



by Elliott Goldstein B.A., LL.B

Video surveillance: admissibility and weight in criminal courts

The R.C.M.P. suspected four persons who lived in a rooming house in Winnipeg, Manitoba, of trafficking in drugs. They planted a self-confessed drug addict in the rooming house and gave him marked money to purchase drugs from one of the suspects. On the balcony of a house directly across the street from the rooming house, R.C.M.P. officers were stationed with a surveillance camera. They observed a drug buy and filmed it. The film also showed the actual arrest of three of the accused after R.C.M.P. blocked the escape of the suspects' vehicle. The motion picture film was tendered in evidence at the trial of the four who were jointly charged with conspiracy in the sale of the narcotics. The year was 1950¹

By the late 1970's Canadian police regularly used video cameras and recorders during surveillance operations. Criminal acts such as conspiring to commit murder, attempting to commit murder, drug trafficking, theft, fraud, gambling, illegal picketing, mischief, and acts of gross indecency have been recorded on videotape by police and tendered in evidence.²

Surveillance videotapes and films are admissible in evidence in Canadian criminal courts if they are relevant, true and accurate reproductions (i.e., reliable), fair (i.e., not misleading), and verified on oath by a capable witness (i.e., authenticated).³

Surveillance videotapes are relevant only if their contents are material to an issue before the court. Tapes are not true and accurate reproductions if they contain distortion (e.g., colour, optical, tape speed, etc.). Editing of the sound (audio) or picture (video) track will result in a tape's rejection by the court, if such editing destroys the sequence and chronology of the tape.

A surveillance videotape may be authenticated by:

- (1) the person who operated the surveillance camera;
- (2) a person present when the recording was made;
- (3) a qualified witness; or,
- (4) an expert witness.

Witnesses in categories one and two - who see the event as it is being recorded - are eye-witnesses. An eye-witness testifies to two things:

- (a) what he saw, from memory; and
- (b) whether what he sees on the monitor screen in the courtroom is the same as what his memory tells him he saw at the scene.

Witnesses in categories three and four are

not eye-witnesses, but they can still authenticate the surveillance videotape either because of their familiarity with its subject matter or their knowledge of the operation of the equipment that produced it.

An example of a qualified witness is a police officer that watches the event take place on a surveillance monitor simultaneous with its occurrence. If the event was recorded by an automatic surveillance camera (e.g., time-lapse) or one triggered by an alarm (such as a motion detector) then an expert witness would be called to verify the videotape and prove its "technical production".

Notwithstanding that a surveillance videotape has aforementioned four criteria, a trial judge (as trier of law) has a judicial discretion to reject a videotape if its prejudicial effect outweighs its probative value. For example, if the videotape's contents are gruesome, horrific, or would only serve to arouse the sympathy and passions of a jury it may be excluded. Prejudice may also arise if the videotape's soundtrack contains hearsay statements.

The weight afforded the videotape is determined by the trier of fact (i.e., the jury or the judge if sitting alone). The veracity of the authenticating witness and the quality of reproduction affect the emphasis that the trier of fact will put on the surveillance videotape. If the authenticating witness is not credible (not believable) then the jury may choose to ignore the videotape evidence.

Where identification is in issue, the Supreme Court of Canada has held that a videotape alone can provide the necessary evidence to enable the trier of fact to identify the accused as the perpetrator of the crime. If it is of good quality and gives a clear picture of

events and the perpetrator, the videotape may provided the best evidence of the identity of the perpetrator.

The number of video surveillance cases has more than doubled in the last decade. Canadian criminal courts have demonstrated a positive attitude toward the use of videotape to present evidence. In fact, the Supreme Court of Canada has commented that a videotape "may indeed be a silent, trustworthy, unemotional, unbiased and accurate witness who has complete and instant recall of events. It may provide such strong and convincing evidence that of itself it will demonstrate clearly either the innocence or guilt of the accused."⁴

The many uses for videotape by law enforcement officers will be discussed in future articles. Stay tuned!



Elliott Goldstein, B.A., LL.B. is a Toronto area lawyer who practices civil and commercial litigation and consults to the security industry.

Over the past 17 years Mr. Goldstein has written and published over four dozen articles and two books on the topic of videotape and photographic evidence. These articles have been published in Canada, the United States, England, and South Africa. Mr. Goldstein has lectured extensively throughout Canada on the legal aspects of video surveillance to the RCMP in Regina, the OPP in Toronto, the Canadian Police College in Ottawa and at the Justice Institute of British Columbia in Vancouver.

Mr. Goldstein is a member in good standing of the Law Society of Upper Canada and has been practising law in Ontario since 1988. Prior to that he was a member of the Bar of British Columbia since 1984.

Mr. Goldstein's interest in the application of video technology to the legal process began in 1980 when he was in law school in Saskatchewan. Mr. Goldstein subsequently wrote one of the first articles ever published in Canada, on the use of videotape to record and present evidence in civil and criminal courts.

Mr. Goldstein's latest book entitled *Visual Evidence: A Practitioner's Manual* was published in 1991 by Carswell Legal Publishers. It is now two volumes and contains chapters on the law of video surveillance of criminal suspects, casino surveillance, and video conferencing.

Mr. Goldstein has agreed to write a continuing column for Blue Line Magazine on the subject of video evidence.

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Footnotes

1. See *R. v. Kissick and Smallwood* (October 18, 1950, a decision of the Honourable Mr. Justice Montague of the Court of Queen's Bench of Manitoba, as reported in *The Vancouver Sun*, October 18, 1950, p. 11, Winnipeg (Canadian Press) "Mounties use films as dope evidence: Alleged pedlar photographed as he hands over narcotics.").
2. See chapter 22 "Surveillance of Criminal Suspects" in Goldstein: *Visual Evidence*.
3. These same criteria govern the admission of surveillance videotapes and films in the criminal courts of the United States, United Kingdom, Australia, New Zealand, and South Africa.
4. *R. v. Nikolovski* (1996), 141 D.L.R. (4th) 647 (S.C.C.).



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The new Windsor Police Service headquarters building makes an ideal cover for this edition of *Blue Line* on two counts. First the Windsor Police Service is the host to the 47th Annual Conference of the Ontario Association of Chiefs of Police Conference and Trade Show. You will find a floor plan of the Trade Show on Page 28 of this edition. Secondly the new building is particularly unique in both design and content. The structure also holds the Provincial Court House and the central lock-up facilities. You can read more about this facility beginning on page 6.

This being our June/July combined issue you will find lots of other material to keep you thinking and pondering over the summer months. We have columns of interest from Robert Lunney, Joel Johnston and Tom Rataj as well as our usual news and up-coming events.

Have a warm and safe summer and you will see us again in August.