Videotape Evidence in Canadian Military Courts

Elliott Goldstein[1]

I. INTRODUCTION

Using video tape to present evidence in Canadian military courts is an idea whose time has arrived. An established evidentiary tool in the hands of Canadian civil and criminal trial lawyers, videotape has the potential of modernizing the way that evidence is presented in military courts.

This article discusses the admissibility and weight of videotape evidence, describes how videotape evidence has been used in Canadian civilian courts and American military courts, and offers suggestions for its use in Canadian military courts.[2]

II. ADMISSIBILITY AND WEIGHT

The admissibility of a videotape is governed by the same rules that apply to photographs.[3] All the cases dealing with the admissibility of photographs hold that such admissibility depends on:

a. their accuracy in truly representing the facts;

b. their fairness and absence of any intention to mislead;

c. their verification on oath by a person capable to do so.[4]

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[1]B.A., LL.B. (Saskatchewan), Barrister and Solicitor of the Supreme Court of British Columbia, Canada. Special thanks to Benjamin Goldstein, Q.C., for reviewing this article. For information write: GOLDSTEIN & GOLDSTEIN, Barristers & Solicitors, Suite 303 Spadina Towers, 728 Spadina Crescent East, SASKATOON, Saskatchewan, CANADA S7K 4H7.

[2]For providing the research material on which this article is based, the Author especially thanks Lieutenant-Colonel D. B. Murphy, Director of Law/Training, Office of the Judge Advocate General, Department of National Defence, Ottawa, Canada, K1A 0K2.

[3]*R.* v. *Maloney (No. 2)* (1976), 29 C.C.C. (2d) 431 (Ont. Co. Ct.). The same principles apply in determining the admissibility of motion picture films. See also *R.* v. *Peterson* (November 4, 1985, Ont. Co. Ct., County of Wellington), where Higgins, J. stated: "... so long as all the safeguards are maintained that are laid down as required for the admissibility of still photos, then I can see no reason why the cinema or moving-picture version of what a camera lens has viewed and recorded on film, should not be just as acceptable in a court of law. The only difference I can appreciate is that one is a still and the other is a series of instantaneous photos of objects, some perhaps moving, capable of being projected onto a screen, the effect of which is to show a scene with motion as a component. It seems to me the issue is one as to weight and not admissibility and I so rule."

[4] *R.* v. *Creemer and Cormier*, [1969] 4 N.S.R. 546, 53 M.P.R. 1, [1968] 1 C.C.C. 14, 1 C.R.N.S. 146 (N.S.S.C. App. Div.).

The contents of the videotape must be relevant and material to an issue at trial. If the videotape's contents would likely arouse a sympathetic reaction in the jury, then the videotape may be excluded on the ground that its prejudicial effect outweighs its probative value.[5] The trial judge has a discretion to exclude a videotape if it is of little probative value and would only serve to inflame the jury.[6]

Who is called to authenticate (verify) a videotape, goes to the issue of its weight, not its admissibility.[7] The more direct a connection the witness has to the videotape, the more weight may be afforded that witness' testimony.[8]

A videotape may be authenticated by:

a. the video camera operator;

b. a person present when the videotape was recorded;

c. a person qualified to state that the representation is accured;[9] or

d. an expert witness.[10]

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 in a courtroom on a screening of a videotape, is the same as what his memory tells him occurred during the event in question.[11] Witnesses in categories three and four are not eye-witnesses, but can still authenticate a videotape either because of their familiarity with its subject matter or their knowledge of the operation of the equipment used to record the videotape.[12]

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[5] *Draper* v. *Jacklyn*, [1970] S.C.R. 92, (1969), 9 D.L.R. (3d) 264 (S.C.C.).

[6] See *R.* v. *Wray*, [1971] S.C.R. 272 and *R.* v. *Lizotte*, [1951] S.C.R. 115, 9 C.C.C. 113 (S.C.C.).

[7] *R.* v. *Lorde and Johnson* (1978), 33 N.S.R. (2d) 376, 57 A.P.R. 376, (December 14, 1978), 3 W.C.B. 92 (N.S. Co. Ct.)

[8] Goldstein, E., *Goldstein On Videotape and Photographic Evidence: Case Law & Reference Manual* (February, 1986), Western Legal Publications, Vancouver, B.C., at 2-79.

[9] E.g., a pathologist who performs an autopsy on the deceased victim. See *R.* v. *Bannister*, 10 M.P.R. 391, [1936] 2 D.L.R. 795, (1936), 66 C.C.C. 38 (N.B.S.C. App. Div.).

[10] *R.* v. *Taylor* (June 8, 1983), 10 W.C.B. 303, (1984) 4 C.R.D. 425.60-08. An expert witness is called to testify about the operation of the recording equipment (e.g., surveillance camera).

[11] *R.* v. *Peterson* (November 4, 1985, Ont. Co. Ct.), County of Wellington, unreported decision of Higgins, J.

[12] E.g. A police officer who installed a hidden video surveillance camera to monitor an area of that was the scene of criminal activity by a person or person unknown.

If a witness watches an event on a closed-circuit television monitor as the event is actually taking place, his testimony is as admissible as the naked eye evidence of a witness present at the scene, provided that the closed-circuit equipment was functioning reliably, and the camera's location was established.[13]

Videotapes are capable of recording both pictures and sound. Editing a videotape's picture track may destroy the tape's sequence and chronology rendering it misleading and, therefore, inadmissible.[14] However, editing may be permitted to eliminate portions of a videotape which are irrelevant, immaterial, or poorly exposed.[15] Recordings of extraneous or purely repetitious scenes, if not deleted, might support an order for exclusion of the entire videotape.[16]

Editing a videotape's soundtrack may be grounds for exclusion of the entire videotape or just the soundtrack.[17] Having inaudible portions on its soundtrack, affects the weight given the videotape, and not its admissibility.[18] Tampering with and altering a videotape's soundtrack — by filtering out sounds — produces a copy that may be misleading.[19]

Videotape in slow-motion is not admissible in a case where time is a significant and relevant fact at issue.[20] A slow motion videotape is neither consistent with nor in conformity with the reality of time because it distorts the spontaneity of movements and their perceived deliberateness.[21] In a case where time is not at issue, a slow-motion

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[13] *R.* v. *Peterson* (November 4, 1985, Ont. Co. Ct.), County of Wellington, unreported decision of Higgins, J. See *R.* v. *Lunsted* (February 21, 1984, B.C. Prov. Crim. Ct.), Vancouver Registry Information No. 42449, unreported decision of Davies, Prov. Ct. J. See also *State* v. *Johnson* 18 NC App. 606, 197 S.E.2d 592, 60 ALR3d 329 (observation of the events by witnesses with the naked eye, rather than over closed-circuit television, was not required when the witnesses actually observed the event at the time it took place).

[14] *R.* v. *Maloney (No. 2)* (1976), 29 C.C.C. (2d) 431 (Ont. Co. Ct.) and *R.* v. *Williams* (March 10, 1977), 35 C.C.C. (2d) 103 (Ont. Co. Ct.).

[15] See *Niznick* v. *Johnson* (1961), 34 W.W.R. 101, 28 D.L.R. (2d) 541 (Man. Q.B.) where Monnin, J. comments on when the edited should be conducted and by whom (i.e., before trial by counsel or during trial by the judge).

[16] *Morris* v. *E.I. DuPont de Nemours & Co.* 139 S.W.2d 984.

[17] *R.* v. *Pere Jean Gregoire de la Trinite* (1980), 60 C.C.C. (2d) 542 (Que. C.A.).

[18] *R.* v. *Hutt* (February 10, 1984, Alta. Q.B.), unreported decision of Dea, Q.B.J.

[19] *R.* v. *Tookey (No. 1)* (February 17, 1981, Alta. Q.B.), Judicial District of Edmonton, Registry No. 8003-1004-C, unreported decision of Bracco, J.

[20] *R.* v. *Maloney (No. 2)* (1976), 29 C.C.C. (2d) 431 (Ont. Co. Ct.).

[21] *Ibid.* See also *R.* v. *Williams* (March 10, 1977), 35 C.C.C. (2d) 103 (Ont. Co. Ct.), per Allen, J.

videotape may be admitted if counsel for both sides, satisfied that "such distortion of accuracy could be explained to the jury", have consented to its admission.[22]

Colour videotapes are more vivid than black-and-white videotapes and are also more natural.[23] Colour distortion in a videotape usually affects its weight, unless the colour of objects or scenes is crucial to an issue in the case. Colour videotapes which serve to inflame the jury and are of little if any probative value, will be excluded.[24] But a colour videotape that is gruesome or sympathy-arousing may still be admitted if shown to the court in black-and-white.[25]

Weaknesses concerning the production of a videotape are matters of weight for the jury to consider and do not effect the admissibility of the videotape.[26] For example, if copying a videotape causes a loss in sharpness or clarity, such loss of image fidelity is not sufficient ground to exclude that copy from evidence.[27]

III. CANADIAN CIVILIAN COURTS

Videotapes have been tendered in Canadian criminal cases to show persons involved in drug trafficking[28], persons entering an illegal drug laboratory[29], picket-line disturbances[30], assaults during hockey games[31], re-enactments of crimes[32], a defendant's interview with a

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[22] *R.* v. *Maloney (No. 2)* (1976), 29 C.C.C. (2d) 431 (Ont. Co. Ct.).

[23] *R.* v. *Green* (1972), 5 N.S.R. (2d) 41, 9 C.C.C. (2d) 289, 20 C.R.N.S. 340 (N.S.S.C. App. Div.).

[24] *R.* v. *Dilabbio*, [1965] 2 O.R. 537, 46 C.R. 131, [1965] 4 C.C.C. 295 (Ont C.A.).

[25] A simple adjustment of the monitor's colour saturation control would result in the image appearing on the monitor screen in black-and-white.

[26] *Ibid.*

[27] *R.* v. *Williams* (November 1, 1977, Ont. Co. Ct.), unreported decision of Locke, J.

[28] *R.* v. *Biasi et al. (No. 3)* 66 C.C.C. (2d) 566, [1982] B.C.D. Crim. Conv. 5450-01, (October 9, 1981), 6 W.C.B. 446 (B.C.S.C.).

[29] *R.* v. *Porter et al.* (1985) 6 C.R.D. 850.60-01, (January 17, 1983), 9 W.C.B. 311, (B.C. Co. Ct.).

[30] *R.* v. *Lewis* (February 14, 1974, Ont. Prov. Ct.), unreported decision of Graham, J.

[31] *R.* v. *Maloney (No. 2)* (1976), 29 C.C.C. (2d) 431 (Ont. Co. Ct.) and *R.* v. *Williams* (March 10, 1977), 35 C.C.C. (2d) 103 (Ont. Co. Ct.).

[32] *R.* v. *Tookey and Stevenson*, 58 C.C.C. (2d) 421, (February 10, 1981), 5 W.C.B. 492 (Alta. Q.B.) and *R.* v. *Simeon* (March 11, 1986, Alta. Q.B.), unreported decision, Alberta Court of Queen's Bench.

psychiatrist[33], mischief[34], sobriety tests of suspected impaired drivers[35], an experiment[36], a defendant's statements to a police officer[37], gambling activity[38], an attack on a provincial legislature[39], a confession of a suspect[40], acts of gross indecency[41] and theft of drugs from a police vault[42].

If there is no recording of spoken words on the videotape, then it is not governed by Part IV.1 (S. 178.1) of the *Criminal Code of Canada.*[43] This section applies only to oral communications (i.e. words transmitted by voice) and not physical acts or gestures, even those which may provide clues as to what has been said.[44]

The *Canadian Charter of Rights and Freedoms* may have a bearing on the admissibility of videotapes recorded during surveillance operations. The phrase "security of the person" in section 7 of the *Charter* could contemplate a right to privacy in some circumstances which, if infringed in such a way as to bring the administration of justice into disrepute, might result in the videotape evidence being excluded under Section 24(2) of the *Charter.*[45]

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[33] *R.* v. *Blackman* (November 4, 1983, B.C.S.C.), New Westminster Registry No. X011455, unreported decision, before McKenzie, J.

[34] *R.* v. *Taylor* (June 8, 1983), 10 W.C.B. 303, (1984) 4 C.R.D. 425.60-08 (Ont. Prov. Ct.).

[35] *R.* v. *Dunn* (1978, B.C. Prov. Ct.), Vernon Registry No. 78-02047, unreported decision of Behncke, J. and *R.* v. *Thibeaudeau* (February 26, 1976, B.C. Prov. Ct.), unreported decision of Cliffe, J.

[36] *R.* v. *Claire Lortie* (October 18, 1983, Que. Sup. Ct.) St. Jerome, Quebec.

[37] *R.* v. *Simpson* (November 23, 1983, B.C.S.C.), [1985] B.C.D. Crim. Conv. 5362-01.

[38] *R.* v. *Irwin and Sansone et al.* (1976), 32 C.R.N.S. 398 (Ont. C.A.) and *R.* v. *Santiago Wong et al* (September 15, 1985, Ont. Prov. Ct.), Judicial District of York, unreported decision of Paris, J.

[39] *R.* v. *Denis Lortie* (January 22, 1985, Que. Sup. Ct.).

[40] *R.* v. *Heathcote* (June 25, 1985, Ont. Prov. Ct.), unreported decision of Robinson, J.

[41] *R.* v. *Lofthouse* (March 24, 1986, Ont. Co. Ct.), County of Wellington, unreported decision of McNeely, J.

[42] *R.* v. *Marchessault* (November 10, 1983, Que. Sup. Ct.) Dossier No. 500 27-003670-835, before Ryan, J.

[43] *R.* v. *Biasi et al. (No. 3)* 66 C.C.C. (2d) 566, [1982] B.C.D. Crim. Conv. 5450-01, (October 9, 1981), 6 W.C.B. 446 (B.C.S.C.).

[44] *Ibid.*

[45] *R.* v. *Taylor* (June 8, 1983), 10 W.C.B. 303, (1984) 4 C.R.D. 425.60-08 (Ont. Prov. Ct.). Note that the onus is always on the person wishing evidence excluded (under section 24(2) of the *Charter*) to establish the further ingredient that the admission of the evidence would bring the administration of justice into disrepute. See *R.* v. *LeBeau* (February 18, 1986, Ont. Co. Ct.), County Court of Wellington File No. 139/85, unreported decision of Higgins, J.

Section 8 of the *Charter* protects against unreasonable search or seizure. In *R. v. Porter*[46] the British Columbia County Court held that the installation of video surveillance equipment does not constitute a search, nor does the capture of optical images constitute a seizure, as those terms are commonly understood. The Court assumed that the protection offered by Section 8 of the *Charter* is limited to searches and seizures of physical property.

In the *Porter* case, the British Columbia County Court took the view that Section 8 protects against trespass, not invasion of privacy. A different approach was taken in *R. v. Wong et al*[47] where the Ontario Provincial Court held that the videotaping of the defendant without his knowledge or consent, did encroach upon the defendant's reasonable expectation of privacy and did violate his right to privacy. In *Wong*, the videotape search was unreasonable because no search warrant was obtained, even though there was no trespass because the camera was installed with the consent and cooperation of the hotel's management.

In *R. v. Lofthouse*[48] the Ontario District Court held that the videotaping of the defendant and his conduct in a washroom cubicle was a search which infringed his reasonable expectation of privacy. The search was unreasonable and the constitutional rights of the defendant were infringed.

However, the trial Judge found that the administration of justice was not brought into disrepute by the admission in evidence of the videotapes because (a) the police had reasonable and probable cause to believe that the public washroom in the Park was being used on a regular and a frequent basis for acts of gross indecency; (b) the use of the video camera was the only means reasonable available of obtaining evidence of the offences being committed; and (c) the videotaping involved no trespass and the installation of the equipment was done on public property with the permission of the public property owner.

In civil cases, videotapes have been admitted to present depositions of witnesses[49], day-in-the-life documentaries of disabled plaintiffs[50],

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[46] *R.* v. *Porter et al.* (1985) 6 C.R.D. 850.60-01, (January 17, 1983), 9 W.C.B. 311, (B.C. Co. Ct.) (video surveillance of a house suspected of containing an illicit drug laboratory).

[47] *R.* v. *Santiago Wong et al* (September 15, 1985, Ont. Prov. Ct.), Judicial District of York, unreported decision of Paris, J., (video surveillance of hotel rooms used for gambling and betting purposes).

[48] *R.* v. *Lofthouse* (March 24, 1986, Ont. Co. Ct.), County of Wellington, unreported decision of McNeely, J., (video surveillance of public washrooms located in a public park).

[49] *Quinn* v. *Hurford* (1978), 5 B.C.L.R. 375, 6 C.P.C. 216 (B.C.S.C.).

[50] *Teno* v. *Arnold* (1975), 7 O.R. (2d) 276, 55 D.L.R. (3d) 57, (Ont. High Court of Justice).

surveillance of suspected malingering plaintiffs[51], views[52], and medical demonstrations[53].

IV. AMERICAN MILITARY COURTS

Videotape has been used to present evidence in American civilian courts for many years.[54] Its first reported use in a military court occurred in *U.S. v. Day*[55]. At issue was the defendant's sanity at the time of his offences. Defence attorneys tendered a videotape of an interview between the defendant and a forensic psychiatrist in his office. The Court permitted the videotape to be shown on the theory that the videotape was solely for the purpose of showing the method and technique employed by the psychiatrist. The psychiatrist commented from the witness stand on the videotape which showed the defendant talking about matters pertaining to his background, his racial attitudes, and his perception of the events when he was shooting his victims.

The Defence in *U.S. v. Stark*[56] also tendered videotapes of interviews between the defendant and his psychiatrist. These interviews formed the basis for the psychiatrist's expert opinion of the defendant's state of mind at the time of the crime. The military trial judge refused to admit these videotapes because the Court did not require all of the psychiatrist's research and investigative results in order to evaluate the weight of his testimony.

The defendant in the *Stark* case was under hypnosis during portions of the aforementioned interviews. However, this did not render those portions inadmissible *per se*. On appeal, the Army Court of Military Review did find that there was substantial basis for the military judge's decision to exclude this evidence.[57] The Court held likewise in regard

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[51] *Guy* v. *Trizec Equities Ltd. et al.* (1978), 26 N.S.R. (2d) 1, 40 A.P.R. 1 (N.S.S.C. App. Div.) and *Smith* v. *Avis* (1979), 35 N.S.R. (2d) 652, 62 A.P.R. 652 (N.S.S.C. Trial Div.).

[52] *Short* v. *Canada Life Assurance Co. of Canada*, Action /C81-2397, New Westminster Registry — a trial before Hinds, J. in New Westminster, B.C., commencing October 24, 1983.

[53] *Lunnon* v. *Reagh* (1978), 25 N.S.R. 2d 197, 36 A.P.R. 197.

[54] See Joseph, G., *Modern Visual Evidence* (1984), New York: Law Journal Seminars-Press, Inc.

[55] *U.S.* v. *Day*, 1 M.J. 1167 (CGCMR 1975) at 1172.

[56] *U.S.* v. *Stark*, 19 M.J. 519 (ACMR 1984) at 526.

[57] The Court cited the case of *State* v. *Harris*, 241 Or. 224, 405 P.2d 492, at 499-500 (1965) where the videotaped statements of a defendant under hypnosis were excluded from evidence due to the potential for confusion and because Court members would likely be unable to consider the videotapes for purposes other than the truth of the statements contained therein.

to those portions of the videotapes during which the defendant was not under hypnosis.

In *U.S. v. Harrington*[58] a videotape was made of a hypnosis session in which a witness was questioned by a psychologist. The hypnosis was used to assist the witness to recall events surrounding a shooting in which he was one of the victims. The videotape was not tendered in evidence, but was recorded to comply with the safeguards set out in *State v. Hurd.*[59]

In *U.S. v. Martin*[60] the jury saw a videotape explaining the step-by-step process by which an expert witness (a civilian dentist and forensic odontologist) arrived at his opinion that the bite-mark on the victim's cheek was made by the defendant.

In *U.S. v. Irvin*[61], a prosecution for child abuse, a videotape of the defendant's quarters was admitted at trial. The videotape and other evidence established that the child victim's injuries could not have resulted from accidental causes.

In *U.S. v. Wiggins*[62], a prosecution for drug trafficking, a videotape, showing the defendant meeting with a drug informant, counting money, and picking up some LSD, was admitted in evidence. The defendant argued that his picking up the money and LSD was a "verbal act", and the drug informant was a *de facto* OSI (Office of Special Investigations) Agent. Accordingly, the informant's failure to advise the defendant of Article 31, 10 U.S.C. para 831 rights made the videotape inadmissible. The military trial judge ruled that an Article 31 warning was not required because the defendant's conduct was a non-verbal statement made during the course of a conversation with a person known to the defendant as a drug trafficker.[63]

Videotaped depositions have been admitted in United States'

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[58] *U.S.*v. *Harrington*, 18 M.J. 797 (ACMR 1984) at 801.

[59] *State* v. *Hurd*, 432 A.2d at 96-97. Many states have employed similar safeguards as a precondition to the admissibility of hypnotically-refreshed testimony, see *Pearson* v. *State*, 441 N.E.2d 468; *State* v. *Long*, 32 Wash.App. 732, 649 P.2d 845 (1982); *State* v. *Armstrong*, 110 Wis.2d 555, 329 N.W.2d 386. See also Plotkin, J., "The previously hypnotized witness: is his testimony admissible?" (Fall, 1984), 106 *Mil. L. Rev.* 163.

[60] *U.S.* v. *Martin*, 9 M.J. 731 (NCMR 1980) at 742.

[61] *U.S.* v. *Irvin*, 13 M.J. 749 (AFCMR 1982) at 751.

[62] *U.S.* v. *Wiggins*, 13 M.J. 811 (AFCMR 1982).

[63] The informant — after he was arrested for transferring some LSD to an undercover OSI agent — agreed to assist the OSI in its investigation of the defendant.

military courts when witnesses are not available to testify at trial.[64] Between the date of the offence(s) and the date of trial, a military witness may be transferred overseas or discharged from the service.[65] Similarly, civilian witnesses may have left the jurisdiction.[66] In such instances, deposition evidence may be taken during a formal pre-trial session of the court authorized by Article 39(a), Uniform Code of Military Justice, 10 U.S.C., para 839(a) (1976).[67] If the deposition is recorded on videotape and shown to the court, the videotape should be included as an exhibit within the trial record because "a videotape is a photograph, Mil.R.Evid. 1001(2), and its qualities as real evidence call for its preservation in the form of a marked exhibit."[68]

In *U.S. v. Crockett*[69] the U.S. Court of Military Appeals was asked to decide two issues: whether the use of a videotaped deposition was authorized under Uniform Code of Military Justice Article 49, 10 U.S.C. Sec. 849[70]; and, whether the defendant was denied his Sixth Amendment right to confront the witness at trial by the use of videotaped deposition.

In deciding the first issue, the U.S. Court of Military Appeals commented that

> "the playing of a viodeotape deposition would appear to give a defendant more safeguards than would be available from the reading of its written counterpart ... Moreover, here we can see no possibility of prejudice from 'playing' the videotape deposition into evidence, instead of transcribing

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[64] *U.S.* v. *Dempsey*, 2 M.J. 242 (AFCMR), pet. denied, 2 M.J. 149 (CMA 1976.). See also *U.S.* v. *Thomas*, 15 M.J. 528 (AFCMR 1982) at 529.

[65] See *U.S.* v. *Kelsey*, 14 M.J. 545 (ACMR 1982) wherein the assault victim, who had completed his service commitment and was discharged from the Army, was back home in the United States at the time his deposition was taken.

[66] See *U.S.* v. *Hogan*, 20 M.J. 71 (CMA 1985) wherein the rape victim, a Philippine national, was living out of the country at the time her deposition was taken.

[67] *U.S.* v. *Kelsey*, 14 M.J. 545 (ACMR 1982) at 546.

[68] *Ibid.*, at 547.

[69] *U.S.* v. *Crockett*, 21 M.J. 423 (CMA 1986).

[70] Article 49(a) of the Uniform Code of Military Justice, 10 U.S.C., para. 849(a), authorizes the taking of "oral or written depositions" and provides in Article 49(d) that, "upon reasonable notice to the other parties," they "may be read in evidence before any military court or commission in any case not capital." Note that in 1983, Congress amended Article 49(d) expressly to permit the recording of depositions on "audiotape, videotape or similar material," and the "playing" of these tapes to the factfinder at trial. (Pub.L. No. 98-209, para. 6(b), 98 Stat. 1400, effective August-1, 1984.)

its contents in written form and then 'reading' the deposition at trial."[71]

In addition, the Court of Military Appeals could find no express prohibition of the use of videotaped depositions in the Military Rules of Evidence, or the Manual for Courts-Martial.[72]

On the second issue, the Court noted that

> "the defendant and his counsel were present and had the opportunity to object to testimony offered on direct examination and to cross-examine the two witnesses about their testimony . . . [t]his deposition was taken in preparation for a pending trial. Thus, defence counsel knew the relevant issues and possessed the same motive for cross-examining (the victim) and her sister that he would have had if they testified in person at trial . . . (The defendant) and his counsel were transported to Florida for the videotape depositions; and so they saw the two witnesses face to face and subjected them 'to the ordeal of a cross-examination'. The depositions were taken in a courtroom in Florida in order to emphasize the solemnity and seriousness of the occasion. Furthermore, the playing of the videotape provided the factfinder an opportunity to observe the demeanor of the absent witnesses."[73]

The Court found that the prosecution had demonstrated the necessity for using the videotape deposition[74], therefore, the defendant was not denied his Sixth Amendment right to contront the witness at trial.

In *U.S. v. Simpson*[75] the U.S. Coast Guard Court of Military Review ruled that videotapes of courts-martial — without a written transcript — do not satisfy the legal requirements for producing a record of trial and the Manual for Courts-Martial does not permit or authorize the use of videotape as the "transcript".[76] On appeal, the

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[71] *U.S.* v. *Crockett*, 21 M.J. 423 (CMA 1986) at 426.

[72] *Ibid.*

[73] *Ibid.*

[74] The Government had established the "unavailability" of the absent witnesses to the extent required by the Sixth Amendment.

[75] *U.S.* v. *Simpson*, 2 M.J. 1125 (CMA 1976), at 1126.

[76] *Ibid.* at 1129. Note that the Court of Military Review refused to review the proceeding because videotapes of the trial were submitted rather than written transcripts of the trial proceedings. Certificates of Review were then filed, see *U.S.* v. *Barton* and *Simpson*, 5 M.J. 1003 (CMA 1976).

U.S. Court of Military Appeals affirmed the lower Court's decision and held that "videotapes cannot be substituted for written or printed transcripts of trial proceedings, verbatim or summarized."[77]

In the aforementioned cases, the issue was not whether videotapes can be used as evidence, but whether videotapes may be substituted for the traditional written transcript of trial proceedings. After the Court of Military Appeals ruling, the videotapes were returned and a typewritten verbatim record of trial was prepared.[78]

V. POTENTIAL USE IN CANADIAN MILITARY COURTS

The admissibility of videotape evidence in Canadian military courts is governed by both case law (discussed above) and statute law. Statute law includes the *National Defence Act*, section 158 of which provides that "the rules of evidence at a trial by court martial shall be such as are established by regulations made by the Governor in Council".[79] These rules, which apply to all court martial proceedings regardless of where the court is sitting, are known as the *Military Rules of Evidence*.[80] Part IV of the *Military Rules of Evidence* sets out the permitted methods of proof, including "Testimony by Graphic Media" (Rule 82).

A. Testimony by Graphic Media

"Graphic medium" is defined in Rule 82(1) as "a model, map, diagram, photograph or other pictorial or graphic mode of description and includes a record of data, experience, communications or events made by accurate mechanical, electrical or other scientific methods".[81] Rule 82(2) states that testimony may be given or supplemented by a graphic medium. The remainder of Rule 82 reads as follows:

> "(3) A graphic medium shall be presented as part of the testimony of a witness who has sufficient knowledge of the facts represented to prove that the graphic medium used does accurately represent them.
>
> (4) A photograph or other mode of depicting facts, made with scientific apparatus that is capable of disclosing

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[77] *U.S.* v. *Barton*, 6 M.J. 16 (CMA 1978), at 18.

[78] *U.S.* v. *Barton*, 11 M.J. 621 (CMA 1981), at 622.

[79] See Article 112.68 of *The Queen's Regulations and Orders For The Canadian Forces* (1967 Revision), Volume II (Disciplinary), (cited as QR & O). Issued under the authority of the *National Defence Act*, R.S.C. 1970, c. N-4, as amended.

[80] See Appendix XVII to QR & O.

[81] Rule 82(1) of the *Rules of Military Evidence*, appendix XVII to QR & O, at 34.

data not perceivable by the unaided senses, may be admitted as part of the evidence of a witness who can prove that the apparatus was of a standard make, in good condition and used by competent operator.

(5) If proved to be trustworthy, a mechanical, electrical or other device may be employed to display or render audible to the court the data, experience, communications or events recorded by a graphic medium admitted under this section."[82]

Photographs are specifically mentioned in the definition of "graphic medium". The phrase "or other pictorial or graphic mode . . ." is broad enough to cover motion picture films and videotapes. Rule 82(3) makes it clear that the "graphic medium" must be verified on oath by a witness. Rule 82(4) permits a photograph (or film or tape) to be admitted into evidence if the authenticating witness can prove how it was made. The phrase "scientific apparatus that is capable of disclosing data not perceivable by the unaided senses" could refer to a surveillance camera with telephoto lens, a night-vision camera[83], or even a camera that takes pictures through a microscope.[84] Rule 82(5) allows equipment (e.g. slide projector, motion picture projector, or videocassette recorder) to be used at trial to "playback" the recorded information.

Thus, Rule 82 of the *Military Rules of Evidence* provides a statutory basis for the admission of videotape or photographic evidence in a Canadian military court. Of course, Rule 82 may also be interpreted with the aid of common law cases.[85]

B. Evidence on Commission

Section 161 of the *National Defence Act* permits the Judge Advocate General to appoint a commissioner to take the evidence of a witness under oath where it appears ". . . that the attendance at a trial by court martial of a witness . . . is not readily obtainable because the witness is ill or is absent from the country in which the trial is held. . . ."[86]

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[82] *Ibid.*

[83] Night vision cameras operate using infra-red light or electronic light intensification.

[84] Photomicroscopy and macrophotography (close-up photography) are used in ballistics testing and when comparing samples of human blood, tissue, hair, fingerprints, and clothing fibers.

[85] Over 170 such cases are briefed and analysed in *Goldstein On Videotape and Photographic Evidence: Case Law & Reference Manual* (February, 1986), Western Legal Publications, Vancouver, B.C.

[86] See Article 112.70 of QR & O.

As it is presently written section 161 does not permit the recording of commission evidence on videotape. Section 161 specifically refers to "the *document* containing the evidence of a witness . . ." and, thereby, excludes the possibility of the evidence being recorded in other than written form.

Unlike section 161, section 637 of the *Criminal Code of Canada*[87] — which governs the taking of evidence on commission in criminal proceedings — does not restrict the method of recording evidence taken on commission. Thus, the Crown in *R. v. Pawliw*[88] was able to apply for a court order appointing a commissioner to take (and record on videotape) the evidence of a female witness who had fled to the United States. The Court ordered that the commission evidence be videotaped so that the jury at trial would be able to observe the demeanour of that witness. This order applied to both the examination-in-chief and cross-examination of the witness.

Were section 161 of the *National Defence Act* amended to permit evidence on commission to be recorded on videotape, then a military court would have a better basis for perceiving a witness' demeanor and evaluating his credibility. Next to the presence of the witness at trial, playing the videotape provides a military court with the most reliable means for evaluating that testimony accurately.

C. View by Court Martial

Section 162 of the *National Defence Act*[89] provides that "a court martial may, where the president considers it necessary, view any place, thing or person".[90]

The taking of a "view" by videotape has the potential for being its most popular use because there are so many scenes which cannot be reproduced at trial. Videotape can be used to record a "view" of physical objects which, because of their size, weight or immobility, cannot be brought into a military courtroom.

If the site to be viewed is located in an area accessible only to those specially trained to reach it (e.g. the top of a mountain or the bottom of

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[87] Section 637 of the *Criminal Code of Canada*, R.S.C. 1970, c. C-34, reads: A party to a proceeding to which the Act applies may apply for an order appointing a commissioner to take the evidence of a witness who (a) is, by reason of (i) physical disability arising out of illness, or (ii) some other good and sufficient cause, not likely to be able to attend at the time the trial is held, or (b) is out of Canada.

[88] *R.* v. *Pawliw* (December 10, 1984), 13 W.C.B. 200, [1984] B.C.D. Crim. Conv. 5455-05.

[89] *National Defence Act*, R.S.C. 1970, c. N-4, as amended.

[90] See Article 112.63 of QR & O.

an ocean), it is unlikely to be viewed unless recorded by a specially trained and equipped video camera operator. Instead of incurring the high costs and great inconvenience which frequently arise when the entire court is taken to view a scene, a video camera operator can be dispatched to the scene with instructions to record on videotape the conditions existing at that location thereby saving much time and expense.

A view by videotape minimizes cost, time delay, and inconvenience (i.e. scheduling problems) associated with the taking of a view by the entire court. It provides a permanent record, enables repeated viewings if necessary, and afford an appellate court the same access as had the trier of the fact to the view. In this way videotape "preserves" the view in case of appeal.

Present day video technology makes possible views by land (terrain), sea (marine), and air (aerial). If section 162 of the *National Defence Act* were amended to permit views by videotape, then the site of an aircraft crash or military vehicle accident could be recorded on videotape and played at trial.

Not only could the site be recorded, but also the actual collision which caused the crash or accident. In fact, a motion picture film was shown at a General Court Martial resulting from the May, 1975 mid-air collision of two Tutor (training) aircraft.[91]

The collision occurred when the right wing of one Tutor aircraft and the tail assembly of another came into contact. As a result, damage was occasioned to the right wing of the first aircraft and the second aircraft crashed into Old Wives Lake, in Saskatchewan.

The pilot of the first aircraft was charged under section 97(b) of the *National Defence Act*. At his court martial, the Court admitted into evidence a motion picture film made by a passenger who sat in the righthand seat of the first aircraft.[92] The 8mm colour movie film, which showed the actual collision between the two aircraft, was authenticated by the passenger who testified that the film represented what he saw on the day of the collision.

In his summation to the Court, the Judge Advocate stated that although the film showed a continuous movement of the aircraft from a banking position to the right, it was for the Court to decide whether the accused pilot was negligent in performing the manoeuvre from the echelon left position.

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[91] *General Court Martial of 106 832 074 Major D.P. Andrews*, Canadian Forces Base Moose Jaw, August 6-9, 1975.

[92] The "passenger" was a student (helicopter) pilot who went up "on a joy ride" to try out his brand new movie camera.

D. Confessions of Suspects

The most important potential use for videotape is the recording of confessions of suspects and accused persons. Once recorded, a videotape confession could be played at the *voir dire* (a trial within a trial) held during a court-martial.[93] The recorded sounds and images on the videotape allow a military court to hear and weigh the intentions of voice, the shades of meaning and nuances of words and gestures of the confessor. Also, a videotape confession would be of great assistance as corroborative evidence in determining who is telling the truth.

In a February 1986 communique issued by the Law Reform Commission of Canada there is reported the interim results of a police-sponsored project to videotape interviews with suspects and accused persons. Those results are summarized below:[94]

"1. There is no evidence to support the major concern, expressed by some police officers and prosecutors before the project began, that the videotaping process would inhibit suspects from making confessions or admissions that they might otherwise have made.

2. There have been no allegations at court of police tampering with tapes or misbehaving in any way prior to commencement of the taped interview.

3. Crown counsel indicate that there have been no problems in having the tape introduced into evidence in the few cases which have actually reached court.

4. The videotaping process has saved court time in those cases where the defence counsel has 'waived' the *voir dire*.

5. The audio-visual equipment has been reported as functioning well, with no reported cases of mechanical failure. Maintenance requirements on the equipment have been neglibible.

6. There has been no evidence that costly professional camera crews or other special technical assistance is necessary to produce a full record of what occurred during the interview in a clear, reliable form."[95]

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[93] See Article 112.605 of QR & O which sets out the procedure for determining the admissibility of an alleged confession.

[94] Grant, Prof. A., *The Audio-Visual Taping of Police Interviews with Suspects and Accused Persons by Halton Regional Police Force, Ontario Canada: An Evaluation — FIRST INTERIM REPORT.* Prepared for the Law Reform Commission of Canada, December 31, 1985.

[95] Law Reform Commission of Canada, *Communique* (February 17, 1986).

The aforementioned results indicate that videotape technology ca play a role in improving the administration of military justice i Canada by providing a full electronic record of military polic interviews of suspects and accused persons.

An audiotape recording of an accused's confession was tendered at recent General Court Martial.[96] During the trial within a trial, th prosecutor introduced the audiotape recording of an interview betwee the accused and a special investigator. The purpose of the recordin was to make sure there was an accurate record of the four-hour lon interview. After the interview, a copy was made of the original tape an given to a secretary to transcribe. The original audiotape was kept in locked cabinet, in the custody of the investigating officer.

The Judge Advocate listened to the original tape in total, read th entire transcript, and decided that the accused's admissions were no made voluntarily because there was an atmosphere of oppression in th interview room. The audiotape recording was inadmissible and no played to the President and other members of the Court.

VI. CONCLUSIONS

In this article, the Author has offered a few suggestions for using videotape to present evidence at courts martial. Videotape's other uses are discussed in the articles found in the bibliography which follows.

Videotape is a powerful evidentiary tool. In the near future it will become more common, so military lawyers should learn to use it efficiently. Its American proponents claims that savings of time and money are possible with its use, but most importantly, videotape aids in the search for the truth by providing sound and pictures of scenes and objects that might not otherwise be seen by the military court. It is time for videotape to play a larger role in the military justice system and for Canadian military lawyers to take advantage of this new, high technology.

[96] *General Court Martial of 451 851 157 Private B.T. Clabby*, First Regiment, Royal Canadian Horse Artillery, CANADIAN FORCES BASE LAHR, Canadian Forces Europe, June 18-21, 1985.