

Video Surveillance and Canadian Law

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

The law governing video surveillance of employees and customers has undergone some major changes in the past few years. This article updates the reader on the current state of the law and suggests procedures to follow when delivering surveillance videotapes to the police.¹

Retail and industrial security officers can monitor and record on videotape the conduct of employees and customers while on the employer's premises. It is legal for a security guard or loss prevention officer to record on videotape the actions of an employee or customer wherever located within the office building, retail store, factory, or warehouse.

It is an indictable offence punishable under the *Criminal Code of Canada* to record the conversations of employees and customers without their prior consent.² An employer may legally record his own conversation with his employee or customer without that person's knowledge.³

Canadian criminal laws which prohibit electronic and audio surveillance (*i.e.* "wiretapping" and "bugging") apply only to voice communications and are inapplicable to videotapes that have no voices recorded on their soundtracks.⁴ Therefore, an employer does not need the consent of his employees or customers to record their actions and conduct on the video (picture) track of the videotape. However, without their consent their conversations cannot be legally recorded on the audio (sound) track of the videotape.

Employees and customers have certain rights of privacy under the *Canadian Charter of Rights and Freedoms*. Section 7 of the *Charter* provides Canadian citizens with the right to life, liberty, and security of the person. Section 8 of the *Charter* affords the right to be secure against unreasonable search or seizure. The protections afforded by these *Charter* rights may be claimed at the criminal trial of the employee or customer accused of, for example, theft or vandalism of employer's property. The accused might argue that his right of privacy had been infringed in such a way as to bring the administration of justice into disrepute. The

accused could then ask the judge to exclude from evidence the videotape which showed him committing the crime. If there was no other evidence linking the accused to the crime, the accused would be entitled to an acquittal (that is, found not guilty and released from lawful custody).

Video surveillance may infringe an employee's privacy where the video equipment is installed to monitor the conduct or efficiency of employees, or uncover idiosyncratic behaviour, or intrude upon the privacy of a particular employee. However, if installed as an investigative aid to monitor a scene of suspected criminal activity, then the video surveillance is fully justified and does not constitute an infringement of anyone's privacy.⁵

The protection afforded by section 8 of the *Charter*, namely, the right to be secure against unreasonable search or seizure, only arises if the person(s) under surveillance (the surveillance target(s))

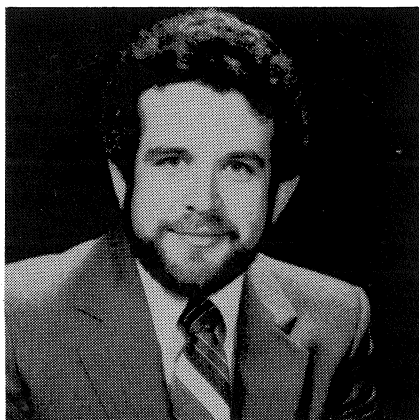
can claim he/she/they had a "reasonable expectation of privacy" when recorded committing the crime. If such an expectation is found by the Court to exist, then the video surveillance violates the rights of the surveillance target(s) and the surveillance videotape may be excluded from evidence, resulting in an acquittal.

Surveillance targets cannot claim a reasonable expectation of privacy if put on notice, prior to committing the alleged criminal act (*e.g.*, theft), that they are under surveillance. The reason is that they cannot claim privacy, if they know they are being watched. Therefore, signs should be posted in plain view at all entrances and displayed prominently throughout the employer's premises that video surveillance equipment is being used to monitor the premises.

The author's recently published book, entitled *Visual Evidence: A Practitioner's Manual*, contains chapters of specific interest to the retail and industrial security industry.¹ For example, the chapter on "Surveillance in the Workplace" contains a list of procedures to follow when conducting surveillance of employees and customers, and dealing with the police. Sample (fill-in-the-blank) forms are provided including, "Statement to Police," "Report of Arrest of Employee," and "Notice re: Employee Arrest for Theft." This chapter also covers the legal issue of authentication as well as technical issues such as accidental erasure and radio-frequency (RF) and electromagnetic (EM) interference.

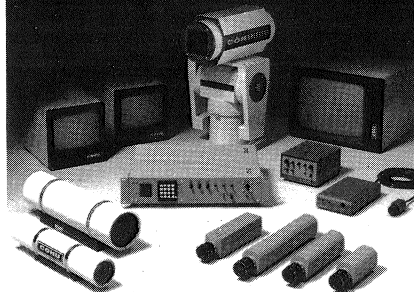
Surveillance videotapes recorded by retail and industrial security officers, or private investigators retained by employers may be used in labor arbitration cases and wrongful dismissal lawsuits.⁶ The employer offers the videotape as proof of the activities and conduct of the employee which justified the disciplinary action or firing. For example, in *Re Doman Forest Products Limited and Sangha*, termination of employment occurred because the employee was absent from work without justification and gave his employer false reasons for his absences.⁷

In the *Doman* case, when the employee



Elliott Goldstein is a lawyer practicing commercial litigation in Toronto. He is the recipient of two research grants from the Law Foundation of Ontario in support of his study of the use of videotape and photographic evidence in Canadian criminal and civil courts. A former professional photographer, Mr. Goldstein is currently writing, directing, and producing an instructional videotape on the use of video to record and preserve evidence for use in court.

YOU DON'T HAVE TO CIRCLE THE EARTH TO FIND THE BEST CCTV CAMERAS



Cohu cameras combine instrumentation performance with unsurpassed ruggedness and reliability. Pressurized environmental models enable you to meet any habitat head-on. And Cohu can complete your CCTV system with our new real-time graphic user interface.

There's a Cohu camera solution to match your application: color or monochrome; single-piece and remote-head models; intensified CCD's for low light applications; standard to ultra-high resolution; interline or frame transfer; even direct digital output models for real-time imaging without pixel jitter.

And because they're made in North America, you can talk directly with the people who design and build your cameras and systems. That's important, because every CCTV system is unique – and Cohu's factory support is the best anywhere.

In Canada, call:
SPR Canada, Inc.
2183 Thurston Drive
Ottawa, Ontario K1G 4Z3
Tel: 613-739-9068 Fax: 613-739-3047.

COHU
Cohu, Inc./Electronics Division
5755 Kearny Villa Road, San Diego, CA 92123
Phone (619) 277-6700 FAX 619-277-0221
CIRCLE 19 ON READER SERVICE CARD

CAVEAT

This article reflects the law of Canada as of March, 1993. New cases now being decided may overrule those mentioned. Information on the current state of the law and the legality of any given surveillance operation may be obtained from your lawyer or local Crown Attorney.

failed to attend work claiming illness (the "flu"), the employer instructed private investigators to conduct surveillance of the employee. The private investigators followed the allegedly ill employee from his residence to a construction site where they videotaped him directing work. Though the morning was cool, the employee's jacket and shirt were open. On other occasions, the employee was videotaped while visiting and working on the construction site.

After his return, the employer company held a fact-finding meeting attended by the employee, a representative of his union, and company officials. When asked what he had been doing during his absence from work during the period of October 23 to November 17, 1989 and November 28, 1989, the employee replied that he "just did a few things around the house and drove the kids to school." The employee did not mention the construction site. A few days after the meeting, the employee was dismissed by letter dated December 11, 1989.

The employee grieved the termination of his employment and the employer tendered the videotapes as evidence to support the firing. The employee's union objected to the videotapes' admission arguing that the surveillance was entirely unreasonable given that the grievor was an 18-year employee with no previous disciplinary record.

The labor arbitrator who heard the grievance stated that the case involved balancing the employee's right to privacy against the employer's right to investigate what it considers an abuse of sick leave. He concluded that the surveillance undertaken in this case was an unreasonable invasion of the employee's privacy and the whole of the surveillance evidence gathered was inadmissible. He reached this conclusion for the following reasons:

1. There was a lack of sufficient evidence to warrant a surveillance from the outset.
2. While the employee may have been involved in a deceitful claim with the Worker's Compensation Board at some other time, that was an event which occurred four years earlier.

3. The employee had a long service to the employer with no other disciplinary record. If the employer developed a suspicion about what the employee was up to when he was supposed to be sick, it had an obligation to confront the employee immediately. The employee ought to have been told in September that the employer would not tolerate an abuse of sick leave. In October, rather than set about in an effort to trap the employee, the employer had an obligation to confront the employee with its concerns and make specific inquiries of the employee and his doctor concerning the nature of the illness.

In reaching this conclusion, the labor arbitrator did not deny that employers have a legitimate interest to ensure that sick leave is not abused. But employees, in turn, have a right to privacy which ought not to be ignored without there first being some reasonable apprehension that abuse is about to occur.

At a minimum, some threshold questions must be put to the employee relating to the nature of his illness, his ability to perform work, and whether he anticipates doing anything else other than resting at home. In this case, it would have also been appropriate to ask if he was launched into another construction project and what he intended to do in that regard.

The labor arbitrator added that if employees deceitfully claim sick leave, fail to report to work, and then carry out activities which clearly indicate they are able to work, there is just cause for dismissal. In the present case, the evidence did not support a conclusion that the employee was carrying out such activities, so he ordered the employer to reinstate the employee, but pay him only 50% of his wage loss while unemployed.

The *Doman* case points out how video surveillance can be used in the investigation of abuses of sick leave and the importance of the employee's right to privacy.

REFERENCES

1. A complete review of the law of "Surveillance in the Workplace" & "Surveillance of Criminal Suspects" can be found in chapters 13 & 22 of *Visual Evidence: A Practitioner's Manual* by Elliott Goldstein, Thomson Professional Publishing, Scarborough, ON.
2. See section 184 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46.
3. Section 184 does not apply to "a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it." See section 184 (2) (a).
4. *R. v. Biasi* (No. 3) (1981), 66 C.C.C. (2d) 566 (B.C.S.C.) and *R. v. Wong* (1991) 60 C.C.C. (3d) 460 (S.C.C.).
5. *R. v. Taylor* (1983), 10 W.C.B. 303 (Ont. Prov. Ct.).
6. A surveillance videotape showing the employee committing theft was tendered by his employer in *Greenough v. Woodstream Corp.* discussed in Goldstein, E., "Surveillance Evidence in Wrongful Dismissal Cases" (*Canadian Security*, May, 1991).
7. *Re Doman Forest Products Ltd., New Westminster Division and International Woodworkers, Local I-357* (1990), 13 L.A.C. (4th) 275 (B.C.).

May
1993

VOL. 15 No. 3

OUR COVER: Fishing vessels of all sizes, plant, equipment, and product worth millions of dollars a year are now protected by narrow band RF wireless system installed by Lockport Security Ltd., Terrace, BC. The new system saves some \$130,000 a year in night watchmen costs.

CANADIAN SECURITY

is published seven times per year by
SECURITY PUBLISHING LIMITED

P.O. Box 430, Station "O"
Toronto, Ontario
Canada M4A 2P1

Telephone (416) 755-4343

President and General Manager:
Jack W. Percival

Member:

Periodical Publishers Exchange

I.S.S.N. 0709-3403

Publications Mail Registration

Number 2895

All rights reserved. The covers and contents of CANADIAN SECURITY are fully protected and must not be reproduced or transmitted in any form or by any means, including photocopying and recording without the copyright holder's express written permission. Such permission must also be obtained before any part of this publication is stored in a retrieval system of any nature.

Editorial contributions are welcomed and Canadian writers will be given primary consideration. Unsolicited contributions should be accompanied by a stamped self-addressed envelope if return is desired. CANADIAN SECURITY assumes no responsibility for loss of material supplied.

Subscriptions: Canada \$30 per year plus G.S.T. \$2.10 = \$32.10; \$75 three years plus G.S.T. \$5.25 = \$80.25. U.S. destinations add \$5.00 per year. Foreign destinations add \$10 (surface) or \$30.00 (airmail) per year. Single copies: Canada \$5, U.S.A. \$6, Overseas Airmail \$10. Annual Directory issue: Canada \$55 plus G.S.T. \$3.85 = \$58.85, Elsewhere \$65. Annual Directory is included in regular subscription.

*Dedicated to the protection
of persons and property*

CANADIAN SECURITY, April/May 1993

SECURITY

The Journal of Protection & Communications

SECURITY • COMMUNICATIONS • FIRE
SAFETY & EMERGENCY SERVICES

HOW TO AVOID COMMON CCTV PROBLEMS..... 9

Consultant Hart Kinnear offers practical advice on equipment and applications and anticipates new developments on the way.

SECURITY FOR FISHERMEN'S CO-OP IN B.C.....12

Alarm dealer Joe Sullivan describes the system he has installed to protect millions of dollars worth of fish and equipment.

ARSON INVESTIGATION ISN'T EASY15

Fire Marshal's veteran investigator Peter Heyerhoff stresses the knowledge, logic, and patience required to find causes.

PRIVATE INVESTIGATION IS A GRAY AREA17

In Ontario the P.I. registrar's office fights an uphill battle against unlicensed operators and illegal operations.

HOW BILL 40 HITS GUARD COMPANIES18

Ontario's controversial new legislation revises employer-union relationships and demands new human resource strategies.

CEO TRAINING URGED FOR POLICE CHIEFS21

Consultant Brian Grainger sees a need for an executive development institute for Canada's senior police force managers.

VIDEO SURVEILLANCE AND CANADIAN LAW25

Lawyer Elliott Goldstein discusses employee and customer rights in his latest feature article for Canadian Security.

THE FUTURE IS ALREADY ARRIVING 27

The home automation movement is continuing to develop and promises export business growth and help for disabled Canadians.

From the Publisher4 Book Reviews33

Product News28,29,30,31,32 Notable Events36

Industry News34,38,40 Advertisers' Index9a



SUPPORT
Canadian
PUBLICATIONS