Video Surveillance in Wrongful Dismissal Cases

By Elliott Goldstein, B.A., LL.B.

Videotape evidence recorded by employers' surveillance cameras is being increasingly accepted by Canadian judges in wrongful dismissal cases. For example, in the April, 1997 case of Richardson v. Davis Wire Industries Ltd., the Supreme Court of British Columbia held that "... if the videotape evidence is probative of a matter in issue and is made in the context of (an employer's) legitimate right to investigate (an employee's) misconduct, then it ought to be admitted." (1) Furthermore, where the employee has no reasonable expectation of privacy, there is no breach of provincial privacy legislation. (2) The case of Richardson v. Davis Wire Industries Ltd. involved a long term (17 year) employee with a good record, who was summarily dismissed for 'sleeping on the job' and then lying about it to his employer. The employee, Keith Gerard Richardson, sued his former employer, Davis Wire Industries Ltd., for wrongful dismissal claiming that it did not have sufficient (i.e., 'just') cause to terminate Richardson's employment.

Richardson worked the night shift (midnight to 7:30 a.m.) as a production foreman and was in charge of monitoring employees and equipment, checking the operation of the plant, etc. and attending to safety concerns. Several months before the dismissal, senior management of the plant began receiving some reports that Richardson was sleeping on the job. Initially, these reports were disregarded as "sour grapes", however, by the summer of 1994, several more reports were received that Richardson was sleeping on his shift for extended periods of time. The general manager of the plant decided to investigate by means of placing a hidden surveillance camera in the foreman's lunch room. This manner of investigation was chosen to find out if the allegations were true and, if so, stop the behavior. The general manager did not wish to insult Richardson by first speaking to him about the allegations of his sleeping on the job if, in fact, Richardson wasn't doing so.

The surveillance camera recorded Richardson in the foreman's lunch room on the night shift for a period of four nights. After viewing the videotapes, the general manager concluded from his observations that Richardson had been sleeping during the periods of time that his activities were recorded by the surveillance camera.

On the fifth night, the general manager, while watching the video monitor, saw Richardson apparently sleeping in the lunch room, just before the scheduled coffee break. He decided to confront Richardson. When he opened the door to the lunch room and turned on the light, he startled Richardson who was sitting in a chair with his feet up on the table. There followed a conversation in which the general manager asked Richardson what he was doing "up there sleeping". Richardson replied that "he wasn't feeling well, and had just come up to rest, as it was just before the coffee break". The general manager asked Richardson how often he slept on the job. The reply he received was inconsistent with the videotaped evidence. Richardson was told that he was lying and was shown the video camera but not the videotape. The general manager explained to Richardson that he was in a position of trust and had broken that trust by sleeping on the job and lying about it.

At trial, Davis Wire sought to tender in evidence the videotape of Richardson's activities in the foreman's lunch room. Richardson's lawyer argued that the videotaping of Richardson's activities constituted a violation of his right to pri-

vacy under British Columbia's Privacy Act. (3), thus preventing the videotape's admission into evidence.

Counsel for Davis Wire, argued that the videotape evidence was admissible because it was relevant as it established the precise time at which Richardson entered and left the lunch room on the four nights in question; the fact that it was Richardson who was shown in the videotapes; and the length of time of the conversation between Richardson and his boss. (4)

The learned trial judge commented as follows on the admissibility of the videotapes: (5)

"Having viewed the video tapes, there is no doubt that they do not establish in any significant way that Richardson was sleeping. It is only when Ward enters the lunch room on September 15 that one captures a clear view of Richardson who, it does appear, was wakened from sleep. The video tape does, however, establish the periods of time when Richardson was in the lunch room, and the period of time during which Richardson and Ward discussed the matters in issue.

"I cannot find that the video tape does anything other than represent the facts in issue between the parties: Greenough v. Woodstream Corp., (1991] O.J. No. 77 (QL) (Ont. H.C.). Furthermore, although limited in its usefulness, the video tape does deal with matters which are material, relevant, and probative and which tend to aid, rather than confuse, mislead or prejudice the matters in issue (Quintal v. Datta, [1988] 6 W.W.R. 481 Sask. C.A.).

"In my view, the video surveillance in this case is consistent with that used in R. v. Caughlin (1987, 18 B.C.L.R. 2d 186 Co. Ct.)."Accordingly, I find that the tapes are probative of matters in issue and should be admitted into evidence."

On the issue of whether the videotapes were made in breach of Richardson's privacy, the trial judge commented as follows:

"I conclude that there was no expectation of privacy on the part of Richardson in the circumstances. Furthermore, even if he had an expectation of privacy, a breach of privacy does not lead to exclusion of the evidence in this case. The Privacy Act merely provides the foundation for a claim in tort and does not prohibit the admission of evidence, even if it were gathered contrary to the Act."Richardson could not reasonably expect to have the protection of privacy when he was sleeping on company time, on company property, and in circumstances where he could be expected to be contacted if needed.

"I cannot find that the production of the video tape in this case would bring the administration of justice into disrepute.

"Furthermore, I reject the argument of the plaintiff that Davis Wire did not have a reasonable basis for conducting the surveillance.

"In my view, Davis Wire set up their surveillance upon reasonable suspicion that Richardson was sleeping on the job. The risk that a party might not be completely forthright is recognized in the ruling that video tapes need not be disclosed to the plaintiff until after discoveries because a plaintiff might tailor his evidence to suit: Daruwalla v. Shigeoka (1992, 72 B.C.L.R. 2d 344 S.C.)."Having said this, it is true that the video tapes have limited probative value by reason of the poor quality of the tapes. Nevertheless, the tapes establish, as Richardson concedes, the periods of time in which he was in the foremen's lunch room. Furthermore, it is significant that Richardson relied on the video tape in his affidavit filed in support of his application for summary

judgment under Rule 18A. It is therefore difficult to see that Richardson can now exclude the video tape evidence having already relied upon it in his application under Rule 18A.

"I would therefore allow the video tape evidence to be admitted into evidence and accordingly mark it as an exhibit."

Notwithstanding that the trial judge ruled "admissible" the videotapes, her ladyship expressed her regret that:

"Davis Wire made the choice to install the surveillance equipment in order to catch Richardson in the act of sleeping on the job.

"In my opinion, the surveillance of an employee in hopes of catching him or her engaging in a type of wrongdoing that, while foolish and irresponsible, would not justify summary dismissal, is itself a practice which jeopardizes the relationship of trust and confidence that is so crucial to the employer/employee relationship."

It is unfortunate that Davis Wire did not attempt to solve this problem by honestly confronting Richardson once it became suspicious, and making it clear to him that sleeping on the job would not be tolerated.

It is very interesting to note the difference between the employer's approach and the approach preferred by the court. The employer, after hearing persistent allegations of an employee sleeping on the job, used a surveillance camera as an investigative aid to monitor a scene of suspected activity. The surveillance was used to determine if the allegations were, in fact, true. The employer chose not to speak to the employee first as it wanted to avoid "insulting" him with untrue allegations.

The court's approach would have the employer honestly confront the employee once the employer became suspicious, and make it clear to the employee that sleeping on the job would not be tolerated. In effect, the court wanted the employer to first give the employee a "warning". Presumably, if the allegations persisted, the employer could then conduct the video surveillance and record the proof it needed. Then the employer could summarily dismiss the employee for having ignored the warning.

Alternatively, and perhaps preferably, the employer could question the employee about the allegations, and if the employee lied and denied those allegations, the employee's employment could then be terminated on two grounds: the employee engaged in activity contrary to the warning, and the employee was dishonest.

It is ironic that had Richardson told the truth about the frequency with which he slept on the job, his employer may not have been in a position to fire him. Richardson had not been warned by Davis Wire that his "sleeping" behavior would not be tolerated. The court seemed to imply that certain activities (such as sleeping on the job), "while foolish and irresponsible" would not justify summary dismissal.

The lesson to learn from the Richardson v. Davis Wire Industries Ltd. case is that, where the employer uses video surveillance, the courts will look carefully at whether the employer gave a prior warning to the employee that the activity later recorded on video tape, which caused the firing, would not be tolerated.

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1.The Honourable Madam Justice Kirkpatrick in Richardson v. Davis Wire Industries Ltd., unreported decision of the Supreme Court of British Columbia, Vancouver Registry No. C946330 dated April 21, 1997, at page 21.

2. E.g., The Privacy Act (of British Columbia), R.S.B.C. 1979, c. 336, The Privacy Act (of Manitoba), R.S.M. 1987, c.P125, or similar provincial statutes. Note that Ontario does not have equivalent legislation that makes violation of privacy a civil tort and creates a statutory right to sue.

3. R.S.B.C. 1979, c. 336.

4. Richardson admitted at trial that he was shown on the videotape; that he was shown in the room at the times in question; and that there was no one else in the room at those times.

5. Richardson v. Davis Wire, supra, footnote 3, at page 22.

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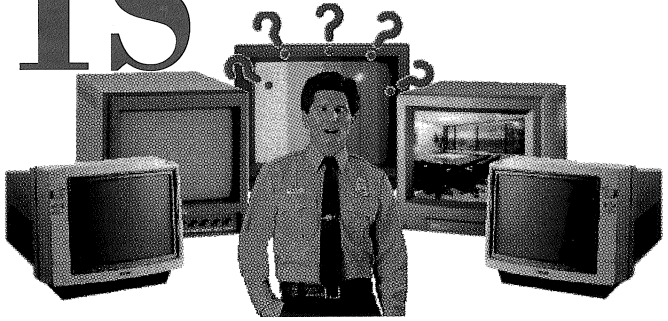

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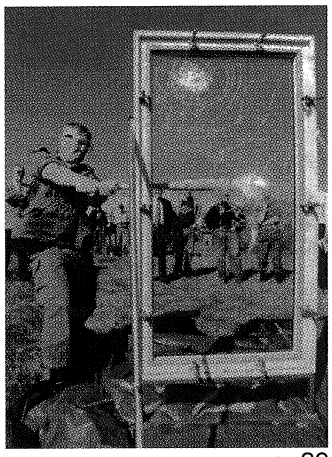

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AS&E's Body Search x-ray finds a lot of drugs and weapons on this person.
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