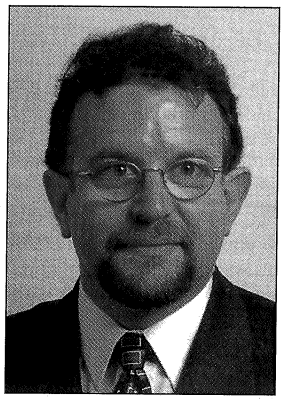
CCTV and the Law

A Room With a View



Inappropriate video surveillance can lead to a charge of mischief, so it is important to know how to avoid potential problems

By Elliott Goldstein

Q: Can video surveillance give rise to a charge of mischief?

A: Yes. Persons who engage in "illicit" video surveillance have been charged with "mischief" under section 430 of the *Canadian Criminal Code* (R.S.C. 1985, Chap. C-46), which reads as follows:

> "Every one commits mischief who wilfully ... (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or (d) obstructs interrupts or interferes with any person in the lawful use, enjoyment or operation of property."

The courts have held that "enjoyment of property," as used in section 430 (1)(c), refers to "use" or "pleasure," and that "operation" applies to a commercial, institutional or industrial enterprise.[1]

In one 1998 case, a surveillance camera was found hidden beneath the desk of a woman working at a chartered accountant's office in Toronto, Ontario.[2] The camera was allegedly placed there by a male colleague. According to the newspaper report, "The camera wires were traced to a VCR hidden behind a filing cabinet at another desk in the office. The tapes were removed from the machine by a man after everyone had left the office for the day, police said."[3] The colleague was charged with "mischief interfering with property."

In another 1999 case, a man was arrested after a babysitter discovered homemade videotapes depicting two young females changing into bathing suits. According to a newspaper report, "the videotape was accidentally popped into the VCR by one of the man's children. The video had been taken inside the family's pool change room and showed two young females changing their clothes. After receiving a complaint from the babysitter, detectives seized a pinhole camera, a VCR and 78 videocassette tapes from the home. The man was charged with two counts of mischief for interfering with the lawful use or enjoyment of property."[4]

In neither of the aforementioned cases did law enforcement or private security officers conduct the video surveillance. Nor was the video surveillance used as "an investigative aid to monitor a scene of suspected criminal activity."[5] The "targets" of the surveillance had a reasonable expectation of privacy, and the recordings were made without their consent.

Use of the mischief section to prosecute those legitimately conducting video surveillance deserves comment

As both of the cases are still before the courts, it would be inappropriate to remark upon them. However, use of the mischief section to prosecute those legitimately conducting video surveillance deserves comment.

The offence of mischief is found in Part XI of the *Criminal Code*, entitled Wilful and Forbidden Acts in Respect of Certain Property.[6] Section 428 of Part XI defines "property" to mean "real or personal corporeal property."[7]

Section 430 must be read in conjunction with section 429, which provides an exception (that is, a defence to the charge) in subsection 430(2):

> "No person shall be convicted of an offence under sections 430 to 446 where he proves that he acted with legal justification or excuse and with colour of right."

The courts have held that the word "and" in that subsection should be read as "or." Therefore, "it is sufficient if the accused establishes that he acted either with legal justification or excuse, or with a colour of right. Colour of right means an honest belief in a state of fact which, if it existed, would be a legal justification or excuse."[8]

This means that the relevant question, then, is whether the person who conducted the video surveillance acted with legal justification or excuse or with a colour of right. Undoubtedly, a person would be legally justified in conducting video surveillance to watch his or her own residence and its contents, or to monitor an employer's building(s) and any contents.

Similarly, conducting surveillance to "protect" oneself or others (for example, family, relatives, employees, employers, customers or guests) would also be legally justified. The word "protect" is used here in the ordinary sense — that is, to mean "to keep from harm, attack or injury."

The mischief section also contains a statutory defence that is of importance to those who conduct mobile surveillance (that is, private investigators). Subsection 430(7) provides the following:

> "No person commits mischief within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only

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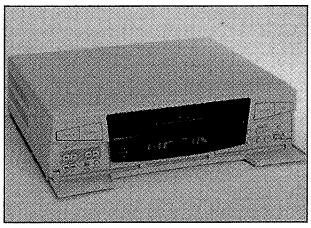

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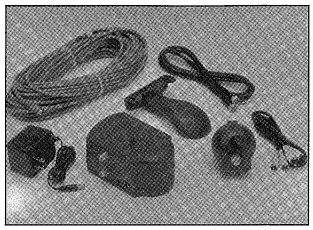

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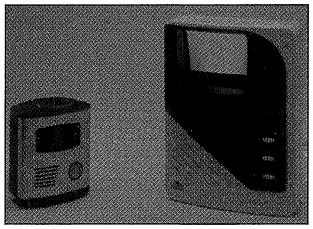

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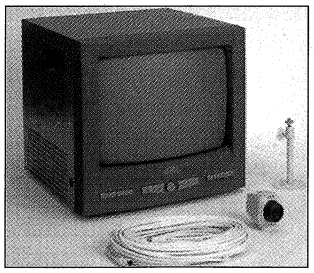

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of obtaining or communicating information."

It could be argued that conducting video surveillance at or near a dwelling-house (that is, a building or structure that is kept or occupied as a permanent or temporary residence, and includes a mobile home) falls within this statutory exception.

All that said, to protect oneself and one's employer from a charge of mischief, an individual is well advised to discuss with his or her lawyer whether "legal justification" or a "colour of right" exists before commencing any surreptitious video surveillance. Also, discussions should be documented and records of the events prompting and leading up to the video surveillance should be kept.

Any successful endeavour requires careful planning. Keep in mind the old adage, "if you fail to plan, plan to fail."

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Author's Notes

1 Greenspan & Rosenberg, *Martin's Annual Criminal Code 2000*, p. 666, (Toronto: Canada Law Book, 1999).
2 "Camera found under desk: Woman filmed below waist," *The Toronto Star*, Friday, October 30, 1998, p. A30.
3 Ibid.
4 "Ontario: Firechief charged in illicit-videotaping case," *The Globe and Mail*, August 24, 1999, p. A5.
5 *R. v. Taylor* (1983), 10 W.C.B. 303, 4 C.R.D. 425.60-08 (Ont. Prov. Crt.).
6 *Criminal Code*, R.S.C. 1985, c. C-46 [as amended].
7 The definition of property for the purposes of Part XI is much narrower than the definition contained in section 2 of the *Criminal Code* (for example, it does not include deeds and instruments relating to or evidencing title or right to property).
8 Greenspan & Rosenberg, *Martin's Annual Criminal Code 2000*, p. 664, (Toronto: Canada Law Book, 1999). Also see *R. v. Creaghan* (1982), 1 C.C.C. (3d) 449 (Ont. C.A.) and *R. v. Ninos and Walker*, [1964] 1 C.C.C. 326 (N.S.S.C.).

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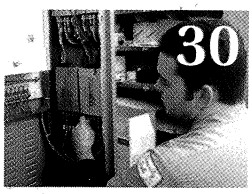

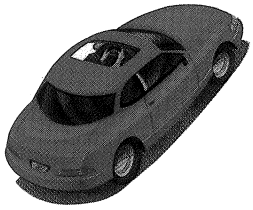

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