to wit, the agent of the Attorney General of the province or of the Solicitor General of Canada to make an application, in spite of the fact that all the necessary information is in the hands of the police and all the supporting materials are to be made by the police.

Secondly, because of the nature of the conditions required for the authorization, the whole process of the police investigation is to be scrutinized at the time of application,
both by the agent and by the authorizing judge. In respect of 
the conventional search warrant or arrest warrant only relevant 
portions of the information in the hands of the police are to be 
disclosed, but here the police have to disclose all the tactical 
information obtained during the period from the beginning of the 
investigation to the time of the application including such 
critical information as the identities of the informants, in 
order to convince the judge that it is in the best interests of 
the administration of justice to grant the authorization and that 
other traditional investigative procedures either have failed, 
are unlikely to succeed, or would be impractical because of 
emergent circumstances.257

The third point is the reviewability of the 
authorization. In Wilson v. The Queen,258 McLintyre J. held for 
the majority of the Supreme Court of Canada that although a trial 
judge cannot go behind or collaterally attack the authorization, 
an application for review of the authorization can be made to the 
same judge who granted it or, if he is not available, to another 
judge of the same court, and that the authorization should be set 
aside where "the facts upon which the authorization was granted 
are found to be different from the facts proved on the ex parte 
review."259 Also, it has been held by recent cases that subject 
to editing by the court for the purpose of safeguarding critical 
information such as the identities of informants, the accused 
should have access to the police affidavit and other materials 
used for the application, so that he can ascertain whether there 
is some basis for setting aside the authorization.260 Thus, the
police officers are to be cross-examined as to the whole process of the investigation at the lengthy preliminary hearings while the defence counsels are seeking for evidence on fraud or wilful non-disclosure on the part of the police.261 Here, a considerable amount of information on procedures and techniques of the police investigation is disclosed in the presence of the criminals.

The fourth and most critical point is the scheme of the authorization itself. In respect of the search warrant or arrest warrant the police choose the objects thereof, and the judge's roll is only to determine the adequacy of the intent of the police. On the contrary, here, the scheme of the authorization envisaged by the majority of the courts is this: The police provide the judge with all the necessary information so that the judge, not the police, can properly choose the objects.262

The following statement of Spencer Co.Ct.J. in Regina v Carothers et al.263 represents this scheme:

Under Section 178.12(e) the application must reveal the names of all known persons, and under Section 178.13(2)(c) the authorization must name all known persons who are chosen for interception.264

[emphasis added]

Another example of presentation of the same view is the following statement of Brooke J.A. in Samson, supra:265

I find no ambiguity in the present ss.178.12(1)(e) and 178.13(2)(c) reading them separately or together. The first of the two sections sets out the facts and information which must be placed before a judge when he
is asked to determine who are all the persons the interception of whose private communications there are reasonable and probable grounds to believe may assist in the investigation ... 266

[emphasis added]

In the above statement of Brooke J.A., I observe lack of due respect, on the part of the court, for the police as professionals in criminal investigation. How can a judge be in a better position than the police to choose the objects of criminal investigation? How can a judge know more about the criminal investigation than the police, without any personal experience thereof and without access to the strategic intelligence the police have accumulated through lengthy efforts?

Besides the issue of selection of the objects, the Supreme Court of Canada in Lyons v. The Queen267 also clarified the supervisory role of the authorizing judge over the police with respect to the manner of the electronic surveillance. After recognizing the authorizing judge's power to permit surreptitious entry by the police into the named premises for the purpose of installing a room bugging device, Estey J. proceeded for the majority of the court:

I believe that a court, in issuing an authorization under Part IV.1, should, in the exercise of its supervisory function, designate the type of device or devices which may be employed and the procedures and conditions which, in the circumstances revealed in the application, are necessary or advisable in the public interest.268

Thus it seems to me that the authorizing judge, not the police,
presides over the electronic surveillance, one of the most important methods of criminal investigation.

3. **Conclusion**

Since the enactment in 1973, it has been frequently maintained by authorities that the *Protection of Privacy Act* has a double-edged impact upon Canadian citizens; the protection from organized crime, and the threat to their own right to privacy. In my view, the law also has a double-edged impact upon Canadian police forces, as detailed above. In a sense this latter result is in the natural course of events. The more power is granted, the more accountability is required.269

I would like to draw the following conclusion with respect to the legal impact of the *Protection of Privacy Act* upon the operation of criminal investigation by Canadian police forces: The police obtained the most powerful weapon in performing the crime-fighting duty, at the cost of their independence in criminal investigation.

D. **Constitutionality of the Protection of Privacy Act**

Because electronic surveillance is a particularly intrusive form of criminal investigation, the legislation which provides the police with the power of electronic surveillance should be critically scrutinized with a view to the protection of the citizen's right to privacy. Therefore, it is essential to
examine the constitutionality of the Protection of Privacy Act under the Canadian Charter of Rights and Freedoms (hereinafter referred to as "the Charter"). Recently, the Supreme Court of Canada made a relevant statement on the interpretation of Section 8 of the Charter which guarantees "the right to be secure against unreasonable search or seizure". In Hunter et al. v. Southam Inc., in which constitutionality of the search and seizure provisions of the Combines Investigation Act was in issue, the unanimous decision of the court ruled that Section 8 of the Charter is not limited to the protection of the property right, but goes at least as far as to protect the right of privacy. Chief Justice Dickson stated: "[T]he purpose of Section 8 is...to protect individuals from unjustified State intrusions upon their privacy." Since the Charter is a "purposive document", it inevitably follows that Section 8 of the Charter should apply not only to traditional search and seizure of tangible evidence but also to electronic surveillance. In other words, the Protection of Privacy Act is now subject to scrutiny under Section 8 of the Charter.

Conveniently, Hunter, supra, has enunciated specific standards which statutory provisions governing the authorization of search and seizure must meet in order to comply with Section 8 of the Charter. First of all, a system of prior authorization which prevents unjustified searches before they happen is required. Secondly, the person authorizing a search and seizure must be neutral and impartial, and although he need not be a judge, he must at a minimum be capable of acting judicially.
Thirdly, in respect of the basis on which the balance of interests between the state and the individual is assessed, there must be, at a minimum, "reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search". Although the Protection of Privacy Act clearly satisfies the first and second standards above, a close examination shall be required with respect to the third hurdle.

Section 178.12(1)(e) of the Criminal Code requires that besides particulars of the offence being investigated "the names, addresses and occupations, if known, of all persons the interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence" (emphasis added) be provided by an affidavit accompanying an application for an authorization of electronic surveillance. Therefore, someone may argue that Part IV.1 of the Criminal Code does not require the applicant demonstrate, or that the judge before whom the application is presented find, reasonable and probable grounds to believe that the targeted individual's private communications will provide evidence in relation to an offence, and thus does not satisfy the third constitutional requirement specified in Hunter.

In my opinion, however, this train of thought is untenable. What is specified in Section 178.12(1)(e) is not a standard on which the authorizing judge assesses the balance of interests. Section 178.12(1)(e) merely shows one of many
elements that must be disclosed in the affidavit accompanying the application. As I detailed in the previous arguments in this study, the law requires that the police disclose, in the affidavit, all the important information obtained in each step of their investigation into a particular offence. And in order to issue an authorization, the judge must be satisfied on such information;

(a) that it would be in the best interests of the administration of justice to do so; and

(b) that other investigative procedures have been tried and failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.278

Thus, the judge can authorize an interception of private communications only when he is satisfied that there are reasonable and probable grounds to believe that a targetable serious offence has been or is being committed and that the named suspect is personally involved in the offence, so that "the best interests of administration of justice" can be secured. When there is a basis for believing the targeted person is himself involved in the offence, it is safe to say that there is a basis for believing the interception of his private communications will provide the evidence.

In Regina v. Finlay and Grellette,279 in which the constitutionality of the legislation was contended, the Ontario Court of Appeal made a clear statement on this point. Martin J.A. for the court pointed out:
In determining the constitutionality of Part IV.1 of the Code the proper approach, in my view, is to consider its provisions and the safeguards contained therein in their entirety. It is not proper, in my opinion, to seize upon individual sections of Part IV.1 and to see if those sections, viewed in isolation, contravene the provisions of the Charter.280

Then Martin J.A. proceeded:

It is true that s.178.13 does not, in express language, require the judge as a condition of granting the authorization to be satisfied that there are reasonable grounds to believe that an offence has been committed or is being or is about to be committed and that the authorization sought will afford evidence of communications concerning the offence... The judge must, however, be satisfied that the granting of the authorization would be in the "best interests of the administration of justice". The language used by Parliament, as previously indicated, requires the judge to balance the interests of effective law enforcement against privacy interests and, in my view, imports at least the requirement that the judge must be satisfied that communications concerning the particular offence will be obtained through the interception sought. The "particular offence", of course, includes the inchoate offences of conspiracy, attempt or incitement to commit the offence. To place this construction on the language used by Parliament is not to read in words that are not there, but to give a reasonable meaning to Parliament's language. ...I am consequently of the view that, when the provisions of Part IV.1 are considered in their entirety, the appellants' contention that s.178.13 permits an authorization to be granted on the basis of a standard that is unconstitutionally low must be rejected.281

[emphasis added]

Thus, the legislation itself is constitutionally valid with respect to this point, that is to say, the basis on which the balance of interests between the state and the individual is assessed.

On the other hand, in my view, an authorization would be unconstitutional if the judge names an innocent third party as
a target of electronic surveillance merely because the interception of his private communications will assist the investigation of an offence. Similarly, the basket clause which covers innocent third parties who are not personally involved in the offence investigated is, in my opinion, unconstitutional. I believe, therefore, the place-relating basket clause as endorsed by the Ontario Court of Appeal in *Samson* should not be utilized any more. In *Finlay and Grellette*, *supra*, however, Martin J.A. also stated that under Part IV.1 of the Criminal Code the private communications of a person may constitutionally become "the subject of an authorization even though that person is not believed to be involved in the commission of the offence, provided that there are reasonable grounds to believe that the interception of the private communications of that person will assist in the investigation of an offence, e.g. a car rental agency from whom a suspect rents cars to transport drugs."\(^{282}\) In my view this portion of the judgment is inconsistent with the prior rulings quoted above, and cannot be sustained.

Apart from the constitutional standards specified in *Hunter*, it is also arguable that Part IV.1 of the Criminal Code is unconstitutional because it lacks express provisions for minimization. Minimization has been defined as "the procedure by which only those communications which are the proper subject of the investigation are intercepted or recorded"\(^{283}\), or "the adoption of measures to reduce the extent of court-ordered electronic surveillance to a practical minimum and at the same time to allow legitimate investigative aims to be pursued"\(^{284}\).
For instance, the United States' counterpart of the Protection of Privacy Act, Title III of the Omnibus Crime Control and Safety Street Act of 1968, has a provision for minimization. Section 2815(5) of Title III provides:

(5) ... Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

Although the Canadian statute is, to a large extent, based on Title III, headed Wiretapping and Electronic Surveillance, it did not follow the American precedent in this point, which has often been criticized in the light of protection of privacy. However, Section 178.13(2) of the Criminal Code provides that an authorization shall, among other things, "contain such terms and conditions as the judge considers advisable in the public interests". Therefore, the authorizing judge can specify any conditions requiring minimization in the interception of private communications, if he thinks such conditions necessary for the purpose of performing his supervisory role over the police as recognized by the Supreme Court of Canada in Lyons. This legislative scheme might not be the better one in the light of the minimization in that it does not specify any guideline for the authorizing judge. Nevertheless, in my opinion, it does not follow that the legislation is unconstitutional because of lack of minimization provisions.
IV. ELECTRONIC SURVEILLANCE IN JAPAN

A. Necessity of Electronic Surveillance

At present there is no statute governing police interception of private communications in Japan. With no specific prohibition against electronic surveillance, however, the Japanese police refrain, unlike Canadian police forces before the enactment of the Protection of Privacy Act, from resorting to this powerful weapon as evidence-gathering and intelligence-gathering measures. Nevertheless, it appears that the Japanese police have been successful in maintaining peace and order in the country up to impressively high standards. While the results of police activities in crime prevention and crime investigation are statistically shown by "crime rate" (the number of offences reported to the police per 100,000 population) and "clearance rate" (the ratio of the cases solved by the police among all the cases reported), the international comparison clearly indicates the efficiency of the Japanese police, that is to say, lower crime rates and higher clearance rates. According to the International Crime Statistics by the International Criminal Police Organization (Interpol), the crime rates and clearance rates in 1984 both in Canada and Japan are as follows:288
### Crime Rates (1984)

<table>
<thead>
<tr>
<th></th>
<th>[Japan]</th>
<th>[Canada]</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>1.5</td>
<td>6</td>
</tr>
<tr>
<td>Sex Offences</td>
<td>3.6</td>
<td>59</td>
</tr>
<tr>
<td>Serious Assault</td>
<td>19.6</td>
<td>117</td>
</tr>
<tr>
<td>Theft (all kinds)</td>
<td>1,137.6</td>
<td>5,119</td>
</tr>
<tr>
<td>Robbery and Violent Theft</td>
<td>1.8</td>
<td>93</td>
</tr>
<tr>
<td>Breaking and Entering</td>
<td>251.2</td>
<td>1,421</td>
</tr>
<tr>
<td>Fraud</td>
<td>90.7</td>
<td>489</td>
</tr>
<tr>
<td>Counterfeit Currency</td>
<td>0.1</td>
<td>4</td>
</tr>
<tr>
<td>Drug Offences</td>
<td>1.6</td>
<td>219</td>
</tr>
<tr>
<td>Crime Total</td>
<td>1,453</td>
<td>10,802</td>
</tr>
</tbody>
</table>

### Clearance Rates (1984)

<table>
<thead>
<tr>
<th></th>
<th>[Japan]</th>
<th>[Canada]</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>97.2 %</td>
<td>83.7 %</td>
</tr>
<tr>
<td>Sex Offences</td>
<td>83.9</td>
<td>65.4</td>
</tr>
<tr>
<td>Serious Assault</td>
<td>94.5</td>
<td>79.1</td>
</tr>
<tr>
<td>Theft (all kinds)</td>
<td>58.7</td>
<td>22.1</td>
</tr>
<tr>
<td>Robbery and Violent Theft</td>
<td>78.8</td>
<td>32.1</td>
</tr>
<tr>
<td>Breaking and Entering</td>
<td>69.8</td>
<td>21.1</td>
</tr>
<tr>
<td>Fraud</td>
<td>97.7</td>
<td>69.7</td>
</tr>
<tr>
<td>Counterfeit Currency</td>
<td>25.5</td>
<td>21.4</td>
</tr>
<tr>
<td>Drug Offences</td>
<td>100.0</td>
<td>88.0</td>
</tr>
<tr>
<td>Crime Total</td>
<td>66.5</td>
<td>46.4</td>
</tr>
</tbody>
</table>
Thus, as far as the statistics go, the Japanese police are remarkably successful in performing their crime-fighting duties. Then the question arises: is it necessary for the Japanese police to resort to electronic surveillance? In my opinion, the answer to this question is "Yes". The reasons are as follows.

First of all, the absolute number of crimes has been on the constant and rapid increase for nearly two decades. In 1973, the number of penal code offences known to the police (in thousands) was 1,191. In 1978, five years later, it went up to 1,337. In 1983, five more years later, the number swelled into 1,541. If this trend continues, which is very likely, the time will come in the near future when the police can no longer manage to deal with the deteriorating situation unless they resort to electronic surveillance which is more effective than traditional methods of criminal investigation. The ever-increasing crimes are a menace to the society, demanding the police to take a new method to prevent and attack them.

Secondly, both crime rates and clearance rates do not reflect inadequacy of police activities in the field of victimless crimes, such as drug offences, gambling, bribery and prostitution. Those crimes are rarely reported from outside to the police, no matter how often they are actually committed. Therefore, ineffectiveness of the police investigation in this field leads to "low" crime rates, while the clearance rates of
those offences are theoretically 100% (because those offences are never counted unless unearthed and solved by the police). And it is in this field that the Japanese police have been criticized for their weakness. A clear example is "drug offences", which is the only victimless crime shown in the *International Crime Statistics, supra*. According to the statistics (1984), the crime rate of drug offences in Japan is 1.6, while 219 in Canada. Although the crime rate in Japan is one one hundred and thirty-third of that in Canada, and the clearance rate thereof is 100%, it does not follow that the Japanese police are the more effective in cracking down on drug offenders. It only points to the inadequacy of the efforts by the Japanese police. The amount of illicit stimulant drugs which are being smuggled into Japan every year is officially estimated to be over 2,000 kilograms. In 1983, the police confiscated 99.0 kilograms of them, less than 5% of the total allegedly smuggled. Maybe the Japanese police are one hundred and thirty-three times less effective in this field than the Canadian counterparts who are armed with the intrusive weapon called electronic surveillance.

The third factor to be considered is "Boryokudan" or "Yakuza", the traditional crime syndicate with a permanent Mafia-type organization. At the end of 1983, the number of Boryokudan members, recognized by the police throughout the country, counted 98,771 in 2,330 groups. Among them, "Koiki Boryokudan", inter-prefectural crime syndicates covering wider areas, had 58,490 men in 1,878 groups of 74 families, and
showed no sign of decline despite the painstaking efforts by the police to crack down on them. They are professional criminals earning their living by illegal activities. Although Boryokudan members account for less than 0.1% of the total population of Japan, they, in 1984, accounted for 6.7% of the total arrested in the country for Penal Code violation and 13.6% of those arrested for other offences. And what is more important is that organized crime dominates drugs, gambling and prostitution, the victimless crimes mentioned above, as its huge resource of income. According to the estimation by the National Research Institute of Police Science, incomes earned by Boryokudan members are 1.08 trillion yen a year, with the drug traffic bearing the largest fruit of 458 billion yen, to be followed by illegal book-making yielding 175.4 billion yen and gambling 69.2 billion yen. Because no cooperation from victims can be expected in the investigations of those kinds of crimes, it is essential for the police to obtain a very intrusive weapon to unearth their sophisticated criminal plans and penetrate their solid organizations. The two key factors in cracking down on Boryokudan are their organization and income. In order to exterminate Boryokudan, it is imperative to arrest and detain those in the upper echelons instead of those in the street level as well as to take away their financial resources. The efforts only by means of traditional ways of investigation have proved to be shortcoming.

The fourth reason is the other type of organized crime, "Kageki-ha", that is, extremists or ultra-leftists with
paramilitary underground organizations. As of the end of 1983, those violent ultra-leftist groups were estimated to have membership of about 35,000 in the country, and they are conspicuously escalating their terrorism and guerrilla activities in recent years. In 1983 those groups caused a total of 17 guerrilla incidents. In 1984 the number of guerrilla incidents increased to 47. In 1985 it surged to 87, more than five times as large as two years ago. Most of the terrorist incidents are brutal, committed by fire-arms, bombs and even rockets, and are causing considerable social unrest in an otherwise stable society. However, it seems that the police are virtually powerless in suppressing the terrorism, and that they find extreme difficulty in solving each incident. In order to subdue this escalating terrorism, the Japanese police definitely need a new intrusive weapon which could deeply penetrate their underground organizations.

In summary the following four factors, in my view, sufficiently indicate the necessity of electronic surveillance as a method of crime investigation by the Japanese police.

a. Constant and rapid increase in the absolute number of crimes.
b. Inadequate law enforcement in the field of victimless crimes such as drugs, gambling, prostitution, etc.
c. Difficulty in cracking down on Boryokudan controlling the victimless crimes which generate huge financial resources.
d. Difficulty in suppressing terrorism by the ultra-leftists' underground organization.
B. Legitimacy of Electronic Surveillance

1. Court Decision

Assuming that electronic surveillance is a necessary method for the Japanese police, and that the time will come in the near future when the Japanese police have to use it in order to deal with the deteriorating crime situation, is it legitimate for them to use electronic surveillance under the present law? With respect to this question, there is only one old case authority which was delivered by the Tokyo High Court on July 17, 1953.306 In this case, a police officer installed, with consent of the manager of the premises, a radio transmitter (room-bugging device) close to the room rented by a member of the Japan Communist Party in order to obtain information upon the whereabouts of several staff members of the Party wanted for violation of the Organizations Regulating Act.307 While he was intercepting private communications between communists gathering in the room, the device was found by the communist members, and the Party filed a suit requesting the prosecutions of the police officer and the chief of his police station for abusing their authority.308 Thus, the legality of the electronic surveillance was contended in the court. The Tokyo High Court ruled as follows (translation):

Although it is true that in Japan sovereign power resides with the people309 and that the people's fundamental human rights concerning their homes, speech, assembly, association etc. shall be the supreme consideration,310 at the same time all the Japanese people are responsible for utilizing those fundamental rights for the public welfare.311 Therefore the
exercise of those fundamental rights is not without limitation, but should be restricted so as to be in harmony with the public welfare. Whenever there are suspicions of crimes, regardless of the kinds of offences or damages etc., it is within the duty and authority of the judicial police officer to investigate thereon, and with respect to the methods of the investigation it is legitimate to take any disposition necessary for attaining the purpose of the investigation, provided that the disposition is not a compulsory one and that it does not violate the laws and orders. Therefore, the objects of such an investigatory disposition can include not only the suspects of the crimes but also relevant third parties who have some relationship with the offence or suspects.

The sole purpose of the interception of communications in this case was the investigation of the crime committed by the eight staff members of the Party. The police had obtained the consent of the manager of the premises to the installation and use of the radio transmitter. The device was installed close to the outside of A's room, but, according to the clear evidence, it did not affect the outlook or utility of the room at all. There is no evidence indicating that the interception was conducted for the purpose of preparation for oppressing the legitimate political activities of the Japan Communist Party. Although the installation and use of the radio transmitter were kept secret from A whose communications were to be intercepted, the device was not attached to the room itself, and the consent of the manager of the premises had been obtained beforehand with respect to its use and installation. Thus, it is clear in evidence that the police regarded the interception as non-compulsory disposition. Therefore, as far as the interception was performed for the purpose of attaining the object of the investigation, there was no abuse of the police authority even if there was some minor bad influence upon the exercise of A's fundamental rights, which was the natural result accompanying the interception, because such restricted electronic surveillance was in harmony with the public welfare, and A and his company were responsible for utilizing their fundamental rights for the public welfare.

Thus the court was of the view that electronic surveillance by the police for the purpose of criminal investigation is legitimate so long as it is not accompanied by
trespass on the premises of the targeted person. Since then there has been no development in case law as to electronic surveillance (owing to the fact that the police stopped resorting to the method), and the above judgment is the only authority with respect to the legitimacy of the police interception of private communications. However, this judgment is now subject to severe criticism by academic scholars for paying no attention to the privacy right as well as for the ambiguity of its reasoning.315 Considering that the right to privacy, which is now considered to be one of the most important principles underlying the fundamental human rights guaranteed by the Constitution of Japan,316 was not generally recognized at the time of the judgment, it seems that this old authority has little binding power at present, and that a fresh deliberation upon the legitimacy of electronic surveillance is required.

2. Legislation

As mentioned before, there is no statute specifically regulating electronic surveillance at present. Article 13 of the Electronic Cable Communications Law317 provides (translation):

Article 13. A person who obstructs electronic cable communications by destroying electronic cable communication equipment, attaching devices thereto or by other means hindering the function of electronic cable communication equipment shall be punished with imprisonment at forced labor for not more than five years or with a fine of not more than one million yen.

Since wiretapping by the police would create no obstruction of telephone communications intercepted, the surreptitious activity cannot be covered by this provision.
Article 4, Paragraph 1 of the Electronic Communication Business Law provides (translation):

Article 4. Secrecy of communications relating to dealings of an electronic communication business corporation shall not be violated.

And Article 104 of the same law proceeds (translation):

Article 104. A person who violates the secrecy of communications relating to dealings of an electronic communication business corporation shall be punished with imprisonment at forced labor or with a fine of not more than 300,000 yen.

However, "communications relating to dealings of an electronic communication business corporation" in those provisions are taken to exclude telephone communications of a private party which can be listened to by the other private party at the end of the terminal. Thus, wiretapping is, generally speaking, not prohibited by the Articles.

The most relevant statutory provision, which requires detailed consideration, is Article 197, Paragraph 1 of the Code of Criminal Procedure enunciating the principle in favor of non-compulsory dispositions in criminal investigations. The provision reads (translation):

Article 197. With regard to investigation, such examination as may be necessary for attaining its object may be made. However, compulsory dispositions shall not be effected excepted when there are special provisions therefor in this law.

[emphasis added]

At present there are no "special provisions" for electronic surveillance in the Code of Criminal Procedure. Therefore, if "compulsory dispositions" in Article 197(1) include the surreptitious interception of private communications, it would be
against Article 197(1) of the Code of Criminal Procedure for the police to resort to electronic surveillance. On the other hand, if we take the traditional view that the "compulsory dispositions" mean those accompanying some physical compulsion against the object thereof, or those imposing some legal duties upon the object thereof, it would follow that the electronic surveillance is out of the scope of the Article. Indeed, the Tokyo High Court Judgment on July 17, 1953, supra, is apparently of the view that surreptitious interception of private communication itself is not a compulsory disposition.

In my view, however, the touchstone of "compulsory disposition" should be whether or not the disposition in question is against the will or reasonable expectation of the person who is the object of the disposition. A typical example of "compulsory disposition" is, of course, the traditional search and seizure of tangible evidence. Even if a search and seizure is conducted in secret while the object person is absent from the premises concerned, nobody would suggest that such search and seizure is a non-compulsory disposition because it is not accompanied by physical compulsion against or legal duties upon the object person. It is a compulsory disposition because it is against the object person's reasonable expectation for security of his property and privacy. Similarly, the surreptitious interception of private communications made under circumstances in which it is reasonable for the originator thereof to expect that they will not be intercepted by any person other than an intended recipient should be considered as "compulsory
disposition". Therefore, I am of the opinion that the Japanese police cannot use electronic surveillance for the purpose of criminal investigation without "special" statutory provisions governing its procedures: it would be against Article 197(1) of the Code of Criminal Procedure.

3. Constitution

In order to fully examine the legitimacy of electronic surveillance, we cannot avoid deliberation upon the constitutionality thereof. Article 35 of the Constitution of Japan provides (translation):

> Article 35. The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33. Each search or seizure shall be made upon separate warrant issued by a competent judicial officer.

It is clear that at the time of proclamation of the Constitution of Japan "search" and "seizure" in Article 35 referred only to the traditional search and seizure of tangible evidence. Thus, the Tokyo High Court Judgment on July 17, 1953, supra, apparently took the view that Article 35 does not apply to electronic surveillance as a means of criminal investigation. Recently, however, some leading scholars, taking into account the development of the case law in the United States concerning electronic surveillance, maintain that Article 35 of the Constitution of Japan protects, like the Fourth Amendment to the United States Constitution, the privacy right, and thus it is applicable to the police interception of private communications.
In Canada, the need for a broad perspective in approaching constitutional documents was recognized in Hunter. Chief Justice Dickson for the Supreme Court of Canada ruled as follows:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one").328

[emphasis added]

There seems to be no reason why this powerful statement applies only to the Canadian and American constitutions but not to the Japanese one. Therefore it would be sensible to argue that Article 35 of the Constitution of Japan is applicable to electronic surveillance, which is a new social reality unimagined at the time of the enactment of the Constitution.

On the other hand, some other scholars argue that Article 35 cannot encompass electronic surveillance because it did not anticipate such kind of police activities at the time of the enactment, and that there is considerable difficulty in interpreting the Japanese words "Jukyo, Shorui oyobi Shojihin"
Those scholars, however, unanimously maintain that Article 31 of the Constitution of Japan, which adopted the principle of requirement of "due process of law", applies to electronic surveillance. Article 31 reads (translation):

Article 31. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

Because "liberty" in Article 31 encompasses the privacy right, in order for the police to intercept private communications, there must be specific procedures established by law for the electronic surveillance. Further, they also contend that because of the intrusive nature of electronic surveillance and of the substantial threat to the privacy right which could be created thereby, the restricting conditions similar to those required by Article 35 shall be demanded in the law governing electronic surveillance procedures, and that at least the principle of the warrant requirement enunciated by Article 35 should apply to electronic surveillance. Thus according to those academic authorities which maintain that Article 35 does not directly apply to electronic surveillance, the requirements specified by Article 35 are virtually applicable to the police interception of private communications.330

Another relevant constitutional provision is Article 21 which guarantees the freedom of speech. Article 21 provides (translation):
Article 21. Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

[emphasis added]

It is clear from the wording that uncontrolled electronic surveillance by the State which violates the secrecy of private communications is prohibited by Article 21. On the other hand, however, the freedom of speech guaranteed by Article 21 is taken to be subject to the reasonable limits for the purpose of the "public welfare" clarified in Article 12 of the Constitution. Article 12 reads (translation):

Article 12. The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.

[emphasis added]

An example of the limitation to the secrecy of communication for the purpose of the public welfare is found in Article 100 of the Code of Criminal Procedure, which authorizes the search and seizure of postal matters. Article 100 provides (translation):

Article 100. A court may seize or cause to be produced postal matters or papers relating to telegrams, sent out by or to the accused, which are in the custody or possession of a Government office or of any other person transacting communication business. (2) Postal matters or papers relating to telegrams other than those mentioned in the preceding paragraph, which are in the custody or possession of a Government office or of any other person transacting communication business, may be seized or caused to be produced only when there are circumstances which warrant their being considered to be connected with the case in hand. (3) When any disposition has been effected under the provisions of the preceding two paragraphs, notice of such fact shall be given to the sender or to the
addressee. However, this shall not apply if there is apprehension that such notification may obstruct the proceedings.

Similarly, the police interception of private communications would not violate the constitutional freedom of speech, if it is within the reasonable limits for the purpose of the public welfare. Indeed, the Tokyo High Court Judgment on July 17, 1953, quoted before, seems to have ruled that electronic surveillance for the purpose of criminal investigation is, in principle, within the reasonable limits for the public welfare. In my view, however, the limitation for the purpose of the public welfare should be restrictedly specified in the form of statutory provisions which balance the need for effective crime investigation against the protection of the privacy right.

4. Conclusion

As seen above, there are grave suspicions that the police interception of private communications under the present law, in which no specific statutory provisions clarify the electronic surveillance proceedings, is against the Code of Criminal Procedure and the Constitution. With such suspicions, the Japanese police might as well refrain from resorting to this enchanting method of criminal investigation. Because, with respect to the admissibility of illegally obtained evidence, the Supreme Court of Japan takes the view that "where it is not appropriate from the standpoint of deterring future illegal investigative activity to allow into evidence the things illegally obtained in gross disregard of the principle of the
warrant requirement embodied, inter alia, in such provisions as Article 35 of the Constitution..., such evidence is to be held inadmissible"333 (translation, emphasis added), it is likely that the private communications intercepted by the police under the present law would be inadmissible in evidence at trial.

Thus Japan needs a fresh electronic surveillance law, the legal framework satisfying the requirement of judicial warrant and balancing the conflicting social interests; the need of the police to obtain information on criminal activities and the protection of the individual's right to privacy.

C. Desirable Contents of Electronic Surveillance Law in Japan

Assuming Japan needs new legislation on electronic surveillance, what shall be the ingredients of the law? As to this final question of the study, I would suggest that the Protection of Privacy Act, the Canadian precedent in this controversial field, is basically an appropriate model for the proposed law in Japan. The Protection of Privacy Act, as we have seen in detail earlier, is an elaborate legal scheme which sets up a scope of lawful police interception of private communications under restricting conditions. The law has furnished the Canadian police forces with the most effective weapon in major crime investigation, while, at the same time, protecting the constitutional right to privacy of the citizens by
virtue of the judicial control over police conduct. It is a deliberate legal framework balancing the two conflicting social interests, which can be a model for other democratic countries.

In my opinion, the following elements of the Canadian precedents shall be essential to the Japanese legislation as well.

1. The police can lawfully intercept private communications of the suspects only when consent of the originator or intended recipient thereof is obtained, or when a judicial authorization is obtained.

2. The offences in respect of which the authorization can be obtained are limited to certain serious offences or those committed by organized crime.

3. An authorization may be given only when the judge to whom the application is made is satisfied that

   a. there are reasonable and probable grounds to believe

      (i) a targetable serious offence has been or is being committed, and

      (ii) the person whose private communications are to be intercepted is personally involved in the offence,

   and

   b. one of the following conditions has been met;

      (i) other investigative procedures have been tried and have failed.

      (ii) other investigative procedures are unlikely to succeed.
(iii) the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

4. A private communication secured by lawful interception is admissible as evidence. However, in order for the lawfully intercepted private communication to be received in evidence, prior notice of the prosecution accompanied by the details of the communication has to be given to the accused.

5. A private communication secured by unlawful interception is prima facie inadmissible, unless the originator or intended recipient has consented to its introduction in evidence. However, this is subject to the discretion of the trial judge to admit such evidence where the evidence is relevant and the unlawfulness of the interception was due only to a defect of form or irregularity in procedure.

6. An authorization is valid only for a certain period of time, and is subject to renewal on application. In order to grant the renewal, the judge must be satisfied that the same conditions as required for the original authorization have been met.

7. The person who became the object of the electronic surveillance pursuant to the authorization is to be notified of the fact of the interception within a certain period of time after the interception was lawfully terminated.

On the other hand, it seems to be inevitable that because of the difference between both countries in legal systems and traditions some particular elements of the Canadian model are
not suitable for the Japanese counterpart, and therefore should be modified. Such elements shall be pointed out in the following.

Firstly, the Protection of Privacy Act provides that except in case of emergency an application for a judicial authorization must be made by the Attorney General of the province, the Solicitor General of Canada, or their designated agents. Not being given the status of the applicant, the police have to ask the agent of the relevant Minister to make an application for electronic surveillance, in spite of the fact that all the necessary information is in the hands of the police and all the supporting materials are to be provided by the police. Probably, this is an appropriate system to make sure of the deliberate operation of electronic surveillance in Canada, where the provincial and municipal police forces come under the supervision of the Attorney General, the chief law enforcement officer of the province, and where the RCMP, as the federal police force, is under the direction of the Solicitor General of Canada. In Japan, however, the police, under the Code of Criminal Procedure, are given authority to conduct criminal investigation independent of the prosecutor. Although the police, after completing an investigation, shall send the case to the prosecutor together with the written and other evidence obtained, the police are not accountable to the prosecutor for the investigative activities within their independent authority. Neither is the prosecutor responsible for the police
investigation. Therefore, if the status of the applicant for the judicial authorization is limited to the prosecutor, it would bring about considerable interference in the police authority in criminal investigation. Considering that before World War II only the prosecutors had the authority for criminal investigation with the police as their assistants, and that the independent police authority in criminal investigation was created by the democratic reformation of the Code of Criminal Procedure in 1948, such interference in the police authority would not be accepted. In my opinion, in order to keep the independent investigative authority of the police, and, at the same time, to make sure of the deliberate operation of electronic surveillance in Japan, the status of the applicant for the judicial authorization should be restricted to the judicial police officer at the rank of Police Superintendent or higher, designated by the National Public Safety Commission or the Prefectural Public Safety Commission.

The second point is the scheme of the authorization itself. As seen earlier in this study, the scheme of the judicial authorization envisaged by the Protection of Privacy Act and the court decisions thereon is this: "The police provide the judge with all the necessary information so that the judge, not the police, can properly choose the objects of electronic surveillance." It seems to me that Canadian jurisprudence has had little difficulty in accepting the novelty of the scheme. I believe, however, this scheme cannot be imported into Japan where
there is no tradition in which the courts preside over the investigative activities of the police. Canada inherited the common law tradition in which the police were created as delegates of the citizens, and were under direct supervision of the justice of the peace. In Japan, on the other hand, the police were created as an integral part of the state authority, and they have never been the servants of the judiciary. In Canada, an arrest warrant is an order by the justice directing the police to arrest the suspects so that they can answer to the charge before him or some other justice having jurisdiction. On the other hand, in Japan an arrest warrant is not an order, but a permit to arrest the suspects for the purpose of the criminal investigation. Thus, the police, having obtained the arrest warrant, still have the discretion not to execute it. In Canada, a search warrant is also an order, and any article seized under a search warrant must, without delay, be brought before the justice who issued the warrant or some other justice of the peace in the same territorial division so that the justice can decide the disposition. In Japan, again, a search warrant is a permit, and the police can keep the seized articles in their own custody until sending them to the prosecutor after the completion of the investigation. With those differences in the judicial roles between Canada and Japan, I believe that the scheme of judicial authorization in Japan should be this: the police choose the objects of electronic surveillance, and the authorizing judge shall determine the adequacy of the intent of the police; the same scheme as those for the arrest warrant and search warrant.
Besides the issue of the selection of the target, the Supreme Court of Canada in *Lyons* recognized the supervisory role of the authorizing judge over the police with respect to the manner of the electronic surveillance. In Japan, however, it is also irrelevant and unfair to expect a judge to accept a supervisory role over criminal investigation. Here, again, the manner of the electronic surveillance should be chosen by the police and the judge's role shall be to determine the adequacy of the police's intention. Specifically, the Japanese law should require that if the police intend to do room-bugging by virtue of surreptitious entry into the premises of the suspect, the intention and the reasons thereof be made clear at the time of the application, so that the judge can scrutinize the adequacy of such an operation. Thus, the initiative in the manner of criminal investigation shall be secured in the hands of the police. The judge should strictly be the neutral and impartial arbitrator between the police's needs and the citizen's rights, not the supervisor of the police investigation.

On the other hand, the supervisory role of the authorizing judge over the police in Canada is, in a sense, recognized in compensation for the sweeping power attached to a single authorization containing the basket clause and itinerant interception clause, and usually no minimization requirement. Therefore, if we deny the judge's supervisory role in Japan, it would be reasonable to attach less intrusive power to an authorization. Thus, I would propose that the Japanese
electronic surveillance law require that the authorization specify, among other things,345 the particulars of the persons whose private communications are to be intercepted, and the particulars of the place at which private communications may be intercepted, allowing no basket clause or itinerant interception clause. Also, it would be preferable that the law contain a provision for minimization, like Section 2815(5) of Title III.

In the first half of this study, I drew the following conclusion with respect to the legal impact of the Protection of Privacy Act upon the operation of criminal investigation by the Canadian police forces: "The police obtained the most powerful weapon in performing the crime-fighting duty, at the cost of their independence in criminal investigation." I believe that under the circumstances in Japan more restricting rules with respect to the intrusive power attached to an authorization shall be required, while the initiative to choose the target, place and manner of the electronic surveillance should be secured in the hands of the police. The Japanese police shall enjoy less power and more independence.
V. CONCLUSION

What is law? Answering this fundamental question of legal studies, Professor S.M. Waddams states: "the law in any society is the society's attempt to resolve the most basic human tensions, that between the needs of man as an individual, and his needs as a member of a community. The law is the knife-edge on which the delicate balance is maintained between the individual on the one hand and the society on the other."346 In spite of the strong emphasis placed on Man as an individual, no one can doubt that it is part of Man's nature to live in a community. Thus, a human society must, in order to survive, develop a system of resolving conflicts between individual interests and community interests. The law is the system of resolving those conflicts. In this sense, the criminal procedural law regulating electronic surveillance may be the worthiest of the name of law. It is a legal framework balancing two fundamental interests: the right to privacy, that is, the core concept of the dignity of individuals, and effective crime prevention, that is, a widely shared desire to be protected from crime. Thus, electronic surveillance law deserves the most careful balancing of competing yet defensible interests.

Privacy has long been a highly valued interest in the West, and it has been given by the Canadian courts constitutional protection against any kind of unreasonable search and seizure by
the state. In Japan, with all the traditional indifference of the people thereto, privacy recently emerged as a legally protected interest. Despite an old case authority to the contrary, the Japanese courts, too, are likely to afford it constitutional protection against unregulated electronic surveillance.

In Canada the attempt to set up a legal framework to balance the police need against the privacy right resulted in the Protection of Privacy Act proclaimed on June 30, 1974, which has decided a scope of lawful interception by the police of private communications under restricting conditions. After a decade of confusing practice, the law now seems to have furnished the police with the most powerful weapon in major crime investigation, while protecting the constitutional right to privacy of the citizens. The law, however, has had negative impacts upon the Canadian police forces in that it brought about undue interference, judicial or otherwise, in the operation of criminal investigation, as detailed in this study. In short, the police obtained the most powerful weapon in performing the crime-fighting duty, at the cost of their independence in criminal investigation.

Up to this time the Japanese police have refrained from resorting to electronic surveillance. The traditional cooperative attitude of the citizens toward the police as symbolized by Junkai Renraku, supra, seems to be the main factor which made it possible for the police to maintain peace and order
in the country without using this effective method of criminal investigation. However, with the rapid urbanization of the society accompanied by the increasing anonymity of the residents and the westernization of the legal consciousness resulting from permeation of the post-war democratic reformation, it seems to be getting more and more difficult to preserve the cooperative relationship between the police and the citizens. Therefore, it seems that sometime in the near future the deteriorating crime situation will force law makers to give the Japanese police new tools including electronic surveillance. When the time comes, I believe, the Protection of Privacy Act, the Canadian precedent to balance the two conflicting interests, can, with the necessary modification as proposed in this study, be an appropriate model for the Japanese counterpart.

When we take into account the relatively low crime rate in Japan, the cooperative attitude of the citizens toward the police, the ease with which the police are able to identify members of organized crime, and the unique status of the Japanese police in the criminal justice system in the country, my proposal that Japan introduce an electronic surveillance system with less intrusive power than in Canada while preserving traditional Japanese police strategies in criminal investigation will be generally acceptable. Then, I hope, electronic surveillance will be a supplemental and limited investigative tool for the Japanese police, and at the same time will be seen by Japanese citizens as a reasonable limitation to the newly emerged constitutional right to privacy.
NOTES

1. 1973-74 (Can.), c.50.


3. Ibid.


5. Id. at 272-276.


7. Ibid.


9. Id. at 290.

10. Ibid.

11. Id. at 293.

12. (1890) 4 Harv. L. Rev. 193.


14. The increasing threat to privacy brought about by the development of modern technology has been described by Alan F. Westin as follows in Science, Privacy, and Freedom: Issues and Proposals for the 1970's (1966) 66 Col. L. Rev. 1003, at 1050:

Man's ability to follow the movements and monitor the private conduct of his fellow human beings has been greatly expanded by the development of new surveillance devices and techniques. Physical surveillance has been aided by inventions such as subminiature tags and transmitters, long range cameras, directional microphones, and a great variety of sophisticated "bugs" and wiretapping instruments. Access to the life history of individuals has been made possible by the ever increasing amount and variety of records kept by government and industry, the efficiency with which computers can handle these records, the increasing tendency toward data sharing and centralization, and recent developments leading to replacement of private
money and check transactions with fully recorded, computerized credit systems. Discovery of an individual's innermost secrets - his fears, hopes, and problems - for purposes such as personnel selection and loyalty-testing has been facilitated by the spread of psychological surveillance techniques such as polygraph and personality tests.


17. 171 N.Y. 538, 64 N.E. 442 (N.Y.C.A.).


19. 122 Ga. 190, 50 S.E. 68.

20. See Keeton, supra, note 18, at 851.


24. The second federal legislation is the Privacy Act, 1980-81-82-83, c.III, Schedule II, the purpose of which is "to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to such information" (Section 2).

25. The British Columbia Privacy Act, S.B.C., 1968, c.39; the Manitoba Privacy Act, S.M., 1970, c.74; and the Saskatchewan Privacy Act, S.S., 1974, c.80. These laws do not cover conduct of a peace officer acting in the course of his duties.

26. Burns, supra, note 21 and 23, at 64.

27. Id., at 10. See also W.L. Prosser, Privacy (1960) 48 Cal. L. Rev. 383.

28. See A.F. Westin, Privacy and Freedom (1967) Ch.6


30. Id. at 351.


42. G.A. Res. 217 (iii), dated December 10, 1948.

43. Dai Nippon Teikoku Kenpo.


46. Westin, supra, note 14, at 1050.

47. 15 Kakyu Minshu (No.9) 2317.

48. 23 Kei Shu (No.12) 1625.


51. Ibid. at 149.


53. Ibid.

54. See id. at 29.

55. See W. Kelly and N. Kelly, Policing in Canada (1976), at 397.


57. See Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, supra, note 50 and 51 at 156.


59. See Craig, supra, note 52-54, at 34.


61. See D. Watt, Law of Electronic Surveillance in Canada (1979), at 86.


64. See R. v. Cotroni; Papalia v. R. (1979) 7 C.R. (3d) 185 (S.C.C.), at 204.

65. My interview with Vancouver Police Department.

66. Craig, supra, note 52-54 and 59, at 34.

67. Contra, id. at 29.

68. S.C. 1880, ch.67.
69. Supra, note 56.

70. See Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, supra, note 58, at 110.


76. Id. at 664.


79. Id. at 50.

80. Id. at 51.


82. (1975) 26 C.C.C. (2d) 388 (Ont. C.A.).

83. Id. at 391.

84. Criminal Code, s.178.11.

85. Ibid. s.178.16.

86. Ibid. s.178.11(2).

87. Ibid. s.178.12(1)(e).


90. Criminal Code, s.178.11.

91. Ibid. s.178.2.
92. Ibid. s.178.18.

93. Ibid. s.178.11(2).

94. Ibid. s.178.16.


96. Id. at 369


98. Crown Liability Act, s.7.2 and s.7.3.


100. Official Secrets Act, s.16.

101. 1976-77, c.53.

102. 1980-81-82, c.125.

103. 1984, c.21.

104. 1985, c.19.


106. Criminal Code, s.178.11(2).

107. Ibid. s.178.1.

108. Ibid. s.178.12.

109. Ibid. s.178.13(1)(a).

110. Ibid. s.178.13(1)(b).

111. Ibid. s.178.13(2)(a).

112. Ibid. s.178.13(2)(b).

113. Ibid. s.178.13(2)(c).

114. Ibid. s.178.13(2)(c).

115. Ibid. s.178.13(2)(c).

116. Ibid. s.178.13(2)(e).

117. Ibid. s.178.13(2)(d).

118. Ibid. s.178.13(3)and s.178.13(4).
119. Ibid. s.178.15.
120. Ibid. s.178.16(1)(a).
121. Ibid. s.178.16(4).
122. Ibid. s.178.16(1).
123. Ibid. s.178.16(3).
124. Ibid. s.178.16(1).
125. Ibid. s.178.16(2).
126. Ibid. s.178.23(1).
127. Ibid. s.178.12(3).
128. Ibid. s.178.23(4).
129. See Regina v. Welsh and Iannuzzi (No.6), supra, note 95, at 370.
131. Id. at 28.
132. (1976) 31 C.C.C. (2d) 245 (Ont. Co.Ct.).
133. Id. at 247.
136. Id. at 204.
137. My interview with the RCMP.
140. Id. at 992, 51 C.C.C. (2d) at 13-14.
141. P. Burns, supra, note 88, at 126.
142. (1978) 38 C.C.C. (2d) 212 (Ont.C.A.)
143. Id. at 217.


145. An extension telephone is an "electromagnetic, acoustic, mechanical or other device". See Regina v. Dunn (1975) 28 C.C.C. (2d) 538, 33 C.R.N.S. 299 (N.S. Co.Ct.).

146. Supra, note 138-140 and 144.

147. The essence of the reasoning of McIntyre J. for the majority of the court appears in the following passage in [1980] 1 S.C.R. at 994-995, 51 C.C.C. (2d) at 15-16:

   It is elementary to say that the Courts must discern and apply the legislative intent when construing the statutes. The intent must be found upon an examination of the words employed in the enactment for it is the intent which the Legislature expressed which must have effect. It is for this reason that the meaning of statutory language must be examined and on occasions fine distinctions must be made. In my view, the difference between the word conversation and the word communication is, in the context of this statutory provision, significant. A communication involves the passing of thoughts, ideas, words or information from one person to another. Conversation is a broader term and it would include, as all conversations do, an interchange of a series of separate communications. It is consistent with the scheme of Part IV.1, in my view, to consider that the originator of a private communication within the meaning of s. 178.1 is the person who makes the remark or series of remarks which the Crown seeks to adduce in evidence. If a person, with a reasonable expectation of privacy, speaking in an electronically intercepted conversation makes statements which the Crown seeks to use against him, he has, in my view, as the originator of those statements, the protection of the privacy provisions of the Criminal Code because those statements constitute private communications upon his part and their admissibility at any subsequent trial will depend upon the provisions of Part IV.1 of the Criminal Code. I do not find this a strained or unrealistic interpretation of the words of the statute. In fact, where a police officer or police agent participates in a conversation with a suspect knowing that it is being intercepted electronically and hears the suspect make hoped for inculpatory statements of
147. Quote continued:

importance to the Crown's case, I am unable to consider the police officer to be the originator of the very statement or statements he was seeking to obtain.

It follows from what I have said that the Act applies here to those statements in the telephone conversation and personal conversation between Dwyer and the appellant which were originated by the appellant.


150. See Watt, supra, note 61, 105 and 130, at 35.


152. Ibid.

153. Id. at 440.


156. See Watt, supra, note 61, 105, 130 and 150, at 46.


158. Ibid. s.178.11(2)(b).

159. Ibid. s.178.16(1).

160. Supra, note 138-140, 144 and 147.

161. When an undercover police officer wears a concealed radio transmitter ("body pack"), the recording of his conversation is conducted by another member of the police force.

162. Supra, note 149.

163. Supra, note 151-153.

164. Criminal Code, s.178.18(2)(d).

165. Supra, note 104.
166. **Criminal Code**, s.178.18(2)(b.1).

167. **Supra**, note 138-140, 144, 147 and 160.

168. *Id.* at 1005-1006, 51 C.C.C. (2d) at 23-24.


177. According to my interview with the RCMP, this situation often happens.


185. *Ibid.* s.178.12(1)(e.1).


188. See Watt, *supra*, note 61, 105, 130, 150 and 156, at 86.


192. Ibid. s.178.13(2)(b).
193. Ibid. s.178.13(c).
194. Ibid. s.178.13(2)(c).
195. Ibid. s.178.13(2)(c).
196. Ibid. s.178.13(2)(e).
197. Ibid. s.178.13(2)(d). Unlike other items in s.178.13(2), this item is not mandatory. See Watt, supra, note 61, 105, 130, 150, 156 and 188, at 129.
198. See Watt, ibid.
199. My interview with the RCMP.
200. My interview with the RCMP.
201. Criminal Code, s.178.12(1)(e).
202. E.g., in Watt, supra, note 61, 105, 130, 150, 156, 188, 197 and 198, at 91, the learned author states as follows:

   It is the potential involvement of a known subject in the commission of the offence being investigated that makes his conversations of evidentiary significance and, accordingly, it is only knowledge of the contemplated object's identity in this participatory sense that animates the identification requirement of section 178.12(e).

204. Supra, note 134.
205. Supra, note 203, at 4. On the other hand, the court held that an authorization is not invalid solely by reason of the fact that it fails to name all "known" suspects, while a failure to specify all "primary targets" may well lead to the authorization being struck down on the basis of fraud or non-disclosure. An accurate analysis of this case is in S.D. Frankel, The Relationship of "Known" and "Unknown" Persons to the Admissibility of Intercepted Private Communications, (1979) 21 Cr. L.Q. 465.
207. My interview with the RCMP.
208. My interview with the RCMP.

209. (1977) 40 C.C.C.(2d) 87 (Ont. Co.Ct.).

210. Id. at 90-91.

211. 1967-68, c.7.


213. My interview with the R.C.M.P.

214. Criminal Code, s.178.13(3).


216. Criminal Code, s.178.13(3).

217. Ibid. s.178.13(3)(a).

218. Ibid. s.178.13(3)(b).

219. Ibid. s.178.13(3)(b).

220. Ibid. s.178.13(3)(c).

221. Ibid. s.178.13(3).

222. Ibid. s.178.13(4).

223. My interview with the RCMP.


225. In Regina v. Crease et al. (No.2) (1980) 53 C.C.C. (2d) 121, 16 C.R. (3d) 221 (B.C.C.A.), it was held that an interception is not lawfully made where, notwithstanding the authorization contains a basket clause for unknown persons, the person sought to be included in the basket clause was known by the police, at the time of renewal of the authorization.

226. In Regina v. Commisso (1983) 7 C.C.C. (3d) 1, 36 C.R. (3d) 105 (S.C.C.), it was held that it may be that if it were shown that the police on a renewal had not revealed that they had grounds to ask for a separate authorization for another offence then the renewal might have been obtained irregularly, and the subsequent interceptions would be unlawful and any evidence obtained through such interceptions inadmissible.

227. Criminal Code, s.178.15.
228. Ibid. s.178.15(1)(a).
229. Ibid. s.178.15(1)(b).
230. Ibid. s.178.15(1).
231. Ibid. s.178.15(1).
232. Ibid. s.178.15(2).
233. Ibid. s.178.23(1).
234. Ibid. s.178.12(2).
235. Ibid. s.178.23(3).
236. My interview with the RCMP.
237. My interview with the RCMP.
238. Criminal Code, s.178.16(1).
239. Ibid. s.178.16(1).
240. Ibid. s.178.16(3).
241. Ibid. s.178.16(4).
242. Ibid. s.178.16(4)(a).
243. Ibid. s.178.16(4)(b).
244. Ibid. s.178.23(1).
245. E.g., in Regina v. Welsh and Iannuzzi (No.6), supra, note 95 and 96, at 370, the Ontario Court of Appeal held as follows:

   Section 178.23(1) is directory and its purpose is to ensure that there be disclosure that private communications have been intercepted and thereby provide a basis for political accountability. However, it cannot be said that a failure to comply with this section can retrospectively characterize an otherwise lawful interception as unlawful.

246. Criminal Code, s.178.16(2).
247. Supra, note 95, 96 and 245.
248. The relevant part of the court decision reads as follows:

   In my opinion, an interception complies with both the Code and the authorization if it is made in respect to a stated offence, i.e., for the purpose
or object of investigation or gathering evidence with respect to the named offence. The fact that the pursuit of the objective of the authorization reveals evidence of other crimes does not affect the lawful character of the interception.

249. The relevant part of the court decision reads as follows:

If an authorization does not include either as a named or unnamed person any of the parties to a communication, the interception cannot be characterized as lawful, and the intercepted communication is, therefore, inadmissible.


251. Supra, note 135, 136 and 250.

252. Id. at 197.

253. Id. at 201.


255. See Regina v. Leclerc (1985) 20 C.C.C. (3d) 173 (B.C.C.A.), which held that the interception of the accused's private communications under an itinerant interception clause was lawful. On the other hand, the Supreme Court of Canada held in Grabowski v. The Queen [1985] 2 S.C.R. 434, 22 C.C.C. (3d) 68 that the itinerant interception clause combined with a place-relating basket clause was invalid, because such a combination allowed the conversations of anyone to be intercepted anywhere and consequently the authorization contained no limitations as to person or place of the interception.

256. Province of British Columbia, Ministry of Attorney General, 1983 Annual Return: Invasion of Privacy Part IV.1 of the Criminal Code shows that during the six year period from 1978 to 1983 the emergency authorization was granted only four times, while 375 ordinary authorizations (excluding renewals) were granted.

257. Criminal Code, s. 178.13(1).


259. Id., at 124.

261. My interview with the RCMP.


263. *Supra,* note 134 and 204.

264. *Id.* at 16.


266. *Id.* at 201.


268. *Id.* at 465.

269. For example, *Lyons,* *id.*, has a positive aspect to the police as well. In this case, the main issue was whether or not the surreptitious entry by the police into the premises of the accused for the purpose of installing a radio transmitter rendered inadmissible evidence of the interceptions subsequently made pursuant to the authorizations which did not specifically refer to such entry. The court held that unless the authorization contains limitations on or prohibition of surreptitious entry, an authorization by necessary implication authorizes any person acting under the authorization to enter any place at which private communications are to be intercepted to install or to service a permitted listening device, provided such entry is required to implement the authorization.

270. *Supra,* note 32.


272. Section 10(1) and 10(3) of the *Combines Investigation Act,* *infra,* note 273, provide:

10(1). Subject to subsection (3), in any inquiry under this Act the Director [of Investigation and Research of the Combines Investigation Branch] or any representative authorized by him may enter any premises on which the Director believes there may be evidence relevant to the matters being inquired into and may examine any thing on the premises and may copy or take away for further examination or copying any book, paper, record or other document that in the opinion of the Director or his authorized representative, as the case may be, may afford such evidence.
... (3). Before exercising the power conferred by subsection (1), the Director or his representative shall produce a certificate from a member of the [Restrictive Trade Practices] Commission, which may be granted on the ex parte application of the Director, authorizing the exercise of such power.


275. In Hunter v. Southam Inc., id., the Supreme Court of Canada expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one, and that the meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee.

276. Id., at 168 (S.C.R.), 115 (C.C.C.).


278. Criminal Code, s.178.13(1).


280. Id. at 362.

281. Id. at 365-366.

282. Id. at 366.


284. Watt, supra, note 61, 105, 130, 150, 156, 188, 197, 198 and 202, at 178.


287. E.g., in Finlay and Grellette, supra, note 279-282, at 369, Martin J.A. for the Ontario Court of Appeal held as follows:

I am of the view that, having regard to the provisions of s.178.13(2)(d), which may and should be resorted to by the authorizing judge to impose a minimization requirement when the circumstances of the interception warrant the imposing of such a term, the absence of an
express minimization requirement such as that contained in Title III does not render Part IV.1 unconstitutional.


289. Total number of offences contained in National Crime Statistics.

290. Ibid.

291. According to National Police Agency, *The Police of Japan (1985)*, besides the efficiency of the police, the following are said to be the main reasons for the good public peace and order in Japan:

a. Japan is a sea-bound country with a homogeneous race, language and culture.
b. The Japanese have a high level of education and are traditionally bound by norm consciousness.
c. In Japan, the unemployment rate is low. The gap between the rich and the poor is small. There are no fixed social classes. And the people are guaranteed equal opportunities in occupation, social status and income, subject to one's own efforts.
d. Japan exercises strict control over guns and drugs.
e. The Japanese put deep trust in the police and are cooperative in criminal investigation.


294. Ibid.


298. Ibid.

299. 446,417 persons.

300. 144,758 persons.


303. Ibid.


305. Asahi Shinbun, April 2, 1986, at 5.

306. Judgment delivered by Eleventh Criminal Department.

307. Dantai-to Kiseirei.

308. Article 193 of the Penal Code [Keiho] provides (translation):

   Article 193. (Abuse of Authority by Public Officer)
   When a public officer abuses his authority and causes a person to perform an act which he has no obligation to perform, or obstructs a person from exercising a right which he is entitled to exercise, imprisonment at or without forced labor for not more than two years shall be imposed.

309. The preamble to the Constitution of Japan provides (translation):

   We, the Japanese people, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded. We reject and revoke all constitutions, laws, ordinances, and rescripts in conflict herewith.

   [emphasis added]
310. Article 13 of the Constitution of Japan provides
(translation):

Article 13. All of the people shall be respected as
individuals. Their right to life, liberty, and the
pursuit of happiness shall, to the extent that it does
not interfere with the public welfare, be the supreme
consideration in legislation and in other governmental
affairs.

311. Article 12 of the Constitution of Japan provides
(translation):

Article 12. The freedoms and rights guaranteed to the
people by this Constitution shall be maintained by the
constant endeavor of the people, who shall refrain from
any abuse of these freedoms and rights and shall always
be responsible for utilizing them for the public
welfare.

312. Article 189 of the Code of Criminal Procedure provides
(translation):

Article 189. A police official shall perform his
duties as a judicial police official as authorized by
law, or regulations of the National Public Safety
Commission or of the Prefectural Public Safety
Commission.
   2. A judicial police official shall, when he deems an
offence has been committed, investigate the offender
and evidence thereof.

313. Article 197 of the Code of Criminal Procedure provides
(translation):

Article 197. With regard to investigation, such
examination as may be necessary for attaining its
object may be made. However, compulsory dispositions
shall not be effected except when there are special
provisions therefor in this law.
   2. Public offices, or public or private organizations
may be asked to make reports on necessary matters
relating to investigation.

314. 4 Toko Jiho 18, 9 Hanrei Jiho 3.

315. See S. Tanakadate, Tochoki no Shiyo to Puraibashi (1980),
Kenpo Hanrei Hyakusen Vol.1, at 170.

316. See K. Kubota, Puraibashi no Kenri (1965), Nipponkoku Kenpo
Taikei Vol.7, at 145.

317. Yusen Denki Tsushin Ho, Law No.98 of 1953.

- 117 -


322. Nipponkoku Kenpo.

323. Article 33 of the Constitution of Japan provides (translation):

No person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offence with which the person is charged, unless he is apprehended, the offence being committed.


326. The Fourth Amendment provides:

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.


332. Kokyo no Fukushi.

- 118 -
Since neither the Constitution nor the Code of Criminal Procedure provides concerning the admissibility of illegally seized physical evidence, it is proper for this issue to be decided according to the interpretation of the Code of Criminal Procedure. The purpose of the Code of Criminal Procedure is, "regarding criminal cases, to clarify the true facts of cases and to apply and realize criminal laws and ordinances fairly and speedily, while thoroughly accomplishing the maintenance of public welfare and security of fundamental human rights of individuals (Article 1)". It is, therefore, necessary to consider the issue from this point of view. On one hand, it is an important mission of the criminal procedure to apply and realize criminal laws and ordinances fairly and to maintain public order. For that purpose it goes without saying that clarifying the true facts of cases as much as possible is necessary. Considering the characteristic of physical evidence that the illegality of search and seizure procedure could not change the nature, condition, or shape and therefore the evidential value, of the thing which was illegally seized, it is not proper to deny its admissibility in evidence merely because of the illegality of search and seizure procedure, for it would not conduce to the clarification of the true facts of cases. On the other hand, however, the clarification of the true facts of cases must be achieved according to the fair process, thoroughly accomplishing the security of fundamental human rights of individuals. Especially, considering that Article 35 of the Constitution provides that "[t]he right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33", and also considering that the Code of Criminal Procedure strictly provides for such matters as searches and seizures and that Article 31 of the Constitution provides that "[n]o person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law", it should be understood that where it is not appropriate from the standpoint of deterring future illegal investigative activity to allow into evidence the things illegally obtained in gross disregard of the principle of the warrant requirement embodied, inter alia, in such provisions as Article 35 of the Constitution and Article 218, Paragraph 1 of the Code of Criminal Procedure, such evidence is to be held inadmissible.
Including the RCMP undertaking, by contract, the duties of a provincial or municipal police force.

Code of Criminal Procedure, Article 189, supra, note 312.

Code of Criminal Procedure, Article 246.

Code of Criminal Procedure of 1922, Article 246 and Article 248.

Under the enforcement of the new postwar Constitution.

According to Article 199 of the Code of Criminal Procedure, the status of the applicant for an arrest warrant is restricted to the judicial police officer at the rank of Police Inspector or higher, designated by the National Public Safety Commission or the Prefectural Public Safety Commission.


See S. Suzuki, Keiji Sosho Ho (1980), at 69.

Code of Criminal Procedure, Articles 121-124 and Article 222(1).

Such requirement also complies with Article 35 of the Constitution of Japan.

In addition to the particulars of the persons and place, the authorization shall specify:
- the offence in respect of which private communications may be intercepted.
- a particular description of the type of communication sought to be intercepted.
- the manner of interception, especially, whether or not the entry into the place is authorized.
- the period of time during which interception is authorized.

BIBLIOGRAPHY

BOOKS


Canadian Committee on Corrections, "Toward Unity: Criminal Justice and Corrections", 1969.


ARTICLES


Atsumi, T., "Tocho, Wiretapping", (1972), Enshu Keiji Sosho Ho, 74.


Itoh, M., "Issues in the After the Banquet Decision", (1967), 1 Law in Japan, 141.


Satoh, T., "Sasa Hoho to Shiteno Tocho", in Keisatsu Gakuronshu vol.15, No.4, 51 and No.5, 123.


Title, M., "Canadian Wiretap Legislation: Protection or Erosion of Privacy?", (1978), 26 Chitty's Law Journal, 47.

