

VIDEO-TAPE IN CRIMINAL COURTS: A REVIEW AND UPDATE

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Modern technology is changing the way law is practised. Nowhere is this more apparent than in law offices where computers and word processors are found. The Courts are also seeing changes in the way evidence is presented. One such change is the use of video-tape to present evidence in criminal proceedings.

In Canada, over the past few years, video-tapes have been tendered at criminal trials to show drug trafficking,¹ picket-line disturbances,² assaults during hockey games,³ re-enactments of crimes,⁴ an accused's interview with a psychiatrist,⁵ mischief,⁶ sobriety tests of suspected impaired drivers,⁷ an experiment,⁸ accused's statements,⁹ gambling;¹⁰ and, the theft of drugs from a police vault.¹¹

The admissibility of video-tape evidence is governed by the same rules that apply to photographs and motion picture films. The admissibility of video-tape depends upon its:

1. relevancy and materiality to the issues in the case;
2. accuracy in truly representing the facts;
3. fairness and absence of any intention to mislead;
4. verification on oath by a person capable to do so.¹²

Who is called to authenticate a video-tape, goes to the issue of its weight, not admissibility. The more direct a connection the witness has to the video-tape, the more weight afforded that witness' testimony.¹³

The authenticating witness need not be the video camera operator, but should be one of the following: a person present at the time the video-tape was recorded (eye-witness); a person qualified to state that the representation is accurate; or, an expert witness.¹⁴

In addition, the probative value of the video-tape's contents must outweigh its prejudicial effect otherwise it may be excluded even though relevant. If the video-tape tendered is of little probative value and would only serve to inflame the mind of the jury, the trial Judge may, in his discretion, exclude it.¹⁵

Two recent cases are worthy of note:

In *R. v. Biasi*, the Supreme Court of British Columbia dealt with the question of whether surveillance video-tapes constituted interceptions of private communications contrary to s.178 of the **Criminal Code**.¹⁶ The defense argued that the tapes were "telecommunications" which came within the meaning of private communication and were, therefore, inadmissible. The trial Judge ruled that the tapes themselves had not been intercepted; but rather that something else was intercepted by means of the tapes.

The Court also dealt with a second objection, "that an oral communication had been intercepted by means of an electromagnetic device" (i.e. the video camera which recorded the tapes). The trial Judge reasoned that since there was no audio on the video-tapes — no sound track had been recorded — there had been no interception of words transmitted by voice. "Physical acts and gestures, even those from which one may be able to infer what has been said, still do not by themselves constitute oral communication;" therefore the video-tapes were admissible.¹⁷ The implication of this case is that video-tapes which contain no sound track do not infringe the

(privacy) provisions of PART IV.1 of the **Criminal Code**.

In *R. v. Taylor*, the working area of a public library was the scene of a number of incidents of vandalism by a person or persons unknown. When the culprit could not be unmasked by conventional investigation, local police enlisted the assistance of the Special Services Branch of the provincial police who installed a hidden video surveillance camera to monitor the interior of the library.¹⁸

The video surveillance equipment — consisting of a video camera, recorder and time-date generator connected to a motion detector or analyzer — produced video-tapes which showed the accused, a library employee committing acts for which she was subsequently charged with mischief, under s.387(4) of the **Criminal Code of Canada**.

At trial, when Crown asked the Court to receive in evidence the aforementioned video-tapes, defence Counsel objected and submitted that the tapes should not be admitted because:

1. In the absence of a cameraman who can testify that the scenes depicted on the video-tapes truly and accurately represent the reality of what occurred, without distortion, the veracity of the tapes is so tenuous that it would be improper to admit them; and,
2. The manner in which the tapes were recorded infringed on the accused person's right of privacy guaranteed by s.7 of **The Charter of Rights and Freedoms**.

On a *voir dire*, the learned trial Judge dealt with the two defense arguments as follows:

"The issue is whether these tapes are capable of being real and demonstrative evidence to prove the scenes they depict as distinct from evidence that merely illustrates the testimony of a sworn witness."¹⁹

The Judge found these facts:

- (a) The defense has conceded the integrity of the video tapes the Crown seeks to place in evidence.
- (b) An expert witness testified as to how the video camera is activated and the manner in which it records.
- (c) The location of the scene is an employee area in a public library.
- (d) The identity of the person depicted is conceded to be the accused.
- (e) It has been established that the time and date of the incident depicted were imprinted on the tape by a time-date generator.

The learned trial Judge then remarked that the explanation of the operation of the machine persuaded him that "the limitations of the machine, as carefully spelled out in evidence do not render that which is in fact recorded a less than reliable record of the alleged reality. If the tape is relevant, material and reliable it has actual positive value. Counsel has had an opportunity to test the Crown witness as to the manner in which the machine was set up and how it operates." His Honour concluded that in these circumstances the video-tape will not be excluded on the basis of the first submission.

In reply to the second defence objection, the learned trial Judge found:

"What we are concerned with in the case, however, 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."

"The equipment was not installed to monitor the conduct or efficiency of employees. It was not installed to uncover idiosyncratic behaviour 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."

"It may well be that the phrase 'Security of the Person' set out in s.7 of the **Charter** contemplates a right to privacy in some circumstances. Certainly, secret electronic surveillance by the police, in the public interest should be subject to scrutiny and limitation. It would not be in the public interest to have police forces conducting secret surveillances, electronic or otherwise, unless in the course of investigating a crime committed or planned."

"In the case at hand, however, the surveillance was fully justified. It did not constitute an infringement of anyone's privacy. But if we suppose for a 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 these circumstances these video-tapes will be received into evidence."²⁰

The Taylor case is a landmark decision because it establishes that:

1. A video-tape from a non-monitored camera is admissible as real and demonstrative evidence to prove the scenes it purports to depict. A video-tape can do more than merely illustrate the testimony of a witness; it can speak for itself.
2. The witness who authenticates a video-tape need not be an eye-witness to the events recorded. An expert witness can authenticate a video-tape by testifying as to the operation of equipment used to record it.
3. The phrase "security of the person" in s.7 of the **Charter of Rights and Freedoms** may contemplate a right to privacy in some circumstances — and if that right is infringed in such a way as to bring the administration of justice into disrepute, then the accused could apply under s.24 of the **Charter** to have the evidence excluded.

The author has presented only a small portion of the material he has written on the use of video-tape evidence. More information can be obtained by writing Project EVIDEO, P.O. Box 40, Stn. "A", Vancouver, B.C. V6C 2L8.

FOOTNOTES

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¹**R. v. Biasi et al** (No. 3) (1981), 66 C.C.C. (2d) 566 (B.C.S.C.); **R. v. Napoli and Loccisano**, unreported decision, The **Saskatoon Star Phoenix**, July 2, 1981.

²**R. v. Lewis**, unreported decision, The **Toronto Star**, Feb. 14, 1974.

³**R. v. Maloney** (No. 2) (1976), 29 C.C.C. (2d) 431 (Ont. Co. Ct.); **R. v. Williams** (1977), 35 C.C.C. (2d) 103.

⁴**R. v. Murphy** (1972), 8 C.C.C. (2d) 313 (Ont. Prov. Ct.); **R. v. Tookey and Stevenson** (1981), 58 C.C.C. (2d) 422.

⁵**R. v. Blackman**, unreported decision, The **Vancouver Sun**, Nov. 5, 1983; **Contra Bell v. Fantini** (1981), 23 B.C.L.R. 173.

⁶**R. v. Taylor** (June 8, 1983), 10 W.C.B. 303 (Ont. Prov. Ct.).

⁷**R. v. Dunn**, Vernon, B.C. Prov. Ct. Reg. No. 78-02047. **R. v. Gooder**, Vernon, B.C. Prov. Ct. Reg. No. 78-02102.

⁸**R. v. Lortie**, unreported decision, The **Vancouver Sun**, October 18, 1983.

⁹**R. v. Simpson**, unreported decision, The **Vancouver Sun**, Nov. 29, 1983.

¹⁰**R. v. Irwin and Sansone et al.** 32 C.R.N.S. 398.

¹¹**R. v. Marchessault**, unreported decision, The **Vancouver Sun**, Nov. 16, 1983, **Maclean's** Feb. 13, 1984.

¹²**R. v. Creemer and Cormier**, (1968) 1 C.C.C. 14, 1 C.R.N.S. 146, 53 M.P.R. 1(S.C.C.), as quoted in **R. v. Maloney**, *supra* footnote 3.

¹³**R. v. Lorde and Johnson** (Dec. 14, 1978) 3 W.C.B. 92, (1978), 33 N.S.R. (2d) 376 (Co. Ct.).

¹⁴**R. v. Bannister** (1936), 66 C.C.C. 38, (1936) 2 D.L.R. 795, 10 M.P.R. 391, (N.B.C.A.); **R. v. Taylor**, *supra* footnote 6.

¹⁵**Draper v. Jacklyn**, (1970) S.C.R. 92, 9 D.L.R. (3d) 264.

¹⁶**R. v. Biasi**, *supra* footnote 1.

¹⁷*Ibid.*

¹⁸**R. v. Taylor**, *supra* footnote 6. Special thanks to Susan C. MacLean, Assistant Crown Attorney, Judicial District of Durham, Whitby, Ontario for bringing this case to the author's attention.

¹⁹*Ibid.*

²⁰*Ibid.*

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