

CRIME DOES NOT PAY; IT COSTS US ALL

Employee theft at the cash register and the loading dock and customer theft of store merchandise costs Canadian retailers millions of dollars a day. The Retail Council of Canada has estimated that "total 'shrinkage' -- the industry term for theft -- was \$6 million a day (in 1991). "It all added up to more than \$2 billion in merchandise disappearing last year (1991) in everything from department store to small family businesses." (January 13, 1992), *The Toronto Star*

To prevent such losses, retail establishments are installing video surveillance cameras not only as a deterrent to would-be thieves, but also to assist the police in evidence gathering. It is now quite common to see surveillance cameras in department and convenience stores in the greater Metro area.

Video surveillance is either:

- (1) **Overt** -- using visible cameras to deter thieves and vandals; or
- (2) **Covert** -- using hidden video cameras and equipped with pin-hole lenses or hidden behind one-way mirrors.

The video cameras, connected to videotape recorders, enable loss prevention officers and security guards to surreptitiously watch and record the activities of employees working in stores and warehouses and retail store customers.

ADMISSIBILITY

Videotapes recorded using surveillance cameras are admissible in Canadian courts if relevant, true and accurate, and fair (i.e., not misleading). In addition, the videotape must be verified on oath by a witness (i.e., an authenticating witness).

AUTHENTICATION

Videotapes can be authenticated by an eye witness, or a non-eye witness (e.g., a qualified witness, or an expert witness).

EYE-WITNESS

Testifies, from memory, about what he saw, and whether what he now sees in the courtroom on the videotape is the same as what his memory tells him occurred during the event (e.g., camera operator, or loss prevention officer present at the scene who observed the incident).

QUALIFIED WITNESS

Sees an event on a video monitor simultaneously with its occurrence -- is qualified to state whether the videotape recording shown in the courtroom is an accurate representation of what he saw on the video monitor when the recording was first made. Can also testify that the video surveillance equipment was functioning reliably on the day of recording and establish the location of the video surveillance camera.

EXPERT WITNESS

Called to authenticate a videotape that has been recorded automatically by a surveillance video camera connected directly to a videotape machine. This witness did not see the event occur because he was not present at the scene, nor did he view the event on a video monitor when it happened. Nevertheless, the expert witness (usually a police surveillance technician, or the security manager of the retail store) is able to authenticate the videotape by testifying how the surveillance video camera is activated, operated, and by showing the videotape's chain of custody (i.e. who had possession of the videotape from the time it was removed from the video cassette recorder (VCR) until the time of trial).

CRIMINAL CODE OF CANADA

Videotapes without soundtracks do not contravene section 184 of the *Criminal Code* which governs audio and telephone surveillance. The *Criminal Code* restricts the interception of oral communications. Surveillance videotapes reproduce the actions of people, not their communications. A videotape which records an "intercepted private [oral] communication" is subject to the *Criminal Code* and can be admitted into evidence only if the interception was judicially authorized or if either the originator of the communication or the intended recipient has expressly consented to the recording being made. The question of what constitutes valid consent can be a difficult one in a security context.

CHARTER OF RIGHTS AND FREEDOMS

Contains two sections which Canadian criminal courts have interpreted as providing Canadian citizens with a "right to privacy". Violation of a citizen's "right to privacy" is reason for a criminal court to exclude a surveillance videotape from evidence on the ground that its admission would bring the administration of justice into disrepute. Excluding the videotape may result in the acquittal of the accused employee shown on the videotape committing theft.

SECTION 7 -- RIGHT TO "SECURITY OF THE PERSON"

Video surveillance is fully justified and does not constitute an infringement of anyone's privacy where it is used as an investigative aid to monitor the scene of suspected criminal activity. If, the surveillance video camera is installed (1) to monitor the conduct or efficiency of employees; or (2) to uncover idiosyncratic behavior or to intrude upon the privacy of employees in general or the accused in particular, then it may constitute an infringement.

SECTION 8 -- RIGHT TO "PROTECTION AGAINST UNREASONABLE SEARCH OR SEIZURE"

Hidden video surveillance may infringe a person's right to privacy as the following statement indicates.:

... [S]urreptitious video surveillance must constitute a search in circumstances where the person observed by the camera has a reasonable expectation of privacy." Two requirements must be met for there to be a 'reasonable expectation of privacy'. "First, that a person had exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable.

Whether these requirements have been met may depend on the following factors: the accused's location when under surveillance, the time of the intrusion and other relevant circumstances (how the location was used and the presence of others).

WRONGFUL DISMISSAL LAW SUITS

Recently, an Ontario court heard a case in which a fired employee sued his employer for wrongful dismissal after being videotaped "engaging in the theft of company property" 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.

As there was no eyewitness to the theft, the employer, relied entirely on the videotape as the evidence implicating the employee. At trial, the presiding Judge had to determine a number of issues including whether the videotape was admissible in evidence in the absence of eye-witness authentication.

At the outset, the lawyer for the plaintiff employee, objected to the admission of the videotape on the ground that there was no available witness to authenticate it. In response, the defendant 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 that he kept the recorded videotape in his possession until the time when they were turned over to defendant 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."

ACCIDENTAL ERASURE

Erasing a videotape does not render inadmissible testimony of a witness about what it contained. There is no effective legal distinction between a direct view of the action of an alleged offender by a security guard and a view of those activities by a security guard on the video display unit of a camera or a view of those activities on a videotape of what the camera recorded. It is relevant evidence provided that what is seen on the camera or videotape is connected by sufficient evidence to the actions of the alleged offender at the time and place in question. The weight and reliability of the evidence depends upon assessment of all relevant considerations, including the clarity of the recording, its length and where identification is in issue, the witness' prior knowledge of the person said to be identified.

The information contained in this document is extracted from a chapter on surveillance in the workplace, contained in a loose-leaf legal text, up-dated twice yearly, written by Elliott Goldstein, entitled *Visual Evidence: A Practitioner's Manual*, published by Carswell, and available from Thomson Professional Publishing Canada, [in Toronto: (416) 609-3800; toll free: 1-800-387-5164, fax (416) 298-5094].