



**POLICE
DETECTIVES
IN CANADA**

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Police Detectives in Canada

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by

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Police Detectives in Canada

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Police detectives in Canada do not routinely videotape their interrogations of suspects during crime investigations, and yet it was a videotape that was the surprise witness for the defence during the recent prosecution of Neil Proverbs in Toronto (Ontario) for the possession of weapons for the purpose dangerous to the public peace. Proverbs had secretly taped a series of drinking and eating sessions with two police officers who obliged him with stories of police lying and slanting of evidence¹. These tapes were shocking and inflammatory, but they were also irrefutable and admissible evidence.

The Proverbs case, although a strange turnabout of investigative technology traditionally welded by the prosecution perhaps presages its future importance in Canada and necessitates a critical look at the advantages and dangers of the use of video tapes, particularly their use during police interrogation to obtain statements and confessions from the accused for later use as evidence in trial. By 'statements' I mean admissions in respect to matters having some relation to proof of the accused's opportunity to commit a crime, or of a possible motive for it, and other matters that do not directly establish his/her guilt but are links in the chain of evidence - it is the grey area falling short of an admission of guilt but which can be used later to impeach the witness during trial or to prevent him/her from changing the story.

I propose two major questions with respect to the use of such evidence:

1. Does the presence of a recording device, assuming it is known, act upon the mind of the accused in such a way as to affect the voluntariness of the confession or statement, and therefore affect its admissibility in evidence?
2. Whether or not the person knows that they are being taped, and if it is found that the statement was indeed voluntary, should the showing of the videotape to the jury at trial be accompanied by certain precautions to be considered in weighing this particular type of evidence appropriately and fairly?

The present law in Canada relating to the admissibility of a confession is entirely judge-made, and is governed by the rule in *R. Vs Ibriham*² that any statement made to a person in authority must have been made voluntarily. During the voir dire the Crown must prove it to be so beyond a reasonable doubt by showing that it was made without fear of prejudice or hope of advantage.

The sole rationale for this exclusionary rule is the trustworthiness of the statement. It is this rationale that allowed the Supreme Court of Canada to deny any discretion in the trial judge to reject an involuntary confession, the truth of which was confirmed by the finding of subsequent facts.³ Similarly, statements obtained by deception are receivable even though the tactics are reprehensible unless the deception affects the voluntariness.

In *R. Vs Rothman*,⁴ the exclusionary rule was held not to apply to a statement made by the accused to an undercover police officer who posed as a cell-mate because the test of a 'person in authority' is a subjective one. Failure to give a '*right to silence*' caution⁵ or to inform the accused of their right to retain counsel,⁶ may be taken into account in the judicial assessment of voluntariness

but they do not necessarily render the statement involuntary, nor does the giving of a warning make a statement necessarily admissible.⁷

In the United States, other rationale, besides judicial apprehension of untrustworthiness of confessions, have been suggested as supportive of the involuntary statement ban.⁸

1. The protection of the individual citizen against forced self-incrimination.
2. Protecting the individual citizen against bodily manhandling and other undue pressures.
3. Discouraging improper police practices in custodial interrogation and encouraging through extrinsic criminal investigations.
4. Maintaining civilized and basically fair methods of proof in the criminal trial process.

A decision of the Supreme Court of Canada in *Horvath vs The Queen*⁹ may open the door to consideration of these alternate rationales in Canada. A majority decision held a statement to be involuntary notwithstanding that it was not obtained through hope of advantage or fear of prejudice held out by a person in authority but where it is induced by circumstances other than threats or promises. The words used by Mr. Justice Spence were that the statement must be made '*of free will.*' The case may be limited to its facts, however, in that the relevant circumstance involved the inadvertent hypnosis of the seventeen-year-old suspect by his interrogator.

It is the same rule of voluntariness which should determine the admissibility of a videotaped confession, but the videotaped confession tends to escape the same close scrutiny because of what I would criticize as only an illusion of trustworthiness. The Louisiana Supreme Court stated that '*a videotape recording is of even greater accuracy than a written confession. It is reliable, tangible evidence and the best extrajudicial record of the defendant's statements which can possibly be secured.*' In a decision holding that discovery of the electronically recorded confession by the defendant was proper. The court added that '*it establishes, when properly identified, the recorded voice of the confession and the judge and jury are able to observe his/her appearance and demeanor while he/she answers the questions propounded by the interrogator.*'

An Ontario Provincial Court went so far as to take into account unfavourably to the prosecution the fact that the method used to record the interview was 'primitive and unreliable' and could very easily have been improved upon by simple recording devices.¹¹ Both of these judges have assumed that any involuntariness of the statement will be obvious to the court upon viewing the evidence, and that the only risk of untrustworthiness is negated by ensuring that the tape is in an accurate reproduction of what was said and done.

This assumption of trustworthiness may be in danger in itself, but what if, as was initially proposed, the video camera plays a role in the dynamics of the interrogation beyond that of a neutral unobtrusive recording device.

A suspect who is being interrogated must make the decision to talk or to remain silent, to answer questions truthfully, evasively, or to lie.¹² The process of decision making has been described to be the choice of that action for which the sum of the probability of occurrence of the consequences multiplied by their utilities - taking into account both positives and negative utilities - is the greatest.¹³ But the suspect's task of deciding must be performed within the unfamiliar social environment of the interrogation room which is to a great extent controlled by the interrogator, upon

whom the suspect is dependant for the information as to how he/she should perceive the consequences and their probabilities.

Police manuals set out certain tactics and techniques which create a situation conducive to getting a confession. The suggested setting is an extremely quiet room which is devoid of decorations and all possible distractions. There are no small loose objects within the subject's reach which they can *'pick up and fumble with . . . tension relieving activities of this sort detract from the effectiveness of the interrogation, especially during the critical phase when the guilty subject may be trying desperately to suppress the urge to confess.'*¹⁴

The subject is confronted by an interrogator who presents himself as a person of authority, by his dress, usually a business suit, and his manner. The ideal interrogator is described as *'big and commanding in stature with a pleasant appearance and a deep full voice (for males).'*¹⁵ The effectiveness of a persuader in exerting social pressure is enhanced when there is an obvious difference in stature between the persuader and the subject, and if the persuader's credibility is high.¹⁶

These situational factors - the unfamiliar physical environment of the police station, over which the suspect has no control, his confinement and isolation, and in the authority confronting him, produce stress in the suspect. Stress is a cause of performance impairment and can be expected to impair the suspects decision making.¹⁷ This stress can be tempered by the 'sympathy' of the interrogator who is urged to sit 'fairly close' to the subject, with no furniture between them except possibly a small table. *'Distance or the presence of an obstruction of any sort constitutes a serious psychological barrier and also affords the subject a certain degree of relief not otherwise attainable.'*¹⁸

Four general categories of consequence have been described as relevant to the decision made in the course of social interaction - utilitarian gains and losses for self, gains and losses for relevant others, social approval or disapproval, and self-approval or disapproval.¹⁹ The rules of evidence prevent a confession obtained by a person in authority holding out promises or threats of utilitarian gains and losses: the police manuals lay out tactics which act to manipulate the suspects perception of self-esteem and social approval.²⁰

Interrogation is advised to display an air of confidence in the subject's guilt, but at the same time to *'minimize the moral consciousness of the offence'*, *'sympathize with the subject by telling the subject that anyone else under similar circumstances might have done the same thing'* and *'offer a less revolting or more morally acceptable motivation a reason for the offence.'*²¹

Justice Spence suggests that confessing is the honourable and socially acceptable thing to do and that keeping silent is consistent with the bad character of the suspect.²² He pretends to know much more than he does and offers factual evidence in support of his belief in the suspect's guilt, cutting off *'any expectations that the subject may start to offer as this would serve to bolster his confidence and put the interrogator on the defensive.'*²³ He points out the subject's psychological *'symptoms of guilt'*²⁴ which may really be reactions to stress, and emphasizes the subject's powerlessness, and in the futility of resistance to telling the truth.²⁵ He attempts to *'appeal to the subject's pride by well-selected flattery or by a challenge to his honor.'*²⁶

With the addition to this scenario of a video camera, the suspect, assuming he knows he is being photographed and taped, must consider not only the consequences of an ultimate confession, but also the social and 'self-esteem' consequences of the behaviour during the interrogation.

Unquestionably, most people act differently in front of a camera; a camera can, in effect create an actor. During one study in the United States, of the effect of video taping courtroom proceedings, judges, who took part commented that people '*conducted themselves with much more dignity than they otherwise might have.*'²⁷ Could this not be the result of a desire by the 'actors' to say the right thing, look good for the camera, and to create an image that they feel will be approved of? A suspect is confronted at the same time by an authoritative interrogator who is urging him to tell the truth and attempting to persuade him that the role of a self-confessed criminal is of a greater social value than the role of a suspect.²⁸ With the camera in the room, the interrogator's words are bolstered by the potential approval or disapproval of all those who may see the film. Furthermore, with the video camera's natural effect upon the self-consciousness, the attempt to salvage a subject's self-esteem may heighten the tendency '*to talk freely to assert that the subject is not in a position inferior to the interrogator, and by answering before any pressure is exerted, the subject avoids later humiliation.*'²⁹

The video camera may also be seen by the suspect as another witness in the room. Of course, the presence of an impartial witness may arguably be of benefit to the subject, as it offers some assurance that the subject won't be abused and in that respect may enhance the powers of resistance and self-control.³⁰ But the subjects subjective belief is that it is not neutral but rather a tool of the prosecutors, or the means by which other of the prosecutors are that very moment monitoring the interrogation, then it may only increase their power in his/her eyes.

A related effect, suggested by Driver (1968) was that in a prolonged interrogation where the interrogators persistently display confidence in the guilt of the accused, a 'majority dominance' phenomenon may occur, similar to that shown by Asch. Although the Asch experiment involved social perceptions, Driver suggests that recall of past events should be no different; memory is a compound of perception, attitude and beliefs.³¹

Finally, the awareness that the subject is being taped may act to enhance the subject's overall level of stress to a point where the performance is adversely affected and the effectiveness of social pressures to conform is increased.³²

Clearly, any of these factors used by the police interrogator may be more or less successful depending upon the particular characteristics of the individual suspects. If the suspect holds certain information as to the potential legal consequences of a finding of guilt, he/she is less likely to be vulnerable to the interrogator's attempts to affect their perception of consequences.

Accordingly, it has been found that the suspect's prior exposure to interrogation is an important variable in the subject's likelihood to confess;³³ one who has been through it before is best equipped to resist questioning. Surprisingly, while one would think that age, a general maturity, and experience would produce a better person better able to cope with an unfamiliar environment, no greater propensity to confess was found in younger suspects.³⁴

The suspect's self-confidence is said to be the most important factor, as would be expected where the interrogation techniques such as manipulation, self-esteem, and social approval. Low status persons who have never enjoyed a secure or rewarding social position are most vulnerable and persons with strong, unconscious self-punitive tendencies not only tend to confess more easily but even to confess to crimes never actually committed.³⁵

These individual variations point out an inherent discrimination in the interrogation process,³⁶ and should raise a question of the voluntariness and trustworthiness of some confessions made in response to consequences of social approval held out by the interrogator. If, as I have hypothesized, the video camera has a similar coercive effects in tandem with the interrogator's techniques, perhaps as increased confession rate would be deserved, which should not be welcomed without caution.

In the second question which I posed in the beginning of this paper, it was suggested that caution should perhaps also be exercised in the use of videotaped evidence at trial, whether or not the accused was aware that they were being taped. Firstly, the camera does not see all; one must start with the fundamental proposition that every picture ever taken involves some distortion.³⁷ If it is focussed on the suspect, a jury cannot see the interrogator clearly; they are seeing only one half of a conversation. Furthermore, while tactics used during the videotaped interrogation may be seen and judged to be fair, it does not show what went on before.

The possibility of editing is also a potential consideration. It appears that the prosecutor is entitled to choose the conversations that they intend to introduce into evidence.³⁸ Certainly, a trial judge has discretionary power to edit a statement so that only paper evidence be admissible should the voluntary statement of the accused also disclose a previous criminal proceeding against the accused or some other prejudicial or irrelevant reference. The original meaning, however, must not be altered.³⁹ The real danger of videotaped evidence is the questionable competence of the fact finder to view such evidence objectively and to attach no more than the proper weight to it.

In extolling the virtues of video recording confessions and explaining high conviction rates resulting from them in the United States, one detective could not have pointed out the danger more clearly when he said that "*the jury are bewildered by the court set up; in contrast, a television set on which a good deal of the recordings are played is something they watch a good deal of the time and understand 'selling' a case to the jury is like selling a product or a commercial. The jury are able to see the defendant as he really is, not as he appears in the court.*"⁴⁰

Lawyer/linguist Mary Gallagher, in emphasizing that the peculiarities of television as trial evidence must be carefully scrutinised, points out that '*there is a quality about TV tapes themselves that compels people to look at them . . . that juries have an expectation of entertainment . . . there is also an expectation that people on television . . . are going to behave like people in the movies.*'⁴¹ She adds that '*the jury . . . has the expectation that anyone on a government video tape must be guilty of something. This is to concur with the expectation that anyone who has been indicted must be guilty of something, but it's much worse.*'⁴²

A television-watching audience would tend to interpret the appearance, mannerisms, and words of the accused as they would if they were watching a TV program. They see a nice looking well dressed interrogator and an accused who may have been held in detention for several days (or weeks) and they can instantly spot the bad guy. If they saw the accused fidgeting and not co-operating during an interrogation, they may interpret manifestations of fear and stress as 'acting guilty' even though his statements run contrary to that conclusion.

So, while a video tape may be the best evidence in that it does pick up non-verbal communication as well as verbal, it also presents a formidable task to the fact-finders who must sort out and process a number of perhaps conflicting communications.

Defence counsel, faced with the introduction of videotaped evidence by the prosecution may be able to challenge its admissibility, or at least the weight to be given to it, by introducing a psycholinguistic analysis of it. There may be, however, an initial hurdle in getting judges and juries to understand this type of complicated analysis, and not just ‘shut off and . . . go on with the concrete evidence.’⁴³

Linguist’s comments on the ABSCAM tapes during the hearing on the FBI undercover operations were that the taped conversations were not ‘normal’, that it was clear that one speaker had an agenda which he could impose on the conversation so as to convey to a later listener false impressions about the conversation and the other speaker’s part in it.

Although an interrogation does not pretend to be a normal conversation, perhaps the aforementioned television-oriented jury may unconsciously perceive it as such, and interpret such aspects of it as they pick up in accordance with the normal ‘rules’ of a conversation. Psycholinguistics show that this interpretation may be wrong.

First, there is the presumed positive responses. People in conversation are expected to give feedback. But that feedback is often in the form of head nodding, ‘uh-huh’, ‘yeah’, and so forth. Linguists call these markers or lax tokens - which may be signalling to the speaker ‘*I’m listening. Please go on*’, as opposed to signalling agreement with what the speaker is saying. A viewer of this conversation may mistakenly read them as meaning the latter.⁴⁴

Secondly, listeners may overgeneralize. If the person with the agenda (ie. The interrogator) brings up a subject a number of times and the accused is silent, a later viewer of the videotape may get the impression that the accused agreed with the interrogator.⁴⁵ It should be noted that in the law of evidence, if the accused remains silent in the face of police questioning, although this fact can be considered in assessing the weight to be given to any explanation advanced by the defence at trial, it cannot be used as circumstantial evidence of guilt.⁴⁶ If the jury is allowed to see a videotape of the interrogation in which the accused refuses the answer some questions, they may in fact be accepting that as circumstantial evidence of guilt.

With these effects in mind, there are also a number of strategies which the person with the agenda can use to alter the way in which a later viewer will interpret a conversation. Briefly, these include:

1. Securing the appearance of agreement.⁴⁷
2. Coaching: The jury often will not notice who introduces a topic.⁴⁸
3. Camouflaging: This is the tactic of making something visible or important seem invisible or unimportant, for example when a conversation is repeatedly declared to be unofficial or hypothetical.⁴⁹
4. Criminalizing: This is an effort to translate the terms used by the target into terms which are covert or illegal. When the target is focussing on the context of what is being said, and not how it is being said, there is a great opportunity to mislead . . .even when scientific analysis of the speech indicates that the concept and words were not adopted by the target, the damage has been done.⁵⁰
5. The Blocked Exculpatory Statement: The visual procedure is the interruption of statements which start to clarify the target’s position or reveal the rejection or the denial of the suggested illegal acts.⁵¹

6. Insider - Outsider Strategy: This involves isolation of the target from information that the others share. The target's role becomes to find out what is going on. The target may be trapped into performing the desired act because they don't want to appear ignorant or belligerent, going along with peers for the purely social reasons of the conversation.⁵²

These strategies can convey a false impression about the conversation. They do so by advancing the topics of the person with the agenda, which at the same time blocking what the other person may want to talk about. They are successful if that other person does not manage to interrupt with their own topics or agendas which indicate their true intentions. They may be successful even if he does interrupt because of the listeners' over generalization (this is specifically known as *the effect of contamination*.)⁵³

During a police interrogation the interrogator has an agenda to get the suspect to admit to involvement in a crime, either by an absolute confession, or by statements which would tend to incriminate him by placing him at the scene of the crime or in some sort of contact with the victim. The interrogator is '*convinced of the suspect's guilt*' and his/her statements convey that to the suspect, who is unlikely to interrupt a person of such authority. The interrogators' agenda is bound to prevail.

If the interrogator, knowing that the videotape would be shown at trial, even use these strategies in conjunction with his persuasive techniques he may find that a confession is not really necessary for an interrogation to be successful. He can create for the jury the appearance of guilt without it, and be similarly assured of getting a conviction.

Indeed, some of these strategies such as camouflaging, the blocked exculpatory statement, and the insider-outsider strategy, bear a noticeable resemblance to certain persuasive tactics, namely those of minimizing the social consequences of the offence, cutting off any attempts to explain away evidence revealed by the interrogator, and the tactic not already mentioned of isolating co-accused from one another and playing one against the other.⁵⁴

Without any actual experimentation as to the validity of the postulated 'videotape effect', it is difficult to draw any conclusions. There are so many variables involved that any meaningful results could really only be achieved using real suspects and real trials. If a practice ever made of using video during police investigations, and at trial, I would predict an increase in confession rates for those crimes in which a confession plays a significant role in arrests and convictions. [for methodology used to collect similar data, see Seeburger and Wettick, 1967]

If an increase is observed it may not reflect a need to restructure the current rules of admissibility of evidence in accordance with an entirely new way of gathering and presenting evidence. It may be very difficult to demonstrate the videotape to be a coercive tool, when increased confession and conviction rates could only be hailed as resulting from the improved efficiency of the criminal justice system.

Perhaps a new goal of fairness in interrogation techniques should be embraced, and we should question whether getting the confession and the conviction is worth the loss of dignity when we allow '*psychological whipping*.'



Graduating Class of 1986 with Prime Minister Pierre Elliot Trudeau

Dedicated to the memory of Catherine Inculet 1957 - 2015.

Footnotes

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2. [1917] A.C. 599
3. Regina vs Wray (1970) DCR 3rd 673
4. Regina vs Rothman (1981) 59 CCC 2nd 30 CCC
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(Miranda & Arizona 1966)
6. Regina vs DeClercg (1966) OR 674
7. Boudreau vs The King (1949) SCR 262
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10. State vs Hall (1969) 253 La 425, 218 So 2nd 320
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17. Ibid p. 28
18. Inbau and Reid: Supra note 14 p.18
19. Irving: Supra note 12 p.14
20. Ibid p.15
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22. Irving: Supra note 12 p.20
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29. Driver: Supra note 15
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43. Ibid p. 79
44. Ibid p. 7
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