

# CCTV Evidence Accepted in Civil Case

## VIDEOTAPE ACCEPTED AS A "SILENT WITNESS"

### AFTER AUTHENTICATION BY A NON-EYEWITNESS

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

Since the first article on the legal aspects of video surveillance in the workplace was published in *Canadian Security*, the use of surveillance videotapes in Canadian courts has steadily increased.<sup>1</sup>

Recently, an Ontario court heard the case of *Greenough v. Woodstream Corporation* wherein a fired employee sued his employer for wrongful dismissal after being videotaped "engaging in the theft of company property."<sup>2</sup>

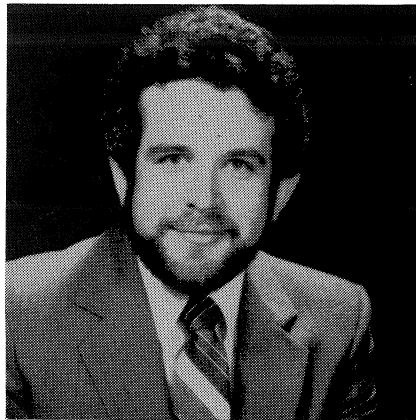
The employee Greenough, a laborer at Woodstream Corporation's plastics moulding plant, was videotaped by a surveillance camera concealed in the ceiling of a specific area of the plant. The camera, triggered by a motion detector, surreptitiously recorded the activities of persons in its field of view.<sup>3</sup>

As there was no eyewitness to the theft, the employer, Woodstream Corporation, relied entirely on the videotape as the evidence implicating the employee, Greenough.<sup>4</sup>

At trial, the presiding judge had to determine a number of issues including whether the videotape was admissible in evidence in the absence of eyewitness authentication.

At the outset, the lawyer for the plaintiff, Greenough, objected to the admission of the videotape on the ground that there was no available witness to authenticate it. In response, the defendant, Woodstream Corporation, called evidence of its personnel manager who testified that he

was present when the video camera and videotape recorder were installed and tested. Furthermore, the manager testified that he was in charge of turning the videotape recorder on and off, that he did not tamper with the videotapes, that he viewed the videotapes on a daily basis and



Now practising law in Toronto, Mr. Goldstein was called to the Bar of British Columbia in 1984 and the Bar of Ontario in September, 1988. This article is based on a textbook 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. The textbook on videotape and photographic evidence will be published in the autumn of 1991. For further information write to the author at 109 Gayla Street, Vaughan, Ontario, L4J 6G8.

that he kept the recorded videotapes in his possession until the time when they were turned over to Woodstream Corporation's lawyer.

After hearing this evidence, the trial judge ruled as follows:

"Provided the technique is explained and some evidence is received as to the reliability of the technical apparatus used for taking the so-called 'pictures,' I am satisfied that this evidence is admissible. In this case, I am satisfied that I can take judicial notice of the functioning of a video camera. Provided that the filming process was not interfered with, and providing someone was available to explain where the camera was positioned, how it was activated, who had access to it and the general operation of the machine, I am satisfied that I can accept this videotape in evidence."

The trial judge based this ruling on a decision of the Nova Scotia Court of Appeal in the criminal case of *R. v. Schaffner* where it was held that:

"A photograph is admissible if it accurately represents the facts, is not tendered with the intention to mislead, and is verified on oath by a person capable of doing so."<sup>5</sup>

The *Schaffner* ruling permitted a videotape to be admitted as real, substantive evidence, not merely as illustrative evidence to corroborate the testimony of an eye witness.

In both *Schaffner* and *Greenough*, there were no eyewitnesses to the crime, so no one could testify that the videotapes accurately represented the facts. However, in both cases there was acceptable evidence under oath as to the physical setup of the video surveillance system and as to the absence of any tampering with that system.

Counsel for *Greenough* also objected to the admission of the videotape on the ground that it infringed section 184 of the *Criminal Code of Canada*, which makes it an offence to "wilfully intercept a private communication by means of an electromagnetic device" (e.g. video camera and recorder). *Greenough's* lawyer argued that "it would bring the administration of justice into disrepute to allow the company to use this illegally obtained evidence (i.e. the videotape) in support of its position."

The court in *Greenough* dismissed this argument on the ground that "the surveillance equipment was not meant to intercept communications but to videotape persons taking company property in a specific location." The trial judge was satisfied that no breach of section 184 had taken place because the videotape lacked a soundtrack.<sup>6</sup>

After viewing the videotape, the trial judge concluded that *Greenough* took part in the theft by assisting others in unlawfully taking company property. The court found that his dismissal was an appropriate reaction by his employer. Accordingly, the court dismissed *Greenough's* wrongful dismissal claim against his former employer, Woodstream Corporation.

The *Greenough* case is important because it is the first civil case in which a Canadian court has permitted a videotape to be admitted after authentication by a non-eyewitness to the depicted event. As a result of *Greenough*, a videotape can be admitted not merely to illustrate a witness's testimony, but instead as a "silent witness" to a depicted event.<sup>7</sup> This case also reaffirms earlier decisions that the privacy provisions of the *Criminal Code* do not apply to videotapes on which sound is not recorded.

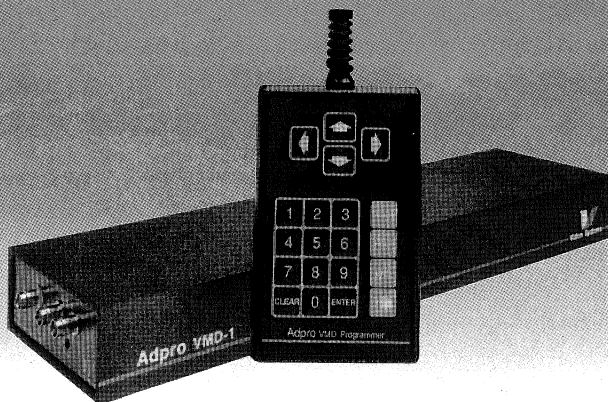
### CAVEAT

*This article reflects the law of Canada as of March, 1991. New cases now being decided may overrule those mentioned above. Security and investigation personnel who are interested in any legal issue discussed in this article should consult their legal advisor or district Crown Attorney.*

### References

1. See "Video Surveillance in the Workplace" (*Canadian Security*, Vol. 10, No. 5, Aug./Sept. 1988, page 19, hereinafter "Video Surveillance").
2. Digested at (Feb. 1991), 2 W.D.C.P. (2d) 29 (digest 66) (Ont. Gen. Div., Welland). The videotape did not show *Greenough* actually taking any items. He acted as lookout for others who did so. Nonetheless, he was equally "guilty" because he assisted in the commission of an offence.
3. Prior to installing the camera, the employer consulted the local police force, and received and acted upon certain recommendations. While not discussed in the judge's decision, these recommendations likely included installing equipment "as an investigative aid to monitor a scene of suspected criminal activity." See the discussion of the *Taylor* case in "Video Surveillance," *supra* footnote 1.
4. The court did find that *Greenough's* evidence was totally unbelievable and it was found, on a balance of probabilities, that *Greenough* did "engage in theft of company property."
5. (1988), 44 C.C.C. (3d) 507 (N.S.C.A.).
6. This ruling is consistent with that of other courts which have held that no interception of private communications can occur where voices are not recorded. See *R. v. Biasi et al.* (No. 3) 66 C.C.C. (2d) 566, [1982] B.C.D. Crim. Conv. 5450-01, (October 9, 1981), 6 W.C.B. 446 (B.C.S.C.).
7. See *Goldstein On Visual Evidence: Practitioner's Manual* (soon to be published by Carswell Legal Publishers, Toronto, Ontario).

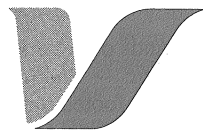
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