



Dealing With Disclosure

A look at whether ATM surveillance tapes have to be disclosed in court

By Elliott Goldstein

Are ATM surveillance videotapes subject to disclosure orders?

A Yes. In a recent Alberta case, the Alberta Court of Queen's Bench (a superior court of criminal jurisdiction) ordered a local bank to produce (disclose) surveillance videotapes on file with respect to a certain time period pertaining to an accused and his victim (the complainant), and any information related to those specific videotapes. The videotapes showed transactions that took place at automated teller machines (ATMs).¹

The facts of this case are somewhat unusual to say the least. The accused was charged with, among other things, unlawfully confining his wife, assaulting her, uttering threats to cause bodily harm or death to her, sexually assaulting her and so on. At the preliminary inquiry, the complainant wife testified that she was confined to her home between November 16 and 19, 1998, by the accused. She claimed that she had no opportunity to escape until November 19, 1998.

The accused's theory was that at no time was his wife confined, that she had opportunities to leave their matrimonial house during that three-day period, and that she did so. In support of his theory, the accused required the bank records for the period of November 16 and 19, 1998, with respect to bank accounts maintained by the accused, to which his wife had access, and some of the banking transactions that took place in these accounts during the relevant time.

The accused submitted that since these transactions took place at ATMs, the video recording security devices at these locations and the aforementioned related information would provide evidence that the wife was using the ATMs during the time in question, was carrying on banking activities, and was able to act independently during this period of time.

The bank refused to release its surveillance videotapes without a court order. However, the bank agreed to safeguard the surveillance videotapes pending the outcome of the accused's application for an order compelling the bank to turn over the tapes.

The accused submitted that it was fundamental to his defence to show that, in contrast to the complainant wife's story that she was held hostage, she was in fact acting independently during the

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relevant time. He argued that the surveillance videotape from the bank was critical in this regard.

The Alberta Court of Queen's Bench considered section 29(5) of the *Canada Evidence Act*, which applies in criminal cases. It provides that a financial institution (for example, a bank), when not a party to a legal proceeding, is not compellable to produce any book or record unless by order of the court made for special cause. The bank, in this case, was not a party to the proceeding because the accused was not charged with having committed an offence against the bank (for example, theft or robbery). Furthermore, the items being sought were required to prove that a

crime was not committed.

The court held that there was a privacy issue involved even though the accused was seeking surveillance camera videotapes of an ATM area to which the public has access. However, the surveillance tapes were not found to be records of a deeply personal nature. Notwithstanding, the court addressed the privacy issues by restricting its order to allowing the accused to obtain only those records related to his own use of the banking equipment and to the use by the complainant of the same ATM.

The court concluded that the videotaped surveillance records fell within sections 29 and 30 of the *Canada Evidence Act* as being "a copy of any entry in any book or record kept in any financial institution" in line with the general spirit of the interpretation of those sections, and in relationship to the modern world of commercial and financial transactions.

The court concluded that the reliability of the videotaped surveillance records also met the general test cited in *Ares v. Venner*,² as follows:

- (1) the record or entry must have been made contemporaneously with the events recorded;
- (2) the record must have been made by someone with personal knowledge of the matters; and
- (3) the record must have been made by someone under a duty to make it.

Therefore, the Alberta Court of Queen's Bench ordered the bank to produce surveillance videotapes it held on file with respect to the time period of November 16 to 19, 1998, pertaining to the accused and to the complainant only, and any information related to these specific videotapes was also to be produced.

It is not clear from a reading of the original judgment whether the surveillance videotapes of the accused and his wife were recorded from within the ATMs (that is, looking outward at the user) or by surveillance cameras directed at the area of the ATMs. However, in my opinion, it is not important whether the camera is internal or external to the ATM.

It is important that this "criminal" court held the surveillance videotapes constitute "a copy of any entry in any book or record kept in any financial institution." This is in line with many

civil courts that have held a surveillance videotape to be a "record" and, therefore, subject to the rules of disclosure and production in civil lawsuits.

What is to be learned from this case? For one thing, banks and other financial institutions should, immediately upon being notified (whether in writing or verbally) that their surveillance videotapes may be required to be produced as evidence, safeguard those surveillance videotapes. Secondly, a surveillance videotape should never be erased after the party in charge of that tape is notified that its production and disclosure may be required for court purposes. Thirdly, careful logs should be kept so that any party in possession of a surveillance videotape can show the chain of custody of that tape. Last, but not least, if this becomes the case, a lawyer should be contacted to get involved because the party in possession of a surveillance videotape may have good reasons for not wanting it to be disclosed. 🌸

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Author's Notes

- 1 R. v. D.L.M. [1999] Alberta Judgments No. 1326, 1999 ABQB 875 (A.C.Q.B., Judicial District of Edmonton, per Judge Lee).
- 2 (1970), S.C.R. 608.

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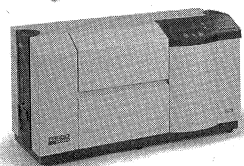
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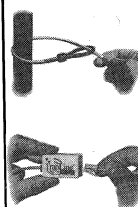
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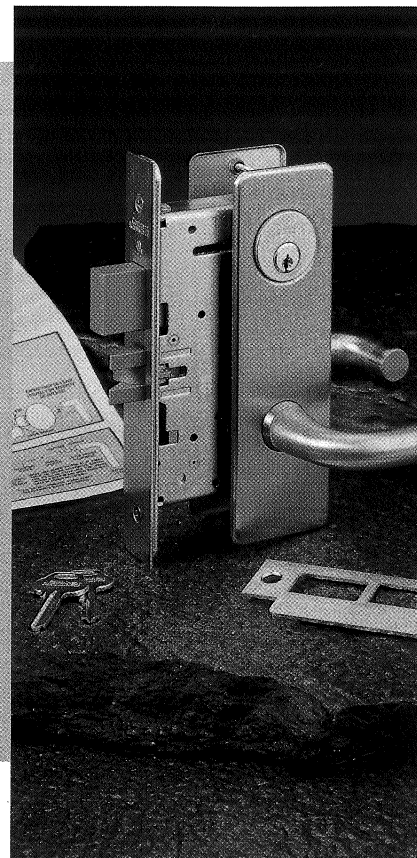
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