

Video Evidence in Court

by Elliot Goldstein

In a casual tone two suspects discussed plans for killing a third man with a group of friends. After a short time the pair were told the murder had taken place. In celebration, the two opened a beer to toast their success. But unknown to the suspects, the men surrounding them were undercover Ontario Provincial Police officers. Wired for sound, the officers had recorded the entire event on videotape. As the suspects left the hotel, the trap was sprung and they were arrested. Their intended victim was later released from protective custody.

The videotape which had captured the scene on film became the centre of attention in a recent Toronto court case. Even in the safety of the courtroom, the videotapes "sent chills up and down the spine" of the presiding judge. He found the pair guilty of conspiracy to commit murder and sentenced them to lengthy prison terms.¹

In the past few years, videotapes have been frequently used in Canada and the U.S. to conduct surveillance of unlawful activities such as wildcat picketing², fencing of stolen property³, drug trafficking⁴, bribery⁵, robbery⁶, burglary⁷, theft⁸, indecent exposure⁹ and sexual assault¹⁰. Surveillance, "watching someone or something in order to observe what takes place"¹¹, is conducted for the following reasons:

- to establish the identity of persons;
- detect and record illegal activities;¹²
- provide tactical information necessary to conduct an efficient and safe search or raid;
- to keep tabs on known criminals or terrorists;
- explain motives of suspects or ensure no other persons are involved; and,
- to act as a deterrent.¹³

With the proliferation of videotaped surveillance operations, more and more tapes are being tendered as evidence in court proceedings.

The use of videotapes in the courtroom is twofold. In some cases they are used as illustrative evidence, to corroborate and explain the testimony of an eyewitness. In other cases, videotapes have been put before the court as demonstrative or real evidence. Independent of any oral testimony, they are intended to prove the events depicted on the film.

Special equipment, such as telescopic lenses and night vision devices, is often used by police and security personnel to observe from a distance, activity not ordinarily visible to the naked eye. Connected to these devices are various types of cameras. Recordings made using this equipment can be tendered in court and may be admitted into evidence provided they meet the criteria set forth below.¹⁴

1. The contents of the videotape must be relevant and material to the issues at trial.
2. It must accurately represent the facts. This goes to the related issues of accuracy and reliability. To be admissible a videotape must contain a true and accurate reproduction of what it purports to portray and what its authenticating witness saw.
3. The chain of custody and continuity of possession of the videotape must be proven to the satisfaction of the court. These requirements ensure that the videotape has not been altered in any way between the time of its recording and its playback in court.
4. Verification on oath by a person capable of doing so goes to the issue of authentication. A witness who has been the subject or involved in the event depicted must testify that the videotape "accurately represents the subject or event at the relevant point in time". In Canada, an authenticating witness must be an eyewitness or someone who has personal and direct knowledge of what is being shown.
5. The probative value of a videotape's contents must outweigh its prejudicial effect otherwise it may be excluded, even though it is relevant.¹⁵

Of course, any evidence that a Canadian court concludes was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter of Rights and Freedoms "shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."¹⁶

Once the videotape is admitted, the judge or jury determines the weight to be given to the evidence by considering the following:



1. The veracity of the authenticating witness.
2. The kind, form, degree and nature of any distortion present in the videotape recording.
3. The likelihood that the videotape was fabricated, falsified, or in any way tampered with between the time it was recorded and tendered in court.

The first consideration would only arise if the videotape recording was tendered as illustrative evidence and would, therefore, be "inextricably linked with the witness' testimony regarding it."¹⁷

The second consideration is grounded on the question, "How much does this videotape recording's portrayal distort the physical facts pictured which are relevant to an issue in the case? Any distortion affecting representations not relevant to an issue at trial is immaterial."¹⁸

The distortion issue would probably not arise in the case of a videotape recording tendered as illustrative evidence (i.e. where there is a witness able to verify the videotape recording). If a sworn witness verified a videotape recording as a reliable representation, knowing it to be false or a fabrication, he would be liable for prosecution on a perjury charge. However, where there is no witness to verify the videotape's contents, the problem of guaranteeing its integrity becomes much more difficult. The "chain of custody requirement" would have to be proven to the court. This involves showing who had the videotape from the time of its original recording to the time of its admission at trial.¹⁹

Once recorded, the videotape should be duplicated and then the original sealed in a container and stored in an exhibit locker or safe until needed for court purposes. The duplicate can be used as a working copy. For added protection when using videocassettes, remove the red safety cap at its bottom to prevent accidental erasure of the videotape.

To conduct a proper surveillance the investigator must be able to observe his subject without being noticed. Frequently this requires that he position himself at a great distance from his subject. By using a closed circuit television system (CCTV) whose video camera is equipped with a telephoto or long-focal-length zoom lens, it is possible to covertly record a subject's activities from a distant point. Such a system can be used to surveil an area from a remote location by observing the CCTV monitor. The image appearing on that monitor can be recorded on videotape.

A videotape recording made using a CCTV system was admitted into evidence in an American case which resulted in the conviction of an accused on a charge of petty larceny (theft under \$200).²⁰

The videotape was held to be competent evidence for the purpose of illustrating the testimony of witnesses who watched the CCTV monitor and saw the accused approach a billfold containing money which had been placed on a desk. The money went missing, but was later found hidden in the room where the accused worked.

The accused's lawyer argued that the videotape could not be used to illustrate the witnesses' testimony because the witnesses did not view any of the events with the naked eye, but were able to see only by means of the television camera; therefore they were not actually eyewitnesses.

The court held that the observation of the events by witnesses with the naked eye, rather than over CCTV, was

not required when the witnesses actually observed the event at the time it took place. Viewing the monitor at the same time the events were taking place was necessary in order for the videotape to be admissible.

In the court's opinion, the mechanical or electrical device which enabled the witnesses to view the event was of no consequence so long as it, the videotape, was accurate.

Often, an investigator is called upon to conduct surveillance under less than ideal lighting conditions. The use of night vision devices (NVD) permit the viewing of a poorly lit subject or scene.

Such equipment generally operates on one of two basic principles. Active equipment projects an infrared beam (invisible to the unaided eye) that illuminates the subject so that it may be viewed with infrared viewers or some other type. Passive projects no infrared radiation, but simply amplifies the existing light by several thousand times and displays it on a small screen (e.g. electronic light intensification equipment.²¹)

Most night vision devices can be used with a video camera, allowing a videotape recording to be made of the image generated. In addition, telephoto lenses can be attached to the front of these devices to increase the distance at which they can be used.

However, some issues arise when this type of videotape is introduced in court. NVDs enable the investigator to observe a scene which would be invisible or barely visible to the naked eye. As such, an investigator could not testify that what the videotape shows is a true and accurate reproduction of what he saw with his naked eye. However, he could testify that the videotape shows what he saw while looking through the NVD or while watching the monitor of the video camera coupled to the NVD.

In other words, when tendered as illustrative evidence, a videotape would only be admissible if the court was willing to adopt the reasoning in the Johnson case; the witness' observation of an event with the naked eye is not required when he actually observes the event at the time of its occurrence.

If a videotape was recorded by an automated surveillance camera forming part of the security system guarding a premise and there were no eyewitnesses to the event, the videotape could be admitted only as demonstrative evidence. In court it would be treated as a "silent witness" capable of "telling its own story", and authenticated by proving how the surveillance camera operated and the chain of custody of the videotape.²²

Applications

Listed below are some examples of surveillance operations in which videotapes have been used to record what is being observed.

Surveillance of picket lines is often conducted by law enforcement agencies to detect any illegal activities engaged in by striking workers. Surveillance videotapes were admitted in trials arising out of disturbances on picket lines of the Artistic Woodwork Co. in Toronto, Ontario, in 1973. Ironically, one of these tapes resulted in the acquittal of a picket captain on an assault charge. Due to conflicting testimony and the fact that the videotape did not show the accused or the police involved for a twenty-three second period leading up to the arrest, the magistrate concluded that the accused was "entitled to a reasonable doubt."²³

In another case, the prosecution tendered videotapes taken during a surveillance operation conducted at two locations, a shopping mall and a restaurant. The videotapes showed various persons coming and going, including the accused and his co-conspirators. Although the tapes did not show any actual drug transactions taking place, they were tendered to assist the jury in understanding what had transpired.

In a *voir dire*, in considering the admissibility of the videotapes, the judge dealt with the question of whether the videotapes constituted interceptions of private communications contrary to section 178 of the Criminal Code. The defence argued that the tapes were "telecommunications" which came within the meaning of private communication and were, therefore, inadmissible. The judge ruled that the tapes themselves had not intercepted private communications.

The judge also dealt with a second objection "that an oral communication had been intercepted by means of an electromagnetic device" — the video camera which recorded the tapes. The trial judge reasoned that since there was no audio on the videotapes — no sound track had been recorded — there had been no interception of spoken words. "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 videotapes were admissible.²⁴ The implication of this case is that videotapes which contain no sound track do not infringe the privacy provisions Part IV.1 of the Criminal Code.

In a rather unusual case, a videotape was tendered to corroborate the testimony of a police officer concerning a defendant's lewd and allegedly indecent behavior. The officer observed and later recorded, using a video camera with a zoom lens, the defendant standing in the dining room of his own house, "exposing" himself before unveiled glass doors.²⁵

In an even stranger case, police installed a CCTV camera in the apartment of a female patient who accused her doctor of taking sexual liberties with her. When the doctor made another "house call", he drugged her and attempted to molest her. The police, watching on a CCTV monitor in the adjoining apartment, were able to prevent another assault. The CCTV equipment used did not produce audio or record on videotape.

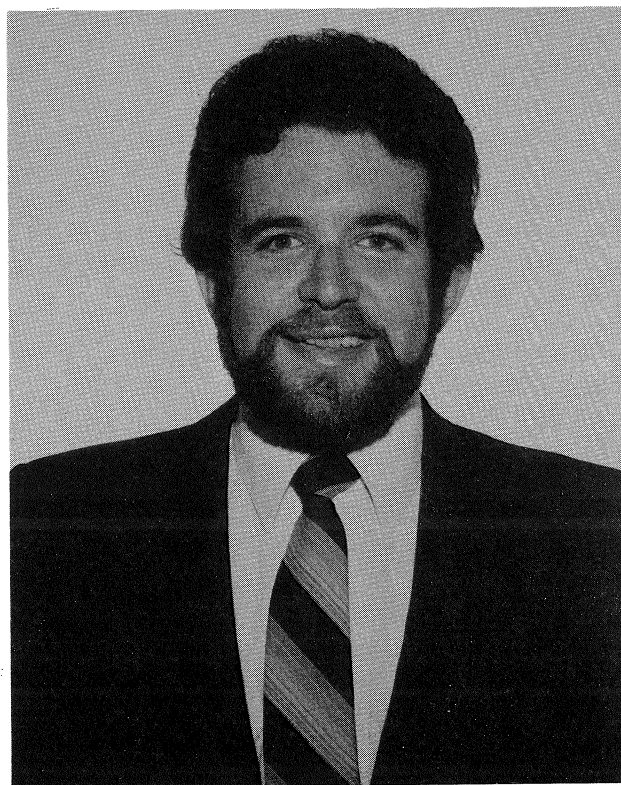
At trial the state attempted to have the officers who observed the video monitor testify about the events they saw on it. The defendant objected on the ground that the police had no warrant to install the equipment and that a warrant was required by the Fourth Amendment — right to be secure . . . against unreasonable searches and seizures.²⁶ The court decided that a warrant was not required to install the video equipment because the intended victim had consented to the entry and installation.²⁷ In effect, "the court treated the participant-consent to videotaping the same as participant-recorded or -transmitted conversation."²⁸

In that case, the installation of surveillance equipment was done with consent. A problem arises when, in order to conduct a surveillance, law enforcement officers must make a non-consensual entry onto private property to install video surveillance equipment. There is authority for court-ordered installation and operation of videotape equipment on private property for the detection of crime in the state of New York.²⁹

In Canada, there is no reported case on this point. Given the similarity between the wording of the Fourth Amendment of the American Bill of Rights and the Canadian Charter of Rights and Freedoms, should the fact pattern in the aforementioned case ever present itself in a Canadian court, it is not unlikely that the case will be decided in the same way.

In the author's opinion, videotape will be used more often in the future to record events that are observed during surveillance operation. Thus, it is incumbent upon law enforcement and security personnel to become familiar with the current state of law on this topic.

While the author has attempted to present the most recent cases, the reader should bear in mind that this article reflects the law on the admissibility and weight of surveillance videotapes in North American courts as of the summer of 1983. As the law of evidence is constantly changing, new cases now being decided, especially those dealing with the Charter, may overrule those discussed above.



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