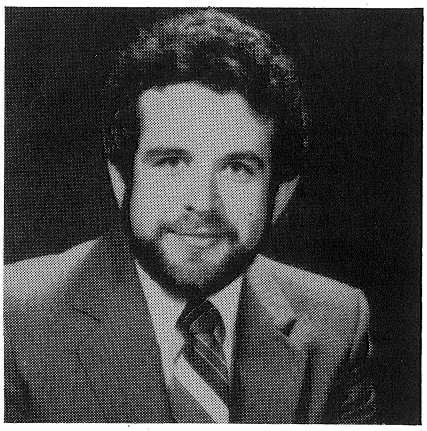
How The Law Stands Today —

VIDEO SURVEILLANCE IN THE WORKPLACE

by Elliott Goldstein, B.A., LL.B.



Now practising law in Pickering, Ontario, Mr. Goldstein was called to the Bar of British Columbia in 1984, and called to the Bar of Ontario in September 1988. This article is based on a manuscript written for Project Visual Evidence, which was funded by The Law Foundation of Ontario, whose generous financial support is gratefully acknowledged by the author. Further information on the study may be obtained by writing to Project Visual Evidence, 1501-360 Ridelle Avenue, Toronto, ON, M6B 1K1.

Video surveillance is routinely conducted in the workplace. Video cameras are used in banks, retail stores, offices, factories, warehouses, and government facilities to conduct surveillance of workers and clients/customers.

It is not illegal to record on videotape pictures of activities occurring in the workplace because there is no Canadian law prohibiting video surveillance of employees. For example, in a few reported Canadian cases, employers used a hidden camera to videotape cashiers suspected of stealing money tendered by customers[1].

It is illegal to record certain conversations on videotape (or audiotape). In fact, to "willfully intercept a private communication" without judicial authorization or the consent of one of the communicating parties is an indictable offence[2]. It is *not* legal for an employer to record the conversations of his employees. However, it *is* legal for the employer to record his own conversation with his employee without that employee's knowledge.

Canadian criminal laws which prohibit electronic and audio surveillance *(i.e.,* "wiretapping" and "bugging") apply only to voice communications and are inapplicable to videotape not having any sound[3].

Right to privacy in the workplace

The Canadian *Charter of Rights and Freedoms* has been interpreted to provide a right of privacy to workers in some circumstances.

For example, in *R.* v. *Kathleen Taylor*[4], the accused was charged with mischief after she was secretly videotaped committing acts of vandalism in the library where she worked. At trial, her defence lawyer tried to convince the Ontario Provincial Court that the videotape evidence should be excluded because Taylor's rights under section 7 of the Charter had been violated. Taylor's lawyer argued that section 7, which gives everyone a right to "security of the person", guaranteed Taylor a right to privacy in her workplace.

The defence submitted that the Court should not admit the videotapes because Taylor did not consent to the videotaping, she was unaware of an electronic eye in her workplace, no judicial officer sanctioned the installation of the video surveillance system, and the Crown prosecutor did not demonstrate that this form of surveillance was the only way to get the evidence it was seeking.

The Court rejected all of these defence arguments for the following reasons:

> What we are concerned with in the case ... does not amount to a surveillance of the accused. What has been described in this case, to date, is a surveillance of a portion of the working area in a public library which has been the scene of a number of incidents over an extended period that give rise to a fair inference of continuing criminal activity by a person or persons unknown. When the culprit was not unmasked by conventional investigation local police enlisted the assistance of the Special Services Branch of the Ontario Provincial Police who in turn installed the video equipment which produced the tapes with which we are now concerned.
>
> The equipment was not installed to monitor the conduct or efficiency of employees. It was not installed to uncover idiosyncratic behavior nor to intrude upon the privacy of employees in general or the accused in particular. Rather the system was installed as an investigative aid to monitor a scene of suspected criminal activity.

The Court received the videotapes into evidence because "... the surveillance was fully justified. It did not constitute an infringement of anyone's privacy. But if we suppose for the moment that it did, it could only be an infringement in a very limited sense of the word and certainly it was not of such a nature as to bring the administration of justice into disrepute."

In the Taylor case, the court recognized that s. 7 of the Charter contemplates a right to privacy in some circumstances but concluded that the surveillance carried out was justified and did not amount to an infringement of privacy.

If an employee's right to privacy was infringed in a manner which brought the administration of justice into disrepute, then he could apply under s. 24(2) of the Charter to have the videotape evidence excluded[5].

Section 8 of the *Charter of Rights and Freedoms* which contains the phrase "right to be secure against unreasonable search or seizure" has also been interpreted as providing a right of privacy. There are a number of criminal cases decided under s. 8 which say that a video surveillance is an "illegal search" where the person being watched has a "reasonable expectation of privacy". But those cases do not involve surveillance in the workplace[6].

The Unions' Perspective

Understandably, trade unions are very concerned about management's attempts to "keep an eye on workers". The Canadian Union of Postal Workers (CUPW) felt so strongly about on-the-job surveillance of its members that it negotiated the following clauses into its agreement with Canada Post Corporation:

> "Article 41.02 *Surveillance:*
> (a) the watch and observation systems cannot be used except for the purpose of protecting the mail and the property of the State against criminal acts such as theft, depredation and damage to property. At no time may such systems be used as a means to evaluate the performance of employees and to gather evidence in support of disciplinary measures unless such disciplinary measures result from the commission of a criminal act.
>
> (b) Notwithstanding paragraph (a), no

closed circuit television system shall be used directly or indirectly to watch employees inside a postal installation. Any such investigative system already existing shall be dismantled within sixty (60) days after the coming into effect of this agreement. No evidence gathered in violation of this paragraph shall be admissible before an arbitrator."

In the absence of such clauses in an agreement, (or in a non-union setting), management has a right to:
(1) maintain surveillance of its employees[7];
(2) investigate employee theft[8];
(3) arrest and detain employees caught stealing[9]; and,
(4) dismiss employees who steal.

Surveillance evidence in wrongful dismissal cases

In the past few years, many wrongful dismissal actions have been launched by employees who believe that their employers fired them without just cause. In *Meszaros* v. *Simpson Sears Ltd.*[10], the employer department store fought back. It effectively used surveillance videotape evidence to convince the court that the employee had been dismissed for just cause — she committed theft of store money.

As explained by the trial judge, the videotape recording came into existence in the following manner.

> The security manager of the department store had a videotape camera placed in such a position as to focus on the cash register of the Drapery Department. A monitor was placed in the office of the company accountant. This installation was secret, known only to the manager, the security manager and the accountant and the tape was played in court. The security manager monitored the cash register for a short time at 9:30 a.m. when the float was put in the cash register by the plaintiff. He then kept watch on the cash register until approximately 1:00 p.m. on the 28th day of September and observed the plaintiff making a sale.
>
> At the commencement of this transaction the security manager had turned on the videotape recorder and left quickly in the direction of the cash register on another floor. The videotape showed the plaintiff to take something from the ledge of the cash register and place it in her right hand sweater pocket.

When accosted by the security manager and the department store manager, the employee disclaimed any knowledge. She claimed that the money ($100 bill) must have fallen among some bags below the cash register. The manager searched those bags to check her story, but the $100 bill was never found.

The department store manager immediately suspended the employee and called the police. She was charged with theft, and dismissed. The charge was later dropped. She sued for wrongful dismissal.

At trial, the employer tendered a surveillance videotape which allegedly showed the employee take money from the ledge of the cash register and place it in her right hand sweater pocket instead of under the tray in the "till".

The Alberta Court of Queen's Bench held that the evidence of the videotape and the security manager was damaging to the employee for the following reasons:

> The videotape showed something (presumably a $100 bill) being taken from the ledge (of the cash register) which had been handed to the plaintiff by the customer; it also showed this something being handed to the plaintiff in the course of a cash transaction and also showed that something being placed in her pocket.

After considering the evidence, the Court held that there was overwhelming evidence of employee misconduct. As to the issue of the burden of proof required when a criminal offence is made in a civil action, the Court held that "all the defendant (employer) has to do is establish that a crime may have been committed on a balance of probabilities". The Court did not apply the more onerous test used in criminal cases — "guilt beyond a reasonable doubt".

Applying the "balance of probabilities" test to the facts, the trial judge had no difficulty in concluding that the employee probably committed the crime of theft because she admitted receiving a $100 bill for goods sold to the customer and the $100 bill was never found.

If the charge had not been dropped and the employee had been convicted of theft, the employer could have introduced the employee's criminal conviction as proof of theft at the dismissal trial. Mere suspicions of theft or dishonesty will not justify the firing of an employee[11]. However, no statutory notice is required under federal or provincial legislation where the employee is fired for willful misconduct such as theft[12].

References

1. *R.* v. *Lunsted* (February 21, 1984, B.C. Prov. Crim. Ct.), Vancouver Registry Info. No. 42449, unreported decision of Davies, Prov. Ct. J. (gov't liquor store), and *R.* v. *Cynthia Miller* (1986) B.C.D. Crim. Conv. 5442-01, (1986) B.C.W.L.D. 4506, 17 W.C.B. 382 (B.C. Co. Ct.) (department store).
2. See s. 178.11 of the *Criminal Code of Canada.*
3. *R.* v. *Biasi et al (No. 3)* 66 C.C.C. (2d) 566 (B.C.S.C.) (drug trafficking).
4. *R.* v. *Taylor* (June 8, 1983), 10 W.C.B. 303, (1984) 4 C.R.D. 425. 60-08 (Ont. Prov. Ct.).
5. See *Goldstein on Videotape and Photographic Evidence: Case Law & Reference Manual* (February, 1986), Western Legal Publications, Vancouver, B.C. at 12-101.
6. See *R.* v. *Wong* (1987), 34 C.C.C. (3d) 51, 56 C.R. (3d) 51 (Ont. C.A.) (gambling activity in hotel room), and *R.* v. *Lofthouse* (1986), 27 C.C.C. (3d) 553 (Ont. Dist. Ct.) (gross indecency in public washroom).
7. Provided that the employees' rights to privacy are not violated. See *Taylor, supra* footnote 4.
8. An employer can only search an employee's person or property with that employee's consent. Searches are also permitted upon arrest or if conducted pursuant to a search warrant.
9. The powers of arrest of a private citizen or corporation are limited to situations where the employee is found committing a criminal offence on or in relation to property owned by, or in the lawful possession of, that private citizen or corporation. See s. 449 of the *Criminal Code of Canada.*
10. (1979), 19 A.R. 239 (Alta. Q.B.).
11. "Dismissal for theft" (April, 1984), 5 *The Employment Law Report* No. 4, 25.
12. *Ibid.*

CAVEAT

This article reflects the law of Canada as of September, 1988. New cases now being decided, and those presently under appeal may overrule those discussed above. Employers, employees, and security personnel who are interested in the legal issues dealt with in this article should consult their lawyers or a Crown Attorney.

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OUR COVER: Part of the state-of-the art control room being watched over by Dave Gutteridge of the National Gallery's Protection Services staff in Ottawa. Frank Scarpino is off camera at right. This is the nerve centre of the new building's $1.2 million security system — one of the largest and most complex in the country. (See page 16).

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