

Divulging Demands

Uncovering the potential negative effect of delaying or incompletely disclosing surveillance videotapes **By Elliott Goldstein**

Security professionals beware. Delaying or incompletely disclosing surveillance videotapes can result in a stay of charges against an accused.

For example, in the case of *R. v. Davidson*,¹ the Ontario Court of Justice dealt with the effect of the disclosure of surveillance videos on the accused's argument that his Section 11(b) *Charter* right to be tried within a reasonable time had been breached.

The accused, Davidson, sought a stay of proceedings if a breach was found. The Crown denied any breach but agreed that if the court found a breach, the appropriate remedy would be a stay of proceedings.²

Per Douglas, J:³

"These allegations concern a disturbance in Casino Rama at 3 a.m. or so, on a Sunday morning. Regulated under the *Gaming Control Act*, S.O., 1992, and the *Criminal Code*, the Casino was subject to numerous requirements to ensure public order and safety. These included the requirement that 'a closed circuit television system,' with extensive capabilities (including video monitoring, recording and printing) covering all of the public and many of the private portions of the Casino must be in place."

Although the judge wasn't entirely happy with the videotapes, noting that the video system evidence was "at best, unsatisfactory," he was satisfied that it was highly probable that the events before, during and after the alleged crime were caught by several video cameras. He also noted that the casino had about 500 cameras, and that there were three types of video recordings: random (made by the casino's cameras before the alleged event); deliberate (video made during and after the

event); and further random recording (made even while the monitor was deliberately recording the accused).

"If I am correct respecting these three sorts of recordings, there can be little doubt that the accused had a right to disclosure, or conversely, that there was a Crown obligation to disclose, which extended to all of these sorts of videos, each of which was created by a State agency, the Casino, as required by provincial law."

In the end, it appears many of the original tapes must have been destroyed, and that at least two different compilations ("dubbed" or "edited" versions) were provided to the defence.

The Crown argued, in essence, it bore no responsibility for the inadequate and delayed tape disclosure, as it was actively seeking, from November 2000 through March 2001, to facilitate the defence request but did not have enough information from the defence to know what it wanted. In other words, the Crown implied the blame, if any, lay with the police forces and/or Casino Rama as third parties.

With respect, this turns the Crown's obligation to disclose state-created and held material into an accused's right, conditional on the accused having sufficient knowledge to ask just the right question to elicit the Crown response. Here, the accused knew there would be videotapes, plural, because it was public knowledge there were cameras in the Casino. He asked for these tapes.

The Crown asked the Ontario Provincial Police, who had an Alcohol and Gaming Commission office within the casino, to preserve and provide the videotapes. Even if the Crown thought this was complied with early in 2001, by no later than March 2, 2001, it knew, definitively, that the defence was not satisfied. And, with due inquiry, the Crown could have

determined that the defence had every reason to be concerned.

The Crown, with respect, did not seem to take the request seriously. The Crown's attitude is implied in the February 26, 2001, transcript, where it adopted the unintelligible casino phrase that the tapes were "dubbed" in order to criticize the defence for requesting unedited, continuous tapes.

The Crown further suggested the defence wished to see 5,000 tapes rather than whatever number was relevant. These comments, notwithstanding earlier efforts and the Crown's later accommodations to the defence in order to view the tapes, did not reflect that the Crown was trying to get to the bottom of the video system issues and produce all relevant disclosure. Hence, given the absence of any waiver, and the ultimate setting of a trial date without a resolution of the disclosure issue, the judge determined *the Crown must bear some responsibility for such disclosure delay* (emphasis added).

After discussing the issue of notebook disclosure, the court dealt with the issue of the prejudice to the accused caused by the delayed and incomplete disclosure of the casino surveillance tapes.

Per Douglas, J:

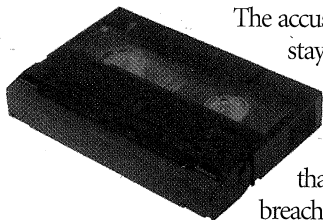
"Turning then to prejudice to the applicant/defendant:

"In my view, this aspect is largely answered by the reasons of Justice Montgomery previously noted, which I briefly re-quote:

"The critical opportunity to attack the credibility of Crown witnesses at this stage of this trial has been irreparably lost."

"However, at this stage of this second trial, I find that the ability to attack has been significantly diminished.

"In circumstances where the public interest in the prosecution of offenders is only engaged by a prosecution for causing a disturbance, 'by screaming'



or, even, for assault to resist arrest, this amounts to some serious prejudice.

"[Defence counsel] Mr. Gold has said that there is serious discrepancy between the evidence given, the statements produced and the now produced notes. While I accept Mr. Gold's assertions, I have not been asked to review such transcripts or statements, and I base my decision solely on the risk that this is so, that the principal tool of truth testing we know, that is cross-examination, has been significantly impaired.

"The accused, of course, has had to wait longer than appropriate to have his criminality, or not, determined. All of this, in my view, amounts to some real prejudice.

"Balancing all of the above, it is my view that 12 months' delay is, in these peculiar circumstances, excessive, explicable only by State disregard of its disclosure obligations, not waived by counsel, and the cause of some quantifiable prejudice. In these exceptional circumstances, I conclude that there has been a breach of Section 11(b).

"Insofar as no other remedy was argued by either the applicant or the respondent, as available, or appropriate, I conclude that count one must be stayed.

"I make, however, no comment respecting the propriety or civility, or not, of the

accused's conduct on the night in question."

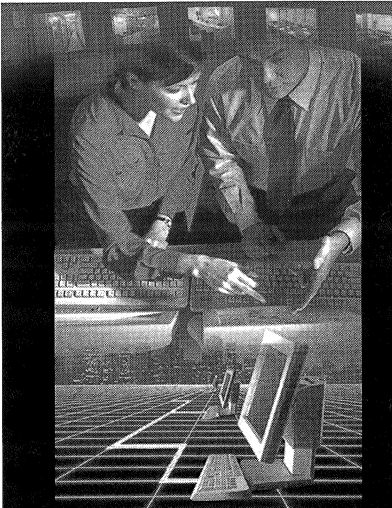
In the *Davidson* case, counsel for the accused argued for a stay of proceedings on the ground that the delay in disclosure of the casino's surveillance tapes caused prejudice to the accused because the accused's ability to attack the credibility of Crown witnesses was irreparably lost or at least significantly diminished. In addition, some tapes were apparently destroyed. These tapes may have shown the events that occurred before, during and after the incident that gave rise to the charges and, therefore, would be helpful to the accused in making full answer and defence.

The *Davidson* case makes it clear that the Crown does bear responsibility for the disclosure of casino surveillance tapes. It also makes clear the importance of preserving the tapes as potential evidence. ♣


Elliott Goldstein, BA, LL.B., is a barrister and solicitor and visual evidence consultant based in Toronto, Ontario.

Author's Notes

- 1 [2001] O.J. No. 5588 (Ont. Ct. J., Orillia, ON) per Douglas, J.
- 2 A mistrial was declared at the first trial of the accused.
- 3 All quotations are from the *Davidson* case.



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October 2003 | Volume 25 Number 7

COVER STORY I

16 Staying Out of Harm's Way

Having an extra set of "eyes" is proving to be a great asset where lives are at risk in the world of high crime

By Jack Kohane

FEATURES I

14 Consulting Conundrums

Getting experts to discuss current trends and challenges facing security managers, as well as some of the solutions available to them *By Bonnie Toews*

20 Anticipating Aftershock – Part 2 of 2

Looking at how privacy legislation may roll out and affect the security industry in British Columbia

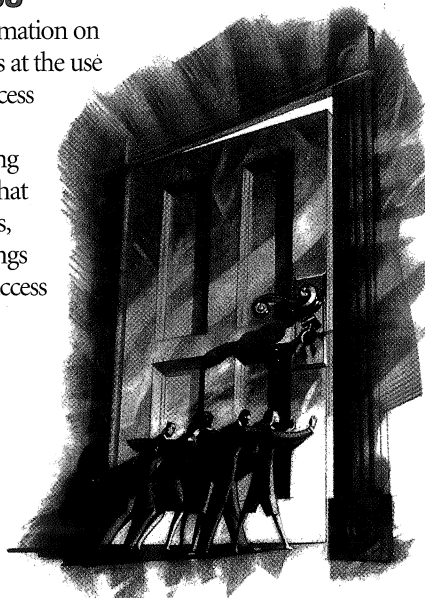
By Dean P. Davison

PULLOUT I

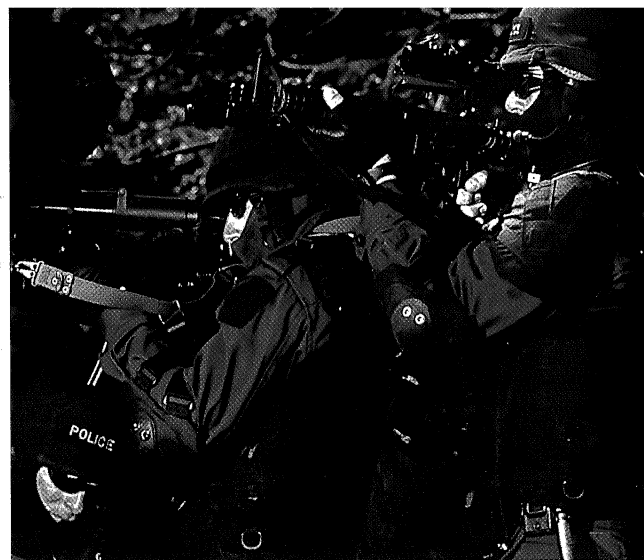
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By Stacey Hunt, Priscilla Jansen, Jordan Johnson, Dwayne Mercredi and Bonnie Toews



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DEPARTMENTS I

4 Editor's Notebook

Going to the Source

6 Letters to the Editor

Providing answers, not questions

8 Industry Updates

Private security concerns cops; disregarding disaster recovery; better securing passports and visas; and more

12 CCTV and the Law

Divulging Demands

By Elliott Goldstein

26 ASIS Offering

Procedure Development – Part 2 of 2

By Herby Duverné

28 CANASA Happenings

On With the Show

29 Product Marketplace

29 Advertisers' Directory

30 CSIS Information

Hazard Resolution

By Tracey Pinder