

Truth in evidence:
The construction of video evidence in judicial decisions.

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ABSTRACT

This study focuses on the conceptualization of video evidence as constructed by judges in their written decisions in Canadian criminal courts and the impact this conceptualization has on understandings of truth. Recent years have seen substantial developments in video recording technology and in the cultural practices that support its use. Of particular interest to this study is the mobilization of video as a means of legitimizing truth claims. Using a qualitative content analysis of 52 recent (2005-2015) Canadian criminal court decisions, this study seeks to understand the way in which judges discuss video evidence in their decisions and the impact these discussions have on discourses of truth. The results of this analysis illustrate that the features typically associated with video evidence coincide closely with specific and longstanding discourses of objectivity, reliability, and credibility that are used to evaluate competing claims in criminal courts—discourses that have traditionally been developed with reference to evaluating testimony. Judges’ adoption of these particular criteria over any others results in video achieving an eminent position in the hierarchy of evidence before the courts. The way in which judges conceptualize video evidence both reflects the historic discourses that shape the current judicial approach to video evidence and (re)creates discourses that will be relied on in future. Given the influential role of courts as official arbiters of truth, the discourses adopted by judges have important implications both within and beyond the legal system.

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Chapter 1 - Introduction

Canadian courts are currently in the midst of a substantial cultural transformation. Visual images and representations have come to dominate the epistemic landscape while other non-visual ways of knowing have experienced diminished trust (Andrejevic, 2004; Zizek, 1999). The impact of this shift in the most trusted forms of evidence has been amplified by the rapid increase in the availability of visual evidence, particularly in the form of video. In nearly every segment of society, video has become increasingly present whether in the form of public or privately operated CCTV systems, municipal open street surveillance systems, dash cameras, police body worn cameras, or mobile phones featuring video recording abilities (Doyle, Lippert, & Lyons, 2012; Draisin, 2011; Koskela, 2004). As a result of this growth, there remain few instances where video recordings are not, at least potentially, available (Cascio, 2005; Deisman, Derby, Doyle, Leman-Langlois et al., 2009; Haggerty & Ericson, 2000; Koskela, 2008; Marx, 2002; Robinson, 2012; Timan & Oudshoorn 2012; Toch, 2012). The combination of increased trust and increased availability of video evidence has produced a dramatic change in the way in which meaning is described and truth determined.

The growth of video evidence, and particularly the ongoing shift in the methods relied on for determining truth, have important consequences for the criminal justice system (Robinson, 2012; Sibley, 2008). Critical scholars have noted that the trust placed in video evidence has facilitated the rise of new avenues for addressing traditional power imbalances within the criminal justice system (Farrar & Ariel, 2013; Harris, 2010; Koskela, 2004; Lutt, 2012; Toch, 2012; Wasserman, 2009). Cases of citizens using video recordings to hold police to account and other so called “sousveillance” or surveillance from below efforts, for example, are becoming increasingly commonplace (Cascio, 2005; Lutt, 2012; Lum, Koper, Merola, Scherer, & Reieux,

2015; Toch, 2012; Wasserman, 2009). Currently we are experiencing a powerful social movement led by marginalized groups who are calling for justice and accountability in the legal system, particularly pertaining to the proclaimed systemic abuse of Black men by police officers. In such instances, individuals are using video, specifically video's perceived relationship with truth, to challenge and overcome the traditional power imbalance between the claims made by individual citizens, particularly those from marginalized groups, and those made by members of powerful institutions such as the police.

While some point to the emancipatory or democratizing potential of video in this way (e.g. Koskela, 2008; Robinson, 2012; Toch, 2012), others argue that the current use of video evidence raises a number of concerns, particularly within the context of the criminal trial. Scholars such as Jessica Sibley (2004, 2008, 2010) and Shannon Panian (1992) warn that the perceived infallibility of video may encourage judges to rely on this form of evidence while turning a blind eye to its limitations. This has important implications both in the courts and in society more broadly. Through legal decisions, judges create meaning and produce truth discourses that impact which version of truth becomes accepted as Truth more broadly. Judges are typically afforded a considerable degree of discretion in these instances, and the perceived objectivity and universality of video only extends this discretion in cases involving video. Given that judges have power to make legally binding decisions and produce truth discourses, it is important to analyze which version of truth they subscribe to, (re)produce, and legitimize.

Despite the importance of this issue, research into the topic of video evidence in the courts has been relatively limited. The majority of the studies that have examined video evidence in the courts have been limited to case studies (e.g. Kahan, Hoffman, & Braman, 2009; Kessler, 2008; Stedmon, 2011) or theoretical analyses (Edmond & San Roque, 2013; Frank, 2011;

Mnookin, 1998; Panian, 1992; Sibley, 2004; 2008; 2010; 2014). While these studies are informative, there remains a substantial gap in the literature with regard to understanding the day-to-day use of video evidence in the courts. This project seeks to address a small portion of this information gap by exploring the judiciary's use of video evidence within Canadian criminal courts, particularly focusing on how judges assign meaning to such evidence and produce truth discourses through reliance on video evidence. To accomplish this, I analyze a selection of written judicial decisions from Canadian criminal courts to analyze how judges construct meaning using video evidence, identify the structural and systemic features that influence this process, and suggest the potential impact the construction of this form of evidence might have in Canadian courts. Through the results of this analysis, I argue that video holds an increasingly eminent position within the hierarchy of evidence relied upon by the judiciary, I present the historic features within the judicial system that support this position, and I suggest the potential for video evidence to shift the role of judges in the adversarial trial system.

I begin this introduction by discussing the current legal context in which video evidence is used, specifically the advent of the principled approach to evidence law. This is followed by a brief overview of the issue of video evidence within the courts, and a review of the justification for the current project. Finally, the chapter closes by providing an outline for the structure of the remainder of this thesis.

The discussions regarding the use of video evidence that follow in the remainder of this thesis must be understood with regard to the current legal context. Characterizing this context, at least with regard to evidence law, is the introduction of the principled approach to the law of evidence (Bryant, Lederman, Fuerst, & Sopinka, 2014). The shift toward the current principled approach to evidence law first gained traction during a period of substantial legal reform

surrounding the introduction of the *Canadian Charter of Rights and Freedoms* (Bryant, Lederman, Fuerst, & Sopinka, 2014; Stratas, 2004). The principled approach was introduced to address many of the perceived weaknesses of the then dominant rules and exceptions-based approach to evidence. The previous rules-based system had been heavily criticized for its complexity, rigidity, and potential for producing injustice. To address these concerns, scholars advocated for the courts to focus on the principles that underlay the rules governing the admission and evaluation of evidence rather than dogmatically applying a series of rigid rules. By shifting the focus from strict rules to guiding principles, the courts hoped to provide more flexibility for judges to adapt their rulings to the particular circumstances of the case. While this shift came at a certain cost to the consistency and predictability of the rulings, this cost was believed to be outweighed by the potential benefit for justice. The introduction of the principled approach represented an important development in how judges approach and conceptualize evidence with relation to the law and carried substantial implications for the current approach to video evidence. In seeking to understand how judges as agents of the legal system approach video evidence, recognizing the role of principles in shaping this approach is key. Two of the most important principles guiding the decision making processes of judges within a criminal trial, and the two upon which this thesis will primarily focus, are those of truth-seeking and fairness.

I introduce the principles of fairness and truth-seeking to provide context for a second major development in the criminal trial, the rapid expansion in the use of video evidence within Canadian criminal courts. Many of the strengths associated with video evidence, such as its perceived objectivity and reliability, coincide closely with the goals of fairness and truth-seeking put forward within the judicial system. Through its alignment with such central principles, video

holds a highly regarded position within the hierarchy of evidence. Visual images are frequently presented as objective and irrefutable evidence of the events that occurred. Furthermore, video is often regarded as such clear and convincing evidence that it does not require the scrutiny and interpretation needed for other forms of evidence (Kahan, Hoffman, & Braman, 2009; Koskela, 2008; Robinson, 2012; Zizek, 1999).

The trust placed in video evidence within the courtroom reflects a broader trust in visual evidence that permeates society (Stocchetti, & Kukkonen, 2011). As Zizek (1999) observes, modern society is marked by a significant rise in the distrust of written or verbal accounts in favour of relying on the personal experience of visual images in a process he terms “the demise of symbolic efficiency” (p. 323). Viewers increasingly equate video or other visual evidence with truth and distrust other forms of evidence to the point where some adopt a “video or it didn’t happen” mentality (Robinson, 2012, p. 1415) in which nothing short of video evidence is considered sufficient proof of an event.

In addition to the increased perception of truth, the impact of video evidence is further increased by the explosion in the prevalence of video cameras in modern society. Many public and private areas now feature constant surveillance through CCTV systems (Deisman, Derby, Doyle, Leman-Langlois et al., 2009; Doyle, Lippert, & Lyons, 2012; Haggerty & Ericson, 2000; Marx, 2002). Similarly, many Canadian municipalities are implementing publically operated open street surveillance systems to monitor public roads and walkways (Deisman et al., 2009). In addition to these, a more recent development has been the informal system of “open circuit television” (OCTV) created by individuals armed with mobile phone cameras capturing events and distributing these videos through social media (Koskela, 2008; Lutt, 2012; Timan & Oudshoorn 2012; Toch, 2012).

The development of such systems of surveillance and “sousveillance” has the potential to dramatically affect many areas of the criminal justice system and was one of the foremost issues that drew my attention to this topic. Video’s enhanced role in the surveillance of the public through such venues as open street surveillance systems, traffic cameras, or the expansion of CCTV, particularly when combined with developments in Big Data, raises visions of Bentham’s panopticon and certainly brings forward interesting questions for criminology and theories of social control (Doyle, Lippert, & Lyons, 2012; Koskela, 2004, 2008; Marx, 2002; Wasserman, 2009). However, it is the way in which the epistemic authority of video has been mobilized in the criminological context that is of particular interest in this study. A number of developments in this area give rise to new and interesting questions for criminology.

There have been numerous high profile cases in recent years of citizens using video to highlight injustice in the criminal justice system, particularly abuse at the hand of the police. In cases such as those of Alton Sterling, Keith Lamont Scott, Eric Garner, and Sammy Yatim, bystander video recordings have brought widespread attention to the issue of police violence against the public, particularly Black men, and have sparked large-scale international protests (Blau, M., Yan, H. & Young, R., Dec. 1st, 2016; CBC News, Jul. 10th, 2016; CTV News, August 13th, 2013; Ford, D., Botelho, G., & Brumfield, B., Dec. 8th, 2014). While similar cases have arisen for decades, notably the infamous publication of the video of the Rodney King beating by police that sparked riots in Los Angeles in 1992, the frequency of such cases in recent years is unprecedented. Mainstream and social media are littered with cases of citizens publishing videos to draw attention to police misconduct. Similarly, in many cases individuals are proactively using video as a means of protection against abuse by police by ensuring video records are made available during potentially violent encounters such as unsanctioned political protests (Koskela,

2008). In these instances, citizens are tapping into the epistemic authority of video recordings to substantiate their longstanding claims of discrimination and abuse on the part of the police. They rely on the perceived reliability and objectivity of video as a means of countering the systemic power imbalance faced by disenfranchised groups within the legal system. In addition to citizens using video to validate their claims against the police, police forces themselves are also tapping into the trust placed in video evidence by introducing their own video recording systems in the form of cruiser and body-worn cameras. Police video systems are often put forward as a means of increasing accountability to the public (Toch, 2012), however, they also serve as an important evidence gathering tool that can substantiate the claims of the officers (Draisin, 2011; IACP, 2004; White, 2014).

Video is used in these scenarios, as a tool to legitimize claims by way of its perceived ability to allow the viewer to access and reproduce truth. The reliability, objectivity, and accuracy of video are seen as providing the viewer a clear understanding of events, free of the subjective interpretations or errors in perception and memory that plague testimonial accounts. This is said to allow for a universally understood and reliable means of representing events as they occurred. While the impact of the cultural shift towards reliance on video as a means of accessing truth is not limited to the justice system, these developments have particular significance in the courts. The courts have an important role in the justice system as the official arbiters of truth. Given that video is poised to greatly affect how truth is conceptualized and its pursuit put into practice, it is essential to gain a more in-depth understanding of how developments in this area are surfacing in the courts.

Despite the perceived value of video evidence, some scholars raise concerns regarding the unconditional trust placed in video and the way in which video is interpreted by the courts.

Doherty (2004) points out that the principled approach to evidence law provides much more discretion to individual judges to tailor their evidentiary decisions to the particular case and thus prevent injustice caused by poor correspondence between the rules of evidence and the circumstances in a particular case. This increase in the discretion of the judge can be problematic when applied to video evidence. Scholars such as Sibley (2004), Edmond and San Roque (2013) and Kahan, Hoffman, and Brahman (2009) argue that there is often a gap between the real and perceived objectivity of video evidence. Many scholars have pointed to the frequent overconfidence in and resultant failure to adequately scrutinize video evidence (Panian, 1992; Robinson, 2012; Sibley, 2004; 2005; 2008)¹. Concerns as to a potential overconfidence in video evidence have been raised by a number of judges and legal scholars. Justice Sopinka in his dissenting opinion in the influential Supreme Court of Canada case of *R. v. Nikolovski* (1996), noted that judicial interpretations of video are not subject to any form of cross-examination or argumentation by the litigants, and thus devoid of the essential process that is typically relied on to ensure the accuracy and fairness of the evidence presented.

While video evidence has been lauded for its utility in determining the facts at issue in a trial and thus facilitating justice (Paccioco & Steusser, 2011; Robinson, 2012), the concerns raised above point to valid issues that must be considered in any discussion of the merits of this form of evidence.

As a result of the relative lack of previous research on the use of video evidence by the courts, this thesis remains largely exploratory with the goal of providing a preliminary analysis of the ways in which judges construct the meaning of video evidence. Specifically, this thesis is guided by following research question:

¹ This lack of analysis is not limited to the legal context. Stocchetti and Kukkonen (2011) point out that, within society at large, individuals typically unreflexively accept visual images as accurately reflecting reality.

How do judges construct the meaning of video evidence in the context of a criminal trial?

In answering this research question, I seek to understand the structural and systemic features that help contextualize judges' approach to video evidence and to explore the potential impact of the judiciary's approach to video evidence on Canadian courts, the criminal justice system, and society more broadly.

This thesis begins with a summary of the academic literature and case law surrounding the issue of video evidence. Here I review the trial process and the laws and procedures surrounding the admission and evaluation of evidence within the criminal trial. Following this, I briefly recount the development of the principled approach to evidence law and its effect on the trial process. Finally, the literature review closes with a discussion of issues relating to video evidence specifically, and a description of the unique role played by video within the criminal trial.

Following this literature review, Chapter Three provides an outline of the theoretical framework underlying this study. Specifically, I discuss the ways in which social constructionism informs the design and analysis of this study. Throughout this chapter, I maintain a focus on the applied aspects of this theory that aid in the identification and analysis of social phenomena to promote a greater understanding of social life. Building upon this theoretical framework, Chapter Four presents the methodology used for this study. This includes a discussion of the judicial decisions relied upon as the source of the data, the identification and collection of these cases, and the process followed for the content analysis applied throughout the study. In this chapter I also outline the constructivist paradigm that guides my analysis and explore the relationship between my theory and the methodological choices made.

With this methodology in place, I then outline the results of the content analysis in Chapter Five, touching briefly on each of the key themes identified in the data. Following the presentation of these results, in Chapter Six, I mobilize the social constructionist framework introduced in Chapter Three to contextualize the features underlying the judicial approach to video evidence. These observations are then discussed in context with the legal and sociological literature and with reference to social constructionist ideas. Finally, Chapter Six closes with a brief discussion of the broader implications of the current use of video evidence on the legal system and, by extension, society as a whole. I then conclude this thesis though a brief review of the major findings and a discussion of the significance of the study, its limitations, as well as suggestions for future research.

Chapter 2 - Review of the Literature

This chapter provides a broad overview of the social construction of video and discourses of visuality and summarizes the literature and case law surrounding the use of video evidence within Canadian criminal courts. To provide context for the approach to video evidence within the courts, this review begins with a discussion of the rising prominence of video evidence in society in general. This touches on the significance of discourses of visuality and particularly the mutually reinforcing relationship between the increasing availability of and increasing trust in video recordings. Following this, I then turn to an overview of the law of evidence. This section focuses on the rules and procedures governing the use of video evidence that have been established both through legislation and case law. The application of these rules is discussed with reference to the development of the principled approach to evidence law and the significance of the principled approach for the evaluation of video evidence. In particular I introduce the principles of truth-seeking, fairness, and reliability as the primary principles that are put forward to govern the evaluation and use of video evidence, principles that will be returned to throughout the remainder of the thesis. Finally, the chapter concludes with a brief discussion of the concerns with video evidence identified in the legal literature, particularly those related to issues stemming from overconfidence in the reliability of video as a form of evidence.

Primacy of Video Evidence

As authors such as Stocchetti and Kukkonen (2011) note, we currently live in a visual age in which the primary mode of communication is via images or visually organized texts. It is this visual communication that informs our social construction of reality. Video evidence has often been put forward as the most accurate and reliable representation of events as they occurred (Goldstein, 2011). Video cameras have come to be equated with truth with visual images

frequently being presented as objective and irrefutable evidence; evidence so clear that it does not require the scrutiny and interpretation needed for other forms of proof (Kahan, Hoffman, & Braman, 2009; Koskela, 2008; Robinson, 2012; Stocchetti, & Kukkonen, 2011; Zizek, 1999). The practical implications of the trust placed in video evidence are compounded by the concurrent decrease in trust of other forms of representation. Zizek (1999) discusses the rise in distrust of written or verbal accounts and the increasing favour of reliance on the personal experience of visual images in a process he terms “the demise of symbolic efficiency” (p. 323). This combination of trust in video and distrust of testimonial evidence has resulted in the growing public popularity of a “video or it didn’t happen” mentality (Robinson, 2012, p. 1415) where nothing short of video evidence is deemed to be sufficient proof of an event.² This mentality is supported by the near ubiquitous presence of video recording technology in modern life, whether from formal surveillance devices in the form of public or privately operated CCTV or, increasingly, from witnesses carrying personal recording devices in the form of mobile phone cameras (Deisman, et al., 2009; Haggerty & Ericson, 2000; Koskela, 2008; Marx, 2002; Timan & Oudshoorn, 2012; Toch, 2012). In an age where “proving” that events occurred through video evidence is common, the lack of such evidence is often greeted with a substantial degree of skepticism (Robinson, 2012, p. 1415). Furthermore, it is often the proof in the form of video evidence that comes to define our understanding of the event (Stocchetti & Kukkonen, 2011). As Pecora (2002) writes “advanced capitalist society at the dawn of the new millennium is less about truth versus fiction, or authenticity versus simulation. It is instead about a quest for real life that requires surveillance for its—for our—verification” (p. 348).

² In keeping with the social constructionist approach within this thesis, images do not inherently possess any epistemic value but are given this through social processes that attribute meaning (Stocchetti & Kukkonen, 2011). Thus references such as this to the “proof” contained in video evidence reflect the meaning and value placed on that evidence by social actors.

This widespread trust in video as a medium is also highly evident in the courtroom. Video evidence is often put forward and received as the “best evidence” by all parties involved in the trial process (Robinson, 2012, pp. 1414-1415). Goldstein (2011) writes it is common knowledge among lawyers that “it is better to show a trier of fact an object or event than to have a witness describe it” (p. 1-2). In assessing video evidence, judges often comment on the reliability and objectivity of video as a medium, especially in comparison with testimony. Commentary on the utility of video within the case law is typified by statements such as “video provides an objectivity that the oral evidence cannot provide”, “if one cannot see it in person, surely the next best thing is a video and if not a video, a still picture” (*Rodger v. Strop*, 1992) or “a photograph can often more clearly and accurately portray or describe persons, places, or things than a witness can by oral evidence. They are not subject to the difficulty inherent in oral evidence of absorbing and relating the mass of detail and then remembering it.” (*R. v. Smith*, 1986) The Supreme Court of Canada has similarly advanced the advantages of video evidence in comparison to much less reliable witness testimony. In the case of *R. v. Nikolovski* (1996), Justice Cory, writing for the majority, discussed the merits of video directly by stating

...the importance and usefulness of videotapes have been recognized. This is as it should be. The courts have long recognized the frailties of identification evidence given by independent, honest and well-meaning eyewitnesses. [The] foreshortened list of the frailties of eyewitness identification may serve as a basis for considering the comparative strengths of videotape evidence. The video camera...is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed. *R. v. Nikolovski* (1996)

Such statements illustrate the high regard held for video evidence by the courts. Here, Justice Cory contrasts the “frailties” of evidence given by eye witnesses with the reliability and objectivity of video evidence. In cases such as this, video evidence is presented as more reliable and less subject to interpretation than witness testimony, a view that has important implications for the evaluation and use of video evidence within the courts.

In many instances, video is argued to be a definitive record of the events that occurred. Jennifer Mnookin (1998) observes in her analysis of photographic evidence that, from their earliest introduction, photographic evidence (including video) has hovered on the line between illustration and proof (pp. 64-65). This position is evident in the high-profile U.S. Supreme Court’s decision in the case of *Scott v. Harris* (2007). In this case, Justice Antonin Scalia, writing for the majority, characterized the video evidence presented as incontrovertible proof of the dangerous behaviour of Mr. Harris. The court went so far as to publicize the police dash cam footage relied on at trial in an effort to “allow the videotape to speak for itself” (Kahan, Hoffman, & Brahman, 2009, p. 841). This case provides a prime example of the tendency to treat video evidence as an unadulterated view of reality both because of the strong statements to this effect made by the majority, and particularly because of the dissenting decision written by Justice Stevens. In his dissent, Justice Stevens commented on the inherent subjectivity of video evidence and the degree of interpretation required in taking the video footage as proof of Deputy Scott’s version of events rather than supporting those Mr. Harris (*Scott v. Harris*, 2007). While Justice Stevens was alone in his dissent in this case, his dissent indicates that even in those cases where the facts displayed in the video are held to be obvious, the interpretation of the evidence necessarily includes some subjectivity and potential for alternate interpretations.

The previously mentioned cases illustrate the superior position often afforded to video relative to other forms of evidence. In addition to presenting the many purported strengths of video evidence as discussed in the legal literature, the previous section began to introduce the way in which the perceived reliability of video is used to override concerns relating to the lack of legal protections governing its use. The perception of video as able to “speak for itself” diminishes the role of the viewer qua interpreter, and infers an objective sheen to their subjective interpretations. While these arguments will be developed further in the conclusion of this chapter and throughout the thesis to follow, it is important to recognize their roots in the well-established reliability of video within the literature.

The Law of Evidence

The following section outlines the specific laws and legal procedures surrounding the use of video evidence in court. As will be discussed through the following chapters, the rules, procedures, conventions, and goals that inform the use of video evidence represent an important link to the past and present function of the legal system. It is within the context of these defining features that the approach to video evidence must be understood and its structural roots identified.

Evidence law in Canada consists of a combination of formal legislation and case law. The legislation governing the collection and use of evidence includes documents such as the *Canada Evidence Act*, various provincial evidence acts and rules of civil procedure (for matters under provincial jurisdiction), as well as a number of provisions within the Canadian Criminal Code. These documents operate in conjunction with a well-established body of common law that sets out the majority of the principles, rules and procedures surrounding evidence (Paciocco & Steusser, 2010, p. 11). As with all forms of law in Canada, evidence law is ultimately governed

by the rights and principles set out in the Canadian Charter of Rights and Freedoms. As will be discussed below, these Charter principles have played a key role in the development of the law of evidence over the last three decades.

As part of the trial system in Canadian society, evidence law is ultimately concerned with facilitating the search for truth and assisting triers of fact in reaching accurate legally factual determinations (Bryant, et al., 2014; Paciocco & Steusser, 2010). In addition to this primary goal, the law of evidence must also take into consideration a number of other interests such as fairness towards the accused, the efficiency of the trial process, maintaining the integrity of the administration of justice, and external considerations such as ensuring privacy, security, and privilege (Bryant, et al., 2014, pp. 12-14).

Prior to the 1980's, the courts sought to achieve these goals through the application of a series of strict rules and formulations surrounding the use of evidence that had been developed through decades of case law (Bryant, et al., 2014). While the specification of rigid procedures for any given circumstance provided a certain degree of efficiency and predictability, the courts recognized that the mass of tests, rules and exceptions these produced resulted in an ungainly state of confusion and, more importantly, recognized that the application of such strict rules left little room to account for the particular circumstances of a case; a state that opened the door to producing an unjust result (Bryant, et al., 2014; Goldstein, 2011). This recognition in combination with widespread re-evaluation of the legal system in light of the recently implemented Charter brought forth a surge of judicial reform with respect to the law of evidence (Bryant, et al., 2014, Goldstein, 2011; Paciocco & Steusser, 2010; Stratas, 2004). Characterizing these reforms was a shift from a more rigidly defined rules based system to a "principled" application of the laws of evidence. Here judges sought to identify the underlying rationale

behind the development of the existing rules of evidence in an effort to better apply the law towards achieving a just result across a diverse range of scenarios (Bryant, et al., 2014; Paciocco & Steusser, 2010, p. 5; *R. v. Khelawon*, 2006). As Bryant and colleagues point out, since these reforms, “there are no longer hard and fast rules for the application of doctrines but rather the court must look at all factors in context to balance public interest in finality of litigation with the public interest in fairness to a particular litigant and ensuring justice is achieved in the specific case” (Bryant, et al., 2014, p. 10).

Beyond redefining the way in which criminal justice professionals carry out their duty, the system-wide shift from a rules-based to a principled approach to evidence law has particular relevance for the consideration of video evidence. As will be discussed below, the renewed focus on principles such as truth-seeking, fairness, and reliability have encouraged judges to give greater consideration to video as a medium and relaxed some of the rules that might hinder its use. Systemic factors such as these both shape and reflect the practices and conceptualizations that inform the construction of meaning with regard to video evidence within the legal system. In seeking to understand judges’ construction of the meaning of video evidence it is essential to situate this analysis within the broader context and identify the systemic influences at play. Among the most influential of these with respect to evidence law is the role played by legal principles.

Principles of Evidence Law

In keeping with the shift away from rigid rules and formulations, the principles at play in the criminal trial remain somewhat broadly defined and subject to interpretation in any given circumstance (Dufraismont, 2013, p. 20). Several scholars have developed typologies of the principles underlying the criminal justice system, or in some cases the principles that ought to

underlie the criminal justice system (see for example Ashworth & Horder, 2013). A considerable scholarship exists regarding this topic already and a comprehensive discussion of the broad range of principles discussed in these works is beyond the scope of this study. I have chosen to focus on a selection of principles particularly relevant to the analysis of video within the criminal trial. I begin with a brief discussion of what is meant by a principle in this study, followed by a discussion of the two principles of primary concern with regard to the treatment of video evidence, truth-seeking and fairness, and how these two principles are linked through the concept of reliability. As will be discussed throughout the remainder of this thesis, it is partially through the particular manifestations of the truth-seeking, fairness, and reliability principles that video has become such a trusted and influential form of evidence within the courts. Before addressing the specific ways in which these principles influence the use of video evidence, it is first necessary to discuss what is meant by legal principle and what functions they claim to perform.

In her discussion of the development of the principled approach to evidence law in Canada, Lisa Dufraismont (2013) distinguishes between legal rules and legal principles. She offers the following three definitive criteria of a legal principle: (1) specificity in that legal principles are relatively vague rather than specific; (2) justificatory content in that principles are usually closely identified with if not identical to their justifications; and (3) weight in that a principle may be contrasting with another principle and their relative importance may be weighed against each other (Dufraismont, 2013, pp. 20-23). These criteria can be applied to a number of different principles within Canadian law, but here I choose to focus on two of the most important with regard to evidence law governing video—truth-seeking, and fairness. As Tanovich notes, these principles are at the heart of criminal evidence law with the very purpose

of evidence law often being described as to “promote the search for truth in a fair and constitutional manner” (Tanovich, 2014; see also Bryant, et al., 2014, pp. 12-14).³

Evidence Law and the Pursuit of Truth

As the primary goal of evidence law, and the criminal trial more generally, the pursuit of truth features heavily in the deliberations of trial judges (Bryant et al., 2014, p. 12; Doherty, 2004; Dufraismont, 2008, p. 204; *R. v. Nikolovski*, 1996; *R. v. Noel*, 2002; Rosenthal, 2002; Tanovich, 2014). As stated by Justice Cory, “the ultimate aim of any trial, criminal or civil, must be to seek and to ascertain the truth.” Specifically, “in a criminal trial the search for truth is undertaken to determine whether the accused before the court is, beyond a reasonable doubt, guilty of the crime with which he is charged” (*R. v. Nikolovski*, 1996, para.13). The emphasis on truth within the trial system has only been expanded with the shift toward a principled approach to evidence (Paciocco, 2001). Many of the rules and procedures contained within evidence law have been developed with the overarching principle of the pursuit of truth in mind and the shift toward the principled approach has brought that focus to the forefront. Justice Doherty (2004) summarizes admission into evidence under the principled approach to evidence as consisting of two general phases, the first of which is focused on establishing that the evidence furthers the search for truth (has probative value), the second of which examines alternate concerns and seeks to establish if there is any reason for the evidence not to be included, for instance, if the evidence risks a prejudicial impact on the trier of fact. Dufraismont also speaks of the “principle of free proof” which “requires that juries, judges, and lawyers generally be unfettered by technical rules

³ The principles of truth-seeking and fairness were selected for their centrality to the evaluation of video evidence and their particular utility in structuring the analysis of this project. This is not to suggest that there are not many other principles important to the function of evidence law. Principles such as preserving the presumption of innocence, the protection of privacy and maintaining the integrity of the administration of justice also greatly affect the way evidence law is created and imposed (see Ashworth & Horder, 2013; Bryant, et. al., 2014; Dufraismont, 2008).

that interfere with common-sense processes of reasoning and fact-finding” (2008, p. 205). The presumptive admission of probative evidence barring any significant reason for exclusion speaks to the importance of the truth-seeking principle within evidence law.⁴

The role of “fairness” in the criminal trial

As stated by Paciocco and Steusser, the rules of evidence are ultimately concerned with helping triers of fact reach a legally accurate factual determination (2010, p. 1). Despite the importance of this principle, discovering the facts of a case is not the only consideration with which judges are concerned. Decisions made regarding the evidence in a trial are always a balance between the search for truth and ensuring the trial is completed in “a fair and constitutional manner” (Tanovich, 2014; see also *R. v. Noel*, 2002). This opposition between fairness and truth-seeking is a common theme in the literature on evidence law (Bryant, et al., 2014, p. 15; Dufraismont, 2008, p. 203; Paciocco & Steusser, 2010). As Lisa Dufraismont (2008) points out, “the common law of evidence is counterintuitive because it seeks to facilitate the search for truth by regulating fact-finders’ access to and evaluation of evidence” (p. 199). While these rules of exclusion and regulation are not always operating in opposition to the pursuit of truth⁵, the presence of rules that may hinder the truth-seeking process (e.g. exclusion of evidence obtained through an illegal search) illustrates the competing objectives at play in the trial process (Bryant, et. al., 2014; Dufraismont, 2008). In practice, the principles of truth-seeking and fairness are closely related. Within a criminal trial, those results that are fair and those results that are

⁴ Despite the relative consensus regarding truth-seeking as the primary function of the trial process, there are critics who argue that the adversarial system itself limits the search for truth through the parties’ focus on victory rather than discovery of truth. They contrast this with the French inquisitorial system where all parties have a duty to seek out the truth (See Dufraismont, 2008, p. 222)

⁵ Dufraismont goes on to discuss how the principles of truth and fairness are not necessarily as diametrically opposed as they are often portrayed in the literature. In many cases, decisions made with regards to fairness, such as the exclusion of forced confessions, are made to ensure the reliability of the evidence presented in court both for the specific case in which the judgment is made and future cases where similar tactics might be used. Much of this relationship between fairness and truth-seeking is mediated by the principle of reliability as will be discussed below.

based on the truth are perceived to be mutually dependent. Unfair results are perceived to be stemming from false determinations, as “true” determinations are typically being regarded as fair. As will be discussed below, moderating this relationship and providing the link to the importance of video evidence is the principle of reliability.

Truth seeking and fairness through reliability

Within the practical application of the law, the pursuit of truth often serves as more of an orienting framework than a practical tool. Throughout the course of the trial, the pursuit of truth is accomplished through the admission and evaluation of evidence. It is this evidence (or lack thereof) that must form the basis of all factual determinations made by the judge or jury (*R. v. Lifchus*, 1997). When evaluating this evidence, judges operationalize the pursuit of truth through the more concrete principle of reliability. Judges have long recognized the discovery of truth as an imperfect process (*R. v. Lifchus*, 1997; *R. v. W. (D.)*, 1991). The very concept of guilt beyond a reasonable doubt acknowledges that, while truth may be the ideal goal, the standard in practice is not absolute truth, but rather ensuring individuals are convicted based on logical inferences made from reasonably reliable evidence (Rosenthal, 2002, p. 335; *R. v. Lifchus*, 1997; *R. v. W. [D.]*, 1991).

While reliability considerations are present within virtually every judicial decision, the criteria for determining the reliability of evidence remain only loosely defined (Marin, 1996). The courts have offered some suggestions for potential “indicia of reliability” to be used in particular circumstances (Marin, 1996). However, they have intentionally resisted providing too great a degree of specificity in an effort to encourage judges to make individual determinations

tailored to the specific case before them in keeping with the principled approach (Edmond & Roach, 2012).⁶

Though writing in the United States, Robert Rosenthal (2002) offers some helpful comments that clarify the concept of reliability. He distinguishes between reliability, competence, and credibility. According to Rosenthal, competence refers to “the capability or capacity of a particular individual to serve as witness. Persons are deemed competent if they are sufficiently intelligent to observe, recollect, and recount an event, and have a moral sense of obligation to speak the truth” (2002, p. 336).⁷ A witness can be determined to be competent without being reliable in cases such as those involving competent witnesses with poor vision of the event, or more commonly, poor recollection. This can be contrasted with credibility which refers to how believable a witness is (Rosenthal, 2002, p. 337). A witness may be competent and reliable without being credible such as in the case of jail house informants or accomplices, categories of witnesses that the courts have acknowledged require caution when assessing their credibility (*R. v. Brooks*, 2000; *Vetrovic v. The Queen*, 1982). In contrast to competence or credibility, reliability refers to an “inherent quality of evidence” (Rosenthal, 2002, p. 337) rather than a personal characteristic such as competence or the believability of that witness as in credibility. “Evidence is reliable if it is what it is purported to be.” (Rosenthal, 2002, p. 337) Finally, I would add to Rosenthal’s clarifications by distinguishing between reliability and probative value. In many cases, evidence may be deemed to be reliable in that they are what they

⁶ It should be noted that much of what has been written on the topic of reliability is written in the context of determining threshold reliability, or the level of reliability necessary for the evidence to be admissible at trial. The broader issue of ultimate reliability, or the weight to afford that evidence, is a much more subjective endeavor that is meant to occur in a process of evaluating all of the evidence presented as a whole. In many cases, the features of the evidence evaluated will be the same for both threshold and ultimate reliability, but given the much lower standard required to establish threshold reliability, the thought processes of judges may differ (see *R. v. Khelawon*, 2006).

⁷ Note that competence has a similar meaning but a very different standard when referring to the competence of an expert witness. In those instances the process used to determine competence varies considerably.

purport to be, but this evidence does not contribute to the determination of the likelihood of any fact in issue.

Reliability and video evidence

Video holds a particularly privileged place within society due to its perceived ability to accurately document and reproduce events (Koskela, 2008; Pecora, 2002; Robinson, 2012). This predilection for video in society is similarly apparent in the courts. Since their first appearance, the courts have been quick to integrate the use of images and subsequently video into their fact finding process (Edmond & Roque, 2013). As stated by Justice Cory in the landmark case of *R. v. Nikolovski* (1996) the “courts have recognized the importance and usefulness of videotapes in the search for truth in criminal trials as this type of evidence can serve to establish innocence just as surely and effectively as it may establish guilt”. Much of the appeal of video evidence is due to the perceived reliability, and to some extent, credibility of video as a medium. Video is seen as “accurately record(ing) all that it perceives”, “remaining cool, collected, unbiased, and accurate”, and being capable of presenting “such very clear and convincing evidence of identification that triers of fact use it as the sole basis for identification of the accused before them” (*R. v. Nikolovski*, 1996). Scholars such as Mnookin (1998) and Sibley (2004) argue that video is treated as its own category of evidence, a category more closely associated with proof than with illustration.

The perceived strengths of video are especially apparent when compared to those of testimonial evidence. Goldstein notes that it is common knowledge among lawyers that having a trier of fact see an object or events is far more impactful than any form of witness description (2011, p. 1). Similarly, Wiebe notes that “a photograph (or video) has often been more acceptable in court as evidence than the oral statement of a witness, because of its clear, concise

portrayal of an object, scene or event, and its apparently ‘unassailable accuracy’” (2000, p. 64). This view is echoed in the courts with judges arguing that “a photograph can often more clearly and accurately portray or describe persons, places, or things than a witness can by oral evidence. They are not subject to the difficulty inherent in oral evidence of absorbing and relating the mass of detail and then remembering it” (*R. v. Smith*, 1986) and “video provides an objectivity that the oral evidence cannot provide.” “If one cannot see it in person, surely the next best thing is a video and if not a video, a still picture” (*Rodger v. Strop*, 1992).

Because of this perceived reliability, video evidence has obtained an important position within the modern trial system. In an age of increasing camera prevalence, it follows that video evidence will come to play an ever greater role in the trial process.

It is important to note that while the courts have been consistent in the shift away from a formulaic application of rules towards a principled approach, this has not meant judges were left with entirely open-ended discretion. Jurisprudence has established a substantial body of case law with the aim of guiding courts’ consideration of certain factors within a given area of law (Bryant, et al., 2014). Despite this, the development of these sets of considerations is not a return to the rules-based system of the past. The courts have been clear that these factors must always be considered in light of the overarching principles behind their introduction rather than being dogmatically applied whenever a particular situation arises (Bryant, et al., 2014, p. 34). That said, the examination of the case law described below provides some insight into the social discourses at play within the judiciary, at least in so far as the construction of their written decisions.

At a broader conceptual level, the discourses influencing judges relates to the study of social practices in general. It is important to note that the practices within the legal system, as

with all social practices, are continuously in flux through a process of creation and recreation. Even in those instances where explicit rules or regulations might guide the considerations of judges, the interpretation of these is in a continuous state of development. Furthermore, as scholars such as Hutton (2006) and Tata (2002) note, judges are first social actors rather than strictly legal actors and do not solely rely on mechanistic procedures within the legal system to guide their behaviour. As socially located individuals, they are influenced by the culture and beliefs of the society that surrounds them both within and outside the legal system. In seeking to understand a social practice then, it is important to consider these practices as part of an ongoing process and to focus on identifying and understanding shifting influences and areas of focus as they are (re)created by the individuals within a system. The principles described above, and the way in which these principles become mobilized in the communications of judges as described below, provide important insight on the social features that influence the judicial approach to video evidence.

The Evaluation of Evidence

Evaluations are at the heart of judicial interactions with evidence and are thus central to understanding how any form of evidence is used within the trial system. There are two key stages at which evidence is evaluated in the criminal trial, the first being evaluations related to admissibility and the second being evaluations with regard to weight. Questions of admissibility are the sole purview of the trier of law, a role filled exclusively by the judge (Paciocco & Steusser, 2010). Questions of weight are generally restricted to the trier of fact, a role filled by the jury, although in the more common judge only trials both roles are filled by the judge. While the line between evaluations of admissibility and those of weight is not always completely clear, this provides a useful distinction for organizing the discussion of this subject.

Admissibility evaluations

One of the primary functions of judges is their role as an evidential gatekeeper. Judges are tasked with ensuring that only legally admissible evidence is brought before the trier of fact. Courts begin with the general principle that judges should allow as much information as possible to be made available to the trier of fact (Paciocco & Steusser, 2010, p. 19). With this principle in mind, Parliament and the courts have identified a number of additional considerations that may justify restricting some evidence from being admitted. For any type of evidence, the party seeking admission must be able to demonstrate that the evidence being submitted is relevant to some material issue at trial and the court must be satisfied that the probative value of the evidence is not outweighed by the prejudicial effect it might produce (Paciocco & Steusser, 2010, p. 19). In keeping with the general principle of inclusion, the standards set for evaluating evidence against these criteria are quite low (Bryant, et al., 2014, p. 43). To be judged sufficiently relevant for admission, the evidence need only increase or diminish the probability of a fact in issue with no minimum standard set for the extent to which it must do so (Paciocco & Steusser, 2010, p. 31). Similarly, there is no minimum standard set for how probative the evidence must be, merely that its probative value outweigh its prejudicial effect on a balance of probabilities (Paciocco & Steusser, 2010, p. 19). In addition to these more universal concerns, there are a number of additional considerations that may vary with the type of evidence presented and the purpose for which it is being introduced (e.g. exclusions of similar fact evidence, character evidence, etc.).

The evidence considered in court can generally be divided into five categories (1) sworn statements, (2) unsworn statements, (3) real evidence, (4) experiments and re-enactments, and (5) documents (Bryant, et al., 2014, p. 37). The category of real evidence consists of a broad range

of “things” where the court is able to view the evidence directly and act as a witness rather than relying on the intermediary of a witness (Bryant, et al., 2014, p. 42). This includes articles before the court such as physical objects; photo, video, or audio recordings; or the physical appearance and demeanor of an individual in court (Bryant, et al., 2014, pp. 42-43). While sworn statements are the form of evidence most commonly produced before the court (Bryant, et al., 2014, p. 37), the substantial weight afforded to real versus *viva voce* evidence makes video and other forms of real evidence of particular importance (Bryant, et al., 2014, p. 43). It is the category of real evidence that is the focus of this paper, more specifically real evidence in the form of video recordings.

As the popularity of video recording has increased in society at large, the prevalence of video introduced in court has experienced a similar rise (Edmond & San Roque, 2013). Accompanying this rise in popularity has been the development of a body of case law surrounding the introduction and use of video evidence. While not extensive, this case law provides some measure of the approach toward video evidence recommended by the court and reflected in judges’ written decisions, some of the key features of which are outlined below.

Admission of video evidence

In Canadian evidence law, video evidence is considered under the broader category of photographic evidence. This includes still photographs and other mediums such as films, slides, and video (Goldstein, 2011, p. 2-1). Before any photographic evidence may be put before the trier of fact in a trial, the party introducing the evidence must be able to demonstrate its admissibility relative to five key criteria: (1) its relevancy, that is its use in proving some fact relevant to the case; (2) its accuracy in truly representing the facts; (3) its fairness and absence of any intention to mislead; (4) its verification by oath by a person capable of doing so; and (5) the

relative weight of its probative value to its prejudicial effect (Goldstein, 2011, p. 2-14; Paciocco & Stuesser, 2010, p. 6; *R. v. Creemer and Cormier*, 1967)⁸.

It is important to note that the information used to assess the evidence by these criteria extends beyond the video itself. In the case of the criterion that video evidence be verified under oath by a person capable of doing so this is clear. However, witness testimony also plays a major role in each of the other criteria as well. The relationship between video evidence and witness testimony varies according to the type of witness relied on and the purpose for which the video was introduced. Despite the fact that the very strength of real evidence is purportedly its ability to provide the court with direct experience of the evidence without the intermediary of a witness, the procedures guiding the admission of real evidence generally rely on some form of testimony to introduce it, or at least establish its identity (Bryant, et al., 2014, p. 43). As will be seen in the chapters to follow, while formally testimony may be required to establish the veracity and reliability of a given piece of video evidence, often the strong perception of video as being inherently reliable leads judges instead choose to focus on their own interpretation of the video evidence regardless of the testimony of the witnesses.

There are two general approaches to the admission of video evidence in Canadian courts; these are typically referred to as the illustrative approach and Silent Witness Theory (Goldstein, 2011). The most common of these is the illustrative approach where the verification of video evidence is completed by the individual who filmed the scene or some other eye witness to the events as they were recorded (Careless, 2015; Goldstein, 2011). In these instances, the video evidence is said to function as an illustration of the witness's testimony. Under this approach, video is treated as a non-verbal expression of the witness's testimony (Goldstein, 2011, p. 2-5).

⁸ The criteria listed are for Canadian courts and administrative tribunals. Similar criteria are used in England, Scotland, Australia, New Zealand, South Africa, Israel, Hong Kong, and the United States (Goldstein, 2011: 2-15)

The video is introduced to corroborate, support, and explain a witness's evidence rather than to function independently as substantive evidence of the events that occurred (Goldstein, 2011, pp. 2-4, 2-5). A witness (often the individual who recorded the video but potentially any eye witness) testifies as to when, where, and under what circumstances the video was captured and verifies that the video recording accurately represents the events as they witnessed them (Goldstein, 2011, p. 2-20.34). While the witness's testimony that the video accompanies is of key importance here, the necessary qualifications of a witness to authenticate such evidence remains somewhat of a grey area and is largely left to the discretion of the judge (Goldstein, 2011, pp. 2-6, 2-20.34). The test for admission set out in the case of *R. v. Creemer and Cormier* (1967) specifies that photographic evidence (including video) requires "verification on oath by a person capable to do so", however, beyond this requirement, the credibility of the witness called to verify the evidence generally affects only the weight afforded that evidence by the trier of fact rather than being a determinant of its admissibility (Goldstein, 2014, p.2-22.19)

Under the "illustrative" approach, the reliance on witness testimony is clear. This connection becomes less clear in instances where there are no eye witnesses available; for instance, incidents captured on unmanned surveillance cameras (Sibley, 2008, p. 25). In these cases the courts rely on an alternative approach to video evidence known as "Silent Witness Theory". Under this approach, video evidence is said to be able to "speak for itself" without the need for corroboration from an eye witness of the event (Goldstein, 2011, p. 2-6). Verification of the video is still reliant on the testimony of witnesses. However, here there is often only circumstantial evidence available for the verification process (Goldstein, 2011, p. 2-13). Verification is accomplished by witnesses (often expert witnesses) testifying as to issues such as the capabilities of the recording equipment, the proper installation and operation of that

equipment, and the retrieval and storage of the video captured (Careless, 2015; Goldstein, 2011, p. 2-10). Once the reliability of the video has been established, the video is then able to “speak for itself” and functions as a form of testimonial evidence within the trial (Goldstein, 2011, p. 2-12; *R. v. Nikolovski*, 1996). Video is somewhat unique in this regard in that the video can be self-validating. While the courts still rely on witness testimony to establish the reliability of the recording, video does not necessarily require testimony to identify or explain the relationship of the evidence to the events in question as is the case with most other forms of real evidence.

Video admitted under Silent Witness Theory in particular embodies many of the features of video evidence that are seen to make it so valuable. With no apparent *auteur* behind the film, videos produced in this way are seen as providing an objective and wholly reliable account of the events as they occurred. Importantly for this study, the evaluation of video entered under Silent Witness Theory also represents an important shift in the role of the judge from one who evaluates competing claims of the adversaries within the litigation process to one capable of witnessing the event directly and making determinations based on their own visual experience of the event. While only briefly mentioned here, at the close of this chapter I examine this development in greater detail.

As Paciocco and Stuesser (2010) point out, the rules of evidence ultimately exist to help triers of fact reach an accurate factual determination, in doing so, they must also ensure that trials remain fair and just. The application of the rules of evidence to video requires a great deal of care due to its potential impact on both of these goals (Panian, 1992, p. 25). Courts have repeatedly noted the powerful potential of video to prove facts at issue before the court (Goldstein, 2011; Panian, 1992; Sibley, 2008). In the words of Supreme Court Justice Cory “[video] may provide such strong and convincing evidence that of itself it will demonstrate

clearly the innocence or guilt of the accused” (*R. v. Nikolovski*, 1996). The courts have been equally clear on the potential prejudicial impact of such a highly regarded and visceral medium (Careless, 2015; Edmond & San Roque, 2013, p. 255; Goldstein, 2011, p. 2-19; Sibley, 2004)⁹. As stated by Justice Cameron in *R v. Penney* (2002), “visual evidence has a greater impact on the jury than oral testimony and therefore care must be exercised to ensure that what is placed before the jury is not presented in a manner which might mislead”.

Despite the stated concern for allowing evidence which might prove prejudicial at trial, legal scholars (and judges) have noted a definitive trend among the judiciary toward a softening of the standards used to evaluate the admissibility of all forms of evidence in an effort to “bring the truth closer to the trier of fact” (Paciocco & Stuesser, 2010, p. 4; see also Goldstein, 2011, p. 2-20.25). This reasoning is evident in the Supreme Court’s recommendations in the influential case of *R. v. L (DO)* (1993) which stated that the judiciary should err towards the side of inclusion when considering the admissibility of evidence. Similarly, in *R. v. Penney* (2002), Justice Cameron noted that only a modest standard of proof should be used when determining admissibility; a standard not even at the level of a balance of probabilities (Goldstein, 2011, p. 2-20.29). Much of the reasoning behind this shift towards admissibility is the belief that the use of a more stringent standard would unfairly limit the evidence placed before the trier of fact and thus confuse the roles of trier of law with the trier of fact (Paciocco & Stuesser, 2010, p. 20).¹⁰ The reduced standard for admission into evidence does not necessarily entail that the evidence must be used in reaching a decision on the facts of the case. Instead, it is simply restating the belief that that the decision to use any particular form of evidence should rest with the trier of

⁹ See also the Supreme Court of Canada case of *Draper v. Jacklyn* (1970) making the same case for photographic evidence, the concerns highlighted there presumably compounded in the case of video.

¹⁰ Given that the vast majority of trials in Canada do not feature a jury, judges typically adopt both the roles of trier of fact and trier of law. The formal distinction between these categories remains an important component of the Canadian trial system.

fact rather than the trier of law. This was reaffirmed in the Supreme Court of Canada case of *R. v. Nikolovski* (1996) where Justice Cory noted that it is better to provide the jury with access to as much evidence as possible and allow them to address concerns regarding the quality of the evidence through the weight afforded to that evidence in their deliberations. The increased reliance on decisions of weight as a means to counter limitations in the evidence underscores the need to understand this stage of the trial process.

Weighting of Evidence

The criteria used for decisions of weight overlap considerably with those used to determine admissibility, namely relevancy, accuracy, absence of intent to mislead, and verification by oath by a person capable of doing so (Goldstein, 2011, pp. 2-17, 2-18). While the criteria are largely the same as those for admissibility, the standards applied for weighting differ considerably. As previously mentioned, admissibility only requires that a moderate standard not even equal to a balance of probabilities be met. As Paciocco and Stuesser (2010) point out, “the party introducing real evidence need not establish [...] that it is probably authentic or that it is authentic beyond a reasonable doubt. It is enough that there is *some evidence* on which a reasonable trier of fact could conclude that the item is authentic” [emphasis added] (p. 20). Determining the weight to apply to any particular piece of evidence in reaching a decision on the facts of the case is a more complex endeavor. This can be a highly variable process and represents the key function of the trier of fact. The permissive standard for the admission of evidence provides an opportunity for the triers of fact to exercise this function, however, it also increases their responsibility to assess the evidence and ensure that unreliable or prejudicial evidence is not given undue weight. In the case of video evidence, the trier of fact must assess

the video itself in conjunction with the testimony of the witnesses used to verify that video to reach a decision on the weight to afford that evidence.

There have been some concerns in jury trials with this approach in that it relies so heavily on the discretion of the jury, particularly when considering visual evidence. In the oft-cited case of *R. v. Creemer and Cormier* (1968) the court noted that visual evidence can have a profound impact upon the jury, particularly because jury members may lack the skills necessary to properly evaluate the evidence. The court argued that the judiciary must be vigilant in their role as evidentiary gatekeepers to ensure juries will not be unduly swayed by potentially prejudicial visual evidence (Goldstein, 2011, p. 20.31). While these concerns were at the forefront in the 1960's, they appear to feature less in the consideration of courts today. In the case of *R. v. Penney* (2002) Justice Cameron cited *Creemer* stating that “visual evidence has a greater impact on a jury than oral testimony and therefore care must be exercised to ensure that what is placed before a jury is not presented in a manner which might mislead”, however, he went on to directly address the recommendation made in *Creemer* by arguing that contemporary populations are better versed on the possibilities of manipulation in visual evidence and should thus be given broader access to such evidence (Goldstein, 2011, p. 2-20.31).

The approach taken by Justice Cameron fits well within the trend towards softening the standards of admissibility discussed above (Panian, 1992, p. 1209); however, some scholars question the basis for the courts' confidence in the ability of jury members to adequately scrutinize visual evidence. The following section raises some of the concerns brought forward by critics of the current judicial approach to visual evidence.

Concerns with Video Evidence

Since the introduction of the photographic medium, courts have acknowledged the evidentiary potential of this technology and have been quick to accept it into the trial system (Edmond & San Roque, 2013, p. 255; Mnookin, 1998; Paciocco & Steusser, 2010, p. 9). The supposed objectivity and permanence of photo and video evidence made these a powerful tool within the courtroom context and they have quickly risen to being favoured as the “best” form of evidence (Robinson, 2012, pp. 1414-1415). Despite the near universally acknowledged utility of this form of evidence, the manner in which the courts interact with video has not been without criticism.

As previously stated, much of the concern with the interpretation of video evidence in court stems from the purportedly excessive degree of trust placed in video evidence by both jurors and the court. Critics argue that this overconfidence in the objectivity and transparency of video leads to a failure to adequately evaluate and scrutinize this form of evidence (Panian, 1992; Robinson, 2012; Sibley, 2004; 2005; 2008). Speaking about the failure to critically analyze the meaning afforded to video more generally, Stocchetti and Kukkonen (2011) argue that this results from an attribution error whereby individuals view the meaning afforded to video as an inherent feature of the medium rather than the result of a social process by which individuals ascribe meaning. Legal scholars have similarly pointed to the near complete trust placed in video as a medium, to the point where viewing a video recording of the event is conflated with viewing the event itself (Sibley, 2004, p. 515; 2008, p. 25). Jessica Sibley refers to this as the “myth of total cinema” (Sibley, 2008, p. 26), a concept stretching back to the initial introduction of cinema in the 19th century that describes audiences’ tendency to ascribe an “indexical relationship” between film and the lived world (Sibley, 2004, p. 111). This can be highly problematic given

the limitations inherent in any representational form. Film necessarily presents a particular point of view whether the choice of this point of view is conscious or mechanical (Sibley, 2008, p. 29). In doing so, it will exclude any number of possible other points of view (Harris, 2010, pp. 368-369). As Sibley (2008) points out “all stories, even true ones, can be told from different angles, with different morals and objectives. Each version may be entirely truthful, but no single version tells the whole story” (p. 30). Apart from what is or is not shown, the visual record produced by film requires meaning to be ascribed through a process of interpretation (Sibley, 2008, p. 32). This is particularly evident in cases where the video record is unclear and contested interpretations arise. In discussing this point, Sibley cites the American case of *Austin v. Patric* where a video recorded from a distant, poorly placed camera was used as evidence by both parties within the case as proof of their competing interpretations of the footage (Sibley, 2008). In this case, the same piece of footage was used to support both of the competing arguments with each side offering a different interpretation. This highlights the necessity of interpretation when ascribing meaning to any visual representation.

The interpretation required to apply meaning to film is not limited to cases with unclear footage. In the high-profile U.S. Supreme Court case of *Scott v. Harris* (2007) the majority of the bench reached a consensus on the events contained within the video and repeatedly referenced what was “clear” from the video record. However, in his dissent, Justice Stevens outlined a very different understanding of the events based on his interpretation of the same visual record emphasizing the interpretive nature of meaning drawn from video evidence. Of particular concern to critics of the current approach to video evidence is not the interpretations that are made or the features that are relied on in doing so, but that the refusal to acknowledge the active role played by the interpreter in constructing the meaning of a given piece of evidence (Sibley,

2008). They argue that judges (and individuals more generally) perceive of video as avoiding issues of interpretation, a denial that has the potential to undermine the use of this evidence in the courts, and one that becomes reinforced with each successive application (Sibley, 2008; See also Stocchetti & Kukkonen, 2011)

When cases depend on the presumably “obvious” truth visible in the video evidence presented, differences in interpretation such as those in *Scott v. Harris* or *Austin v. Patric* are of vital importance in terms of illustrating the subjectivity and variability of interpretation. Research on video identification provides a prime example of this. Experimental research by Josh Davis and Tim Valentine (2009) examining visual identifications illustrates how even under ideal conditions, individuals perform poorly in matching suspects from surveillance footage with individuals in court. This is not aided by the fact that “most examples of *evidence verité*¹¹ are bad quality films—out of focus, shot from a distance, and of poor sound and color quality” (Sibley, 2008, p. 39).

The limitations of filmic evidence mentioned above are not insurmountable. Film critics and to a large extent even audiences are well-aware of the effects of video construction on the message conveyed through video in other arenas such as documentary films or reality television (Sibley, 2008). There appears to be little evidence, however, that the skills used in assessing other forms of film are being transferred to the courtroom (Panian, 1992; Robinson, 2012; Sibley, 2004; 2008). Subjects such as the myth of total cinema seem obvious when applied in areas such as documentaries or reality television, but individuals still seem to fall victim to such myths in courtroom contexts.

¹¹ Sibley (2004) defines *evidence verité* as “filmic evidence that purports to be unmediated and unselfconscious film footage of actual events”(507). Recordings such as surveillance footage of an event are a prime example.

Scholars do not raise the issue of the frailties of video evidence in an effort to undermine the value of this technology. The utility of video evidence is well recognized (Goldstein, 2010; Sibley, 2004). Rather, this issue is raised in an effort to illustrate the excessive confidence placed in this technology and the lack of scrutiny and procedural safeguards that this produces.

Limitations of Experts

In keeping with the perception of video as transparent, courts have generally expressed a great deal of confidence in their ability and that of members of the general public to attach meaning and significance to visual images, or at least, more confidence than would appear to be warranted based on the experimental evidence (Edmond & San Roque, 2013, p. 258). Despite this trust in the abilities of lay people, video evidence is often accompanied by various forms of expert testimony as a means of ensuring the evidence is understood correctly. Experts may be asked to testify on subjects such as the features and function of the recording equipment (particularly in cases lacking eye witness confirmation), the retrieval, storage, and any possible editing of the video footage, and the identity of suspects based on their analysis of the video to name but a few (Edmond & San Roque, 2013).¹² The use of expert witnesses for video evidence in is in keeping with common trial practices of consulting experts on technical matters that might influence the consideration of a given piece of evidence (Paccioco & Steusser, 2011), however, some scholars raise concerns regarding the way in which this precaution is implemented. Gary Edmond and Marcel San Roque (2013) argue that, in many cases, courts rely on experts with limited or unrelated qualifications and experience and that the claims made by these experts are often oversold to the jury (p. 254). To be qualified as an expert witness the court requires that the individual be “shown to have acquired special or peculiar knowledge through study or

¹² Note: expert witnesses are unique in their ability to offer opinion based rather than just direct evidence. This provides a great deal more leeway in presenting their evidence than is the case with most forms of testimony (Edmond & San Roque, 2013: 256).

experience in respect of the matters on which he or she undertakes to testify” (*R. v. Mohan*, 1994). In keeping with the lax scrutiny of video evidence, Edmond and San Roque (2013) call into question the standard to which experts are held to determine their specialized knowledge.

One example of problematic expert testimony is in the case of suspect identification from video. When determining the identity of suspects present depicted in video evidence, courts will often rely on identifications from (lay) individuals familiar with the suspect such as family or friends of the accused. This process is supported by substantial experimental evidence suggesting individuals are much more accurate at identifying familiar faces than those that are unfamiliar to them (Bruce, Henderson, Newman, & Burton, 2001). More problematically, Edmond and San Roque point out that judges will often allow expert witnesses to provide opinion evidence on subjects including the correspondence between the features of the individual in the video footage and the suspect present in court (Edmond & San Roque, 2013).¹³ Such testimony may be particularly problematic due to potential for jurors to perceive expert testimony as additional confirmation of guilt independent of the video rather than commentary on the same piece of evidence (Edmond & San Roque, 2013, p. 262).

The apparent lack of concern regarding the qualifications of experts testifying regarding video is consistent with the purported view of video evidence as being objectively clear and not requiring any degree of subjective interpretation (Sibley, 2008). If video is seen as clearly reflecting an objective truth, it stands that all that is required to access that truth is careful viewing.

¹³ In some cases the experts called may have specializations in biometrics and facial recognition, however, Edmond and Roque point out that in some cases expert status may be attributed and identifications made by investigators who have simply reviewed the film many times and are said to have gained sufficient familiarity there (Edmond & San Roque, 2013, p. 256).

A further concern is that in cases where expert testimony is relied on to expose the weaknesses of video evidence, this testimony may be ineffective against the substantial impact produced by video evidence. According to Justice Chernow:

A two-minute video, if well made, will make a greater impression on the minds and be graven on their minds. In fact, opponents of videotapes argue that a jury will never be able to evaluate intellectual criticism of a video's validity, no matter how devastating the cross-examination of the sponsoring expert. The familiar power of television will shoulder everything else aside. The very value of using the videotape - its ability to impress and explain - is thus the source of the most persuasive argument against its use. (Panian, 1992, p. 1214)

This faith in visual evidence over even well-grounded criticisms by experts represents a key threat to achieving a just result. This risk is particularly great for surveillance footage admitted under Silent Witness Theory which relies solely on expert testimony for verification of its authenticity and reliability and is often the form viewed as most convincing and conclusive evidence (Sibley, 2004, p. 516).

The treatment of expert testimony reflects how the overconfidence in the veracity of video can lead to the failure of the procedures put in place to ensure only accurate, reliable, and fair evidence is used. This confidence can result in undue weight being applied to evidence that is seen to support the individual's interpretation of the video while evidence that undermines the video may be disregarded. Courts may seek to combat this through the provision of more thorough instructions to the jury. However, this may not prove sufficient given the demonstrated powerful impact of video evidence and the relatively minimal impact of jury instructions (Panian, 1992, pp. 1209, 1215).

Conclusion

This chapter has introduced the rules, procedures, and customs surrounding the use of video evidence in Canadian courts and established the cultural context in which this evidence operates. I have highlighted the strong public perception of video as objectively portraying reality held by individuals in society and specifically in the courtroom. I have also introduced the discussion of the principled approach to evidence law and the impact this has within the criminal justice system.

From the more technical description of the place of video within the legal system, I turn now to a discussion of the theoretical perspective that will allow me to place the results of this analysis into a broader sociological framework. Specifically, I present a brief overview of social constructionism as a theoretical framework and outline the ways in which I mobilize this theory in my analysis.

Chapter 3 –Theory

Often when researchers discuss the importance of theory they refer to the need to deduce specific hypotheses regarding a particular phenomenon, hypotheses which may then be verified through empirical observation (Bendassolli, 2013). In such instances, theory is meant to provide the researcher with testable explanations for a given event and the factors that may produce an influence. The focus is on explanation and the prediction of the phenomena under investigation (Hammersley, 1995; Johnson & Christensen, 2008). Deductive approaches are the standard across the vast majority of quantitative studies (Bendassolli, 2013).

When pursuing the goal of inducing understanding from *in situ* observations, theory comes to play a different role (Bendassolli, 2013). For this study in particular, theory is used not to predict or test observations, but to organize and systematize experience (Bendassolli, 2013). Used in this way, theory assists the researcher by providing language and conceptual tools to analyze the subject matter, and by providing a broader (theoretically oriented) context in which to situate the results of the analysis. The goal of this study is to explore and contextualize how meaning-making around video evidence is constructed through legal communications in a court of law. Specifically, I seek to answer the following question:

How do judges construct the meaning of video evidence in the context of a criminal trial?

Given this focus, it follows that I am adopting a social constructionist perspective to guide my methodological considerations and analysis of the data. Prior to explaining how I use this theory to guide my research, I first briefly outline the principal tenants of the theory which are of significance to my thesis.

Social Constructionism and the Construction of Knowledge

Social constructionism originated as a way to understand the way people assign meaning and significance to the world around them (Best, 2008; Burr, 2003). It is a theoretical orientation that offers critical alternatives in understanding how the world, knowledge, and reality are socially constructed and conceptualized (Burr, 2003). For social constructionists, all knowledge and beliefs are perceived as socially constructed rather than fixed or objective (Burr, 2003; Loseke, 2003). While there is no one school of social constructionism, there are major tenets that are shared across the various schools of thought (Lock & Strong, 2010). At its foundation, social constructionist researchers seek to explore how social actors proclaim to understand the world and the processes that (re)produce or guide these understandings (Loseke, 2003). In line with other social constructionist research, I seek to deconstruct the social process of how meaning and understanding is constructed through social activity and interactions between various actors (Burr, 2003; Loseke, 2003; Lock & Strong, 2010), in this case through the medium of written case law decisions.

Scholars in this field are interested in deconstructing social, taken-for-granted knowledge to understand the processes that lead to knowledge being constructed in a particular way (Burr, 2003; Loseke, 2003). To do so, social constructionist researchers aim to deconstruct knowledge, language, communications, culture, and discourses (Burr, 2003; Elder-Vass, 2012). Social constructionist researchers claim that communications play a key role in sharing and developing the shared ideas, values, and behaviours that define social life. As a consequence, social constructionists often focus on the role of language and social interaction in meaning-making (Burr, 2003).

As argued by Tata (2002), it is important for sociological researchers studying law to comprehend the social-historical creation of ideological frameworks and current trends. He encourages us to move beyond the normative framework and ask more fundamental questions about the nature of routine practice, historical changes, substantive inequality, functions and relationships between actors, and roles of culture, public attitudes and public knowledge (Tata, 2002). This sociological conceptualization of how to study law appeals to me as it escapes the rules-discretion dichotomy¹⁴. In fact, Tata (2002) argues that placing jurisprudence and legality at the center of analysis obscures a fuller explanation of social practices. In this thesis, I use the social constructionist lens to understand how these social practices impact the way judges assign meaning to visual evidence in their judicial communications. I use this theory as a way to look beyond the legal understanding, and into a more critical analysis. Prior to engaging in a more detailed discussion of how knowledge can be deconstructed, it is important to situate the evolution of social constructionism.

The Evolution of Social Constructionism

Social constructionism arose primarily in opposition to objectivist approaches of the modernist era (Burr, 2003). Over the course of the 20th century, ideas of objectivity, rationality, and meta-narratives came to dominate social understanding (Jun, 2006). Within this modernist era, objectivist approaches, also referred to by some as positivism and empiricism, defined much of criminological and sociological social knowledge (Burr, 2003; Loseke, 2003). These traditional approaches put forth that social problems can be explored, discovered, and understood through the application of proper scientific techniques built upon universality, objectivity, and

¹⁴ Legal rules approach: rules are seen to ensure predictability, consistency, order, and equality but tend to be inflexible and insensitive, whereas discretion is seen as flexible but easily allows inconsistency, inequality, and disorder. Achieving a balance between these two approaches has been a long-standing problem in legal scholarship. Both approaches are used as resources within a negotiated space that is governed by social-organization and ideological frameworks (Tata, 2002).

neutrality (Loseke, 2003). Accordingly objectivist scholars argue that through objective and unbiased observation of social phenomena we can uncover the true nature of the world (Burr, 2003). As a result, social problems are conceptualized as real, tangible, and measurable (Loseke, 2003). At the heart of such empiricist approaches to knowledge is the understanding that ‘facts’ are ‘out there and waiting to be discovered’ through the proper application of the scientific method. This empiricist conceptualization of the truth holds considerable purchase throughout modern society and is heavily featured in the legal community, as will be discussed towards the end of this chapter. According to social constructionists, however, such a conceptualization of the world is overly simplistic and deterministic (Lock & Strong, 2010).

Arising through the shift towards a postmodernist era, social constructionism challenges the idea that observations of the world can reveal its nature to us unproblematically (Burr, 2003). By problematizing the idea that there are universal, discoverable truths about human behaviour, social constructionism provides a “radical and critical” alternative on how we are to understand human beings as social creatures (Burr, 2003, p. 1). This conceptualization of human behaviour and social phenomena flows from postmodernist ideas which question and reject the fundamental assumptions of modernism and the Enlightenment era (Jun, 2006; Loseke, 2003). Specifically, postmodernism is critical of rationalism, positivism, and metanarratives (Jun, 2006). Instead, postmodernism emphasizes pluralism, multiplicity, and deconstruction (Burr, 2003; Jun, 2006). Postmodern thinkers emphasize the co-existence of plurality and difference in the construction of ‘truth’ (Burr, 2003; Jun, 2006). If there are multiple realities constructed by individuals and society, then there can be no one Truth (Jun, 2006). This leads to a great deal of controversy regarding claims that put forward one version of reality as “real knowledge” (Jun, 2006).

Exploring the construction of reality ‘out there’ is a significant aim for social constructionists. The starting point for social constructionists is that, although there may be a reality ‘out there’, it is difficult to access it¹⁵. They attribute this difficulty to two interconnected features of human behaviour and social life. First, social constructionists maintain that social reality and knowledge are produced through social interactions between people who share a sense of common reality (Jun, 2006). This shared relevance and meaning is conveyed through language, discourses, and a host of non-verbal features of responsive communications (Burr, 2003; Lock & Strong, 2010).¹⁶ Second, according to social constructionists, reality and knowledge have behind them a long history of social practices and discourses which shape our communal understanding of social phenomena (Berger & Luckmann, 1966; Tata, 2002). In other words, the human interaction we rely on to construct categories and concepts we use to describe the world ‘out there’ is dependent on historically, politically, and culturally specific prevailing discourses (Burr, 2003). While interested in how meaning-making is constructed by social actors in their daily interactions (Berger & Luckmann, 1966), social constructionists perceive the knowledge produced unable to be separated from larger organizational, social, political, economic, and cultural terrains (Burr, 2003; Loseke, 2003; Tata, 2002). These terrains play a significant role in determining why certain discourses prevail and others become silenced (Comack, 2006; Loseke, 2003). As such, understandings and actions can be deconstructed by locating them in the particular cultural discourses which they acquire their ‘truth’ status (Lock & Strong, 2010).

¹⁵ As previously acknowledged, there is no one school of social constructionism; as such, the way reality is conceptualized often differs. For example, radical or strict constructionists argue that reality in general—not just social reality, but everything we think of as reality—is socially constructed. Other moderate or contextual constructionists acknowledge that although it might be difficult to access reality outside of discourse, there is nevertheless a material reality beyond us (Elder-Vass, 2012). This conflict within social constructionism, and the ontology I adopt throughout this thesis, is discussed in more details in the Methodology section of this thesis.

¹⁶ This understanding is the basis of my focus on seeking to analyze and contextualize the language and the dominant discourses tapped into by judges in their creation of their legal decisions. .

This can be illustrated with a brief example of how the discourse around language has evolved. While during the Enlightenment era, language was used as “the tool of reason” that was to be “mastered” (Lock & Strong, 2010, pg. 16), during the postmodern era many sociological thinkers argue that there is no way to ground language objectively in the world as the meanings that we associate with language are not fixed by reference to the world but are instead the outcome of social power battles (Elder-Vass, 2012). More moderate constructionists acknowledge that there may be a relationship between language and the world ‘out there’ but recognize that social reconstructions of this cannot objectively reproduce it (Elder-Vass, 2012). This example illustrates that the discourses around a particular social phenomenon are products of social structures and are constantly evolving (Elder-Vass, 2012).

Central to the deconstruction of social interactions is the interrogation of discourses, such as meanings and assumptions embedded in forms of language use, ways of making sense of the world, and corresponding practices (Comack, 2006). Discourse in this sense refers to a “set of meanings, metaphors, representations, images, stories, statements, and so on that in some way together produce a particular version of events” (Burr, 2003, p. 64). Each discourse brings different aspects into focus, raises different issues for consideration, and has different implications for what ought to be done (Burr, 2003). So discourses serve to construct the phenomena of our world through what is said, written, or otherwise represented (Burr, 2003). What each discourse has in common with the others is that it claims to represent the truth (Burr, 2003). The socio-political, cultural, and economic contexts in which discourses emerge are important because they set the stage for how discourses are interpreted (Comack, 2006; Loseke, 2003). From a social constructionist perspective, the discourses that prevail become the taken-

for-granted knowledge and are more frequently relied upon to describe the social world around us (Berger & Luckmann, 1966).

According to Burr (2003), discourses can be conceptualized as a kind of frame of reference against which utterances can be interpreted. She explains the phenomena in the world are subject to a variety of possible constructions or representations at the same time. However, in order to make any argument socially acceptable and meaningful to others, humans describe a particular phenomenon using socially acceptable language and dominant discourses. It is important to note, that “discourses show up in the things that people say and write, and the things we say and write, in their turn, are dependent for their meaning upon the discursive context in which they appear” (Burr, 2003, p. 66). If these shared understandings inform our social practices, then in order to contextualize how meaning-making is constructed within judicial decisions it becomes important to understand the social-organizational and ideological frameworks that guide judges. This means looking beyond the legal method to the taken-for-granted populist and hegemonic ideologies indoctrinated as truth within any studied society (Burr, 2003; Tata, 2002).

Social constructionism then establishes that knowledge and truth are not inherent in the world, but instead they are created and sustained through social practices of individual humans operating within particular social groups (Burr, 2003). Social constructionists claim that there cannot be any given, determined, or certain nature to the world or people, since reality “out there” is the product of social processes and interactions (Burr, 2003). Instead, the acceptable versions of truth and reality are constructed by humans through their daily interactions in the course of social life (Best, 2008; Burr, 2003). Language is but one of the means by which we interact and communicate with one another that helps us construct facts, truth, and reality (Burr,

2003). When we speak, as we speak, the world and reality gets constructed (Burr, 2003). As a result, it is social interaction and communication that social constructionists aim to deconstruct in order to understand the process through which hegemonic consensus is developed and sustained (Burr, 2003; Loseke, 2003; Spector & Kitsuse, 1987).

From a social constructionist perspective, communications, language, discourse, and culture are all products of social structures and these structures can have important practical effects (Elder-Vass, 2012). Of particular importance for this study is the role discourses play in shaping individuals evaluations of truth. Social constructionists recognize that some discourses may be afforded a higher status within any given society. These discourses may then be perceived to be more truthful thus able to outweigh the truths produced by lower status discourses (Comack, 2006; Smart, 1989). Because the values and expectations of an era along with the language used to describe social phenomena shape the discourses we accept as truthful, it is important to deconstruct the social conditions that give rise to such discourses (Dunn, 2010; Elder-Vass, 2012). I adopt this theoretical background for my thesis as it is not deterministic and allows room for individual decision-making. Over a period of time, individuals may act in ways that tend to reproduce the structure in ways that leave it more or less unchanged, or they may act in ways that tend to transform it. In analyzing how social structures work and how they develop, we must take into account not only the collective power that they have but also of the ways in which individual participation in them jointly produces and influences the collective outcome (Elder-Vass, 2012). This understanding of the transformative power of social dialogue has particularly important consequences when considered in the context of the judiciary, their written decisions, and the legal system.

In this chapter thus far I have outlined how prevailing discourses that make up the taken-for-granted knowledge and truth in any society depend on the particular construction or version of a phenomenon that has “received the stamp of truth in our society” (Burr, 2003). Social constructionists claim that meaning does not lie inherently in object itself in the social world. Instead, it is humans, through interaction and communication, that give it meaning (Burr, 2003; Loseke, 2003; Lock & Strong, 2010). For example, as was established in the literature review, the discourse on visibility claims that images are mere tools in the hands of a plurality of agents who use them in such a way as to reproduce control or to challenge it (Stocchetti & Kukkonen, 2011). Images in and of themselves cannot possess meaning as they are not agents (Stocchetti & Kukkonen, 2011). For example, it is not video that *possesses* meaning in and of itself, but rather it is the way it is used in the hands of agents that gives it meaning (Stocchetti & Kukkonen, 2011). When studying visibility, it is not difficult to see how visual forms of evidence supersede other forms of evidence in establishing truth.

This falls in line with the beliefs and understandings of the current Western culture where both the scientific and legalistic discourses are afforded an elevated position of trust because of their ability to (re)produce socially acceptable meaning. Both are understood to lend objectivity to claims as a result of the prestige associated with these institutions and values they represent (Ibarra & Kitsuse, 1993; Loseke, 2003). Exploring such dominant discourses and the impact they have on society is of interest to sociologists. Law is a pervasive institution of social organization and social control (Selznick, 1959). Studying legal discourse can contribute both to the science of society itself and to the self-knowledge of legal practitioners (Selznick, 1959). Consequently, exploring the law-society relation is important because it can reveal what dominant discourses of a particular era obscure. As a social constructionist researcher, I am interested in exploring the

taken for granted discourses about visual evidence judges (re)produce through their written decisions. In order to do so, it is important to first outline the way social constructionist researchers conceptualize the institution of law and the relationship between legal discourse, legal actors, and society.

The Law-Society Relation

In pointing to the constructed and cultural nature of the concept of law, social scientists have observed that there have been a variety of social-control systems found in other societies and in other historical eras many of which differ drastically from the fundamental tenets of modern western law (Kidder, 1983). Social scientists conceptualize law as “symbolic human product” (Sutton, 2016, p.4), a socially constructed phenomenon that is dependent on the cultural, historical, economic, and political contexts of any given era (Comack, 2006; Norrie, 2001). Analyzing these contexts provides important insights in understanding how the legal terrain and its actors (re)produce particular beliefs, values, and discourses without questioning the potential bias they contain (Comack, 2006). The modern western legal institution has been heavily influenced by ideologies originating from the Enlightenment era¹⁷ that emphasize principles of rational legalism and individual justice (Norrie, 2001). From these principles, legal actors are instructed to conceptualize the world in dichotomous terms, such as rational/irrational; thought/feeling; objectivity/subjectivity; abstract thinking/contextual reasoning (Comack, 2006). Legal actors adopt this dualism, giving preference to the former over the latter when deciding if an individual is guilty or not guilty of a particular crime (Comack, 2006).

¹⁷ I recognize this term is used in literature indiscriminately. Generally, its purpose is to describe the cultural and intellectual movement which challenged traditional ideas based on faith. In this paper, I am using it to describe how it influenced the conceptualization of Natural Rights (universal) of humans; the separation of government powers into a legislature, an executive, and a judiciary system; the will of the people; and the philosophy of utilitarianism (<http://classroom.synonym.com/ideas-enlightenment-helped-influence-democratic-thought-6289.html>) It is a concept that is not necessarily continuous or linear. Furthermore, it encompasses a time frame too large (17th and 18th Centuries) to summarize in one paragraph. Enlightenment ideologies emerged over time and are historically dependent.

This section briefly described how the modern criminal law was formed in a particular historical epoch and adopted as its fundamental features and principles the dominant discourses produced by the social relations of the time (Comack, 2006; Norrie, 2001). This section aimed to show how the legal principles adopted are historic and relative rather than natural and general, as the law itself claims (Norrie, 2001). The legal institution is a social phenomenon both because it is created and sustained by society and because its recognition as law depends on the concordance between what it addresses as a whole and the values and beliefs regarding law in any given society (Focarelli, 2012). With that in mind, it is important to understand the way in which the legal system conceptualizes itself, what Comack terms, “The Official Version of Law” (Comack, 2006, p. 20).

The Official Version of Law

For our purposes, “The Official Version of Law” refers to what the legal world would have us believe about itself: that it is an impartial, neutral, and objective system for resolving social conflict (Comack, 2006, p. 20). The law embodies “the most basic values we would like to see cultivated in our society, such as fairness, equality, and the inviolability of individual rights” (Sutton, 2016, p. 9). One of the ways it claims to achieve this is through the doctrine of the separation of powers between the legislature and the judiciary. This is how the law maintains its position as an “autonomous, internally consistent system, divorced from the more political processes of the state” (Comack, 2006, p. 21). The assumption is that the law is made by elected officials and is only enforced by police and courts. This is a notion that reflects the democratic philosophy upon which law is based (Kidder, 1983).

Across the western world, the rule of law is perceived as the foundation of a democratic society and is perhaps the most central doctrine on which modern law is founded (Comack,

2006; Hunt, 1993; Sutton, 2016). The rule of law encompasses two broad claims: (1) everyone is subject to the law; and (2) the law treats all individuals the same, as legal equals, regardless of any social identifiers such as class, status, race, gender, and so on (Comack, 2006). The rule of law rests on the premise that judges are making and applying legal rules in a non-arbitrary, consistent, and coherent way (Norrie, 2001). The judge must be impartial, a trait referring to disinterestedness and absence of prejudice and favouritism (Focarelli, 2012).

In an adversarial system the judge's task is to discern the legally relevant facts of the case to find the "truth" about the matter brought before the court (Comack, 2006). In assisting in the impartiality and fairness of the proceedings, the legal mode of reasoning, captured through legal positivism, asserts that the focus of the legal players is on applying a predefined legal method to find legally relevant facts, rather than operating on the basis of subjective values (Comack, 2006). According to this ideology, judges, themselves rational and objective individuals, working with a coherent set of rules within a just system of law, could therefore, determine the truth of any given case if they applied the established legal method.

The legal method involves identifying and applying of the appropriate rule or test to those facts of the case that are deemed to be legally relevant (Comack, 2006). The result of this proceduralized method, therefore, is supposed to be a neutral, value-free, and objective science of law (Comack, 2006). The way this equality is guaranteed is through the doctrine of *stare decisis* developed under the common-law tradition of case law which states that "like cases are to be treated alike" (Comack, 2006). Judges, therefore, must rely on previous cases in making their decisions, and lower courts must follow the decisions reached by higher courts (Comack, 2006). Adherence to these principles promotes and ensures the idea that law is predictable, consistent, and certain (Comack, 2006).

In both in its form and in its method, therefore, the institution of law asserts its claim that it is unbiased, just, and universal (Comack, 2006). If uncritically analyzing the law from this lens, a researcher is likely to miss out on the discourses legal actors reproduce and reinforce as truth. This not only makes for a simplistic and less interesting analysis, but also obscures the fact that law, like all social institutions, is a product of human construction and not a scientific enterprise. Deconstructive analysis of the law reveals aspects hidden by the positivistic legal discourses the law closely adheres to. By examining legal decisions in practice and contextualizing the discourses judges rely on in constructing their written decisions, researchers are able to identify significant differences between what legal discourse claims it is and how it actually functions in society.

The discussions laid out above provide me with an understanding of the framework of what the judiciary constructs as natural without questioning their own (re)construction of the social world. Beyond introducing the conception of the world as socially constructed, this chapter has highlighted the ways in which social science researchers may trace socially constructed elements in society to reach a better understanding of their history and current meaning behind dominant discourses. As Mertz (1994) notes, social constructionism as a theory enables the researcher to “go beyond descriptions that are naïve about the conditions of their own production; go beyond the level of individual experience to more structural understanding of social forces at play”. Before moving on to the methodology chapter explaining how this theory has been mobilized to study the construction of video evidence in particular, it is useful to first provide a brief overview of how law has been deconstructed and contextualized by social constructionist thinkers. This discussion is important to my thesis because it distinguishes

between the narratives reproduced by the legal actors within the institution of law and those put forth by social constructionist theorists studying the legal institution and its actors.

Deconstructing Law: “Official version of law” versus Law in Practice

The aforementioned Official Version of the Law establishes law as an objective, fair, democratic, and ultimately just social institution operating through the enforcement of a body of rules that have been developed through the collective consensus of individuals for the benefit of society as a whole (Comack, 2006; Mertz, 1994; Norrie, 2001; Selznick, 1959). Social constructionist sociologists problematize this understanding of law by pointing to the limitations of the dominant discourses legal actors engage in and to the lack of self-reflexivity on the effects it (re)produces. They argue that the practical application of ideals such as “truth”, “objectivity”, and “justice” within the legal system stem from a particular set of historical, philosophical, and theoretical ideals and represent only one of many potential understandings of what these terms may mean (Comack, 2006; Focarelli, 2012; Mertz, 1994; Norrie, 2001; Scheppele, 1994; Snider, 1994). For example, much of the authority and status of the legal system is gained through the perceived ability of the legal system to access the truth as it exists “out there” through the application of the legal method (Focarelli, 2012; Norrie, 2001; Smart, 1989). Without questioning the basis of this conceptualization, we risk blindly accepting that the truth a particular court found is the ultimate universal truth instead of a legal truth (Focarelli, 2012; Norrie, 2001; Sheppele, 1994; Smart, 1989). It is legal actors within law that construct a social reality of their own. This constructed reality, in turn, forms the basis of all legal thought and action.

The legal system has been continuously (re)constructed as an institution capable of accessing reality “as it really is” through the proper application of the rules outlined in the legal

method (Focarelli, 2012; Norrie, 2001; Smart, 1989). This important aspect of the power of the legal institution, namely, its ability to become the definitive voice on any issues it addresses, speaks to the importance of deconstructing our understanding of this system (Comack, 2006; Comack & Peter, 2005; Norrie, 2001; Smart, 1989; Teubner, 1989). Social constructionists have continuously pointed out that the truth accessed (or more appropriately, constructed) by the legal system represents only its own legal truth and not any objective or universal truth (Focarelli, 2012; Norrie, 2001; Sheppele, 1994; Smart, 1989). In the words of Teubner, “the reality perceptions of law cannot be matched to a somehow corresponding social reality ‘out there’.” (Teubner, 1989, p. 730) Rather, it is law as an autonomous epistemic subject that constructs a social reality of its own. This constructed reality, in turn, forms the basis of all legal thought and action.

Particularly relevant for this study is the legal system’s approach to accessing truth through reliance on a combination of “common sense” conceptualizations of the world, including logical reasoning, and physical evidence. This “common sense” approach to truth entails a focus on positivistic features such as objectivity, rationality, logic, consistency, narrative coherence, and empirical support (Comack, 2006; Scheppelle, 1994; Smart, 1989).¹⁸ Many of these features share ties with other social institutions entrusted with a high degree of epistemic authority, particularly science. Scholars such as Focarelli (2012) and Scheppelle (1994) point out the considerable overlap between how conventions of truth-finding implemented in the legal system closely align with those in broader social life. For example, the dominant consensus regarding the status of truth within the modern era is that it exists in reality “out there” and it is

¹⁸ Note, partly why these features are associated with such a high degree of trust is due to the perceived objectivity or universality associated with them. It is important to recognize, however, that these terms are meaningless outside of a particular definition and application within a particular instance and to a particular individual, qualifications which necessarily describe a subjective process.

discoverable through our senses and application of a reliable, objective method. The institution of law is entrusted as able to resolve conflicts and discover truth because it is predicated on important characteristics and values of the modern era, namely, logic, reason, objectivity, and formal justice. This has worked in favour of law in that it has helped legitimize its authority within modern society (Focarelli, 2012; Comack, 2006; Norrie, 2001).

Social constructionists argue that while the reality created by the legal system cannot be ontologically objective¹⁹, the continued operation of the system is predicated on a certain degree of faith in its truth-finding abilities. To foster this trust, the legal system has developed an extensive set of rules, conventions, and procedures to guide its truth-seeking activities and help justify its claim to epistemic authority. One of the ways the law (re)establishes itself as capable of finding the truth is through the combination of affording judges the discretion to make choices and the providing the rules and procedures necessary to make objective, rational decisions as defined by the legal method.²⁰ This necessarily entails assumptions not only about the ability of judges to access truth, but assumptions regarding the nature of the discoverability of truth as well.

While the legal system operates under the assumption that judges are rational and objective individuals, social constructionist scholars argue that judges cannot be inherently objective but rather conceptualize events and discourses from the viewpoint of their own socio-political, cultural, religious, gendered, ideological, and economic classes (Comack, 2006; Focarelli, 2012; Norrie, 2001). Sheppele comments that “lawyers and trial judges generally receive no special training in the evaluation of evidence or in strategies for discerning truth and

¹⁹ Ontological objectivity, as defined by Focarelli (2012), refers to the facts themselves when their existence independent of their perception by a sentient being.

²⁰ Note, the discretion afforded judges is predicated on the assumption that judges are themselves rational, objective, calculating individuals capable of applying the legal rules and tools to arrive at the truth (Norrie, 2001).

so they too draw on socially situated, unremarkable methods for determining ‘what happened’” (1994, p. 2). Similarly, Norrie (2001) claims a tendency for judges, like any members of society, to evaluate cases using the conventions associated with their social class, a tendency that can produce significant effects given the overrepresentation of affluent, white, male judges within the legal system. Beyond the analysis of individual judges, constructionist scholars also argue that, as agents of the legal system, judges also attempt to act in accordance with the shared values and expectations of the legal community in which they operate, values which are themselves culturally and historically specific rather than universally objective (Focarelli, 2012; Snider, 1994; Tata, 2002). This conceptualization of judges as social actors allows me to place them within a social context and deconstruct the concepts and values they are (re)constructing through their legal communications.

Another key assumption of the Official Version of Law is that it can access the objective truth behind opposing claims. However, this assumption fails to recognize the particular way in which truth is conceptualized in this instance. When a judge evaluates evidence to make determinations about the truth as it really is, s/he is only evaluating the version of truth that becomes evident through legally relevant facts (Comack, 2006). Sociologists note that when a social problem enters the legal terrain, it becomes transformed into a legal issue that can then be processed through the legal system (Smart, 1989; Seidl, 2005). When a victim of violence testifies, for example, she does so as a witness for the prosecution, not as social being in her own right (Comack, 2006). She must sift through the experience to extract those facts of the case the law views as relevant, so at the very minimum, she must cooperate with prosecution to provide descriptions that conform to the prosecutor’s narrative using legally relevant language (Comack, 2006; Snider, 1994; Smart, 1989).

In criticizing the legal system's claims of objectivity, constructionist scholars such as Comack (2006) and Scheppele (1994) point out how truth-finding is a socially situated practice. By recognizing the constructed nature of social phenomena, the constructionist framework opens the door to an analysis of the truth-seeking behaviour of the legal actors operating within the system, and assists the researcher in studying the ways in which the judges select and values one particular construction of truth from the multitude of potential truths available. The social constructionist perspective has been particularly useful in helping scholars identify the structural inequalities reflected in and (re)produced by the legal system's discourses and methods of classifying trustworthy and valuable information (Comack, 2006; Hunt, 1993; Norrie, 2001). Critical scholars argue that the ways in which the legal system defines and accesses truth is reproducing and reinforcing hegemonic discourses which function to protect the interests of the dominant social classes while undermining the claims of others, such as victims of violence (Bonnycastle, 2000; Norrie, 2001; Smart, 1989). Researchers examining the perceived credibility of witnesses, for example, argue that the truth-claims made by youth, women, people of colour, and people of lower socio-economic status may be more easily disregarded by the judges in favour of their older, male, white, and wealthy counterparts (Hunt, 1993; Norrie, 2001; Scheppele, 1994; Snider, 2000).

The biases present in the legal system, and particularly the lack of acknowledgment of these biases by legal actors, can produce significant impacts. Within western society, the law is a particularly powerful institution with the authority to assert its own version of events as the ultimate truth. This is important as it functions to disqualify alternative accounts, knowledges, and understandings of social reality (Bonnycastle, 2000; Comack & Peter, 2005; Smart, 1989). Many authors have argued that law tends to devalue and disregard the lived experience of many

individuals as their construction of truth does not align with the criteria the law has deemed important (Comack, 2006; Comack & Peter, 2005; Sheppele, 1994; Smart, 1989). Sheppele (1994) and Smart (1989), for example, point to the tendency for courts to disregard the testimonies of sexually assaulted women, particularly when those testimonies may be revised over time. They argue that the legal construction of truth as coherent, consistent, and stable over time does not allow room for the idea of a multiplicity of equally truthful stories. Treating revised stories as less truthful, as though truth decays over time and gets subsequently distorted, obscures an important shared feature of revised and original narratives, namely that they are *both* constructed and interpreted *narratives* (Sheppele, 1994). By valuing the first version of truth only, this both devalues the lived experience of the witnesses who may obtain insight on their experiences over time and obscures the constructed nature of all truth claims by suggesting the original testimony was without subjective interpretation (Comack, 2006; Sheppele, 1994; Snider, 1994).

The substantial power of the law to define social issues and make definitive statements about truth is often cited by critical scholars as an influential source of hegemony; however, many disadvantaged groups have also sought to use the power of the legal system to address social inequalities (Smart, 1989). Scholars such as Focarelli (2012), Norrie (2001), Smart (1989) and Burr (2003) note that the legal system represents an important sites of struggle over the definition of social issues. While the positions and influence of those involved in this struggle may not always be equal (Hunt, 1993; Mertz, 1994; Snider, 2000), the contests that occur and the revisions that take place illustrate the limits of the hegemonic dominance present in society (Smart, 1989; Snider, 2000). Some authors argue that because law is such an important site of

struggle, it can be used to destabilize and rewrite dominant narratives and possibly disrupt classist, gendered, sexist, misogynist, and racist discourses (Bonnycastle, 2000; Comack, 2006).

Chapter Summary

The discussions laid out throughout this theory chapter provide the theoretical framework for this thesis. I began with introducing the conception of the world as socially constructed and highlighted the ways in which social science researchers may trace socially constructed elements in society to reach a better understanding of their history and current meaning behind the reproduction of dominant discourses. Following this, I discussed the relationship of law and society as seen from a social constructionist perspective and outlined the main tenets of the official version of law. As will be discussed throughout the remainder of this thesis, the concepts introduced in this chapter have important implications for the interpretation of the data within this study. These discussions orient my analysis and provide the point of reference that facilitates placing my results in a broader sociological context. In the following chapter I outline how ideas from social constructionism are put into practice in the methodology used to complete this research project.

Chapter 4 – Research Questions, Sources, and Methodology

Research Problem and Objective of the Study

The purpose of this study is to analyze how the meaning of video evidence is constructed by judges in Canadian criminal courts. The previous chapters have established the current context with regard to the prevalence and consideration of video evidence, the factors at play in the legal system that influence how judges might approach and conceptualize video evidence, and the importance of these issues with reference to how the judicial decisions might fit within a broader social context. I have argued that social shifts in patterns of meaning making are producing substantial impacts within the legal system and society more broadly. In Chapter 3, I described the way in which social constructionism can guide the analysis of social issues by providing a conceptual framework with which the researcher can make sense of social phenomena by understanding the active role played by social actors in creating and sustaining a shared social reality. In the current chapter, I describe how the conceptualization of the judicial approach to video evidence informed by this theory has been put into practice in the methodological strategy adopted to study this issue.

To achieve my research goal, the analysis is guided by the following research question:

How do Canadian criminal court judges construct the meaning of video evidence in the context of a criminal trial?

Building upon the concepts introduced in the literature review and theory chapters, this chapter opens with an overview of the paradigm, ontology, and epistemology informing this study. Within this section, I provide a brief overview of the debates pertaining to ontology and epistemology within social constructionist schools of thoughts and locate my approach relative to these discussions. Next, I describe the data sources relied on for the analysis and outline the

details of the thematic content analysis used within this project. To conclude the chapter, I provide a brief discussion of the evaluative criteria adopted and the way in which this informs my methodological and analytical choices as well as an examination of the study's limitations.

Methodological Considerations

Paradigm, epistemology, and ontology

The paradigm represents a fundamental aspect of the research project that underpins every step of the decision making process of any given research. Guba and Lincoln (2003) define the research paradigm as a way of viewing the world and understanding how the world is perceived. The paradigm is based on the researcher's epistemological, ontological, and methodological assumptions (Guba & Lincoln, 1994). This outlook informs the researcher of what is important, legitimate, and reasonable in relation to the research inquiry (Carter & Little, 2007). Furthermore, it provides the basis of the researcher's epistemological framework and a reference for their methodological decisions (Carter & Little, 2007; McCotter, 2001). As Blaikie (2009) points out, the centrality of the paradigm to the research project requires that the researcher acknowledge the paradigm, ontology, and the epistemological assumptions at play in the project.

In line with the social constructionist theoretical framework guiding this thesis, this research study adopts a constructivist paradigm. Unlike the traditional scientific paradigm that claims the scientist can reveal the objective nature of phenomenal under study without bias or personal involvement, under the constructivist paradigm I maintain that the construction of knowledge is dependent on historical, situational, and temporal contexts (Best, 1995; Burr, 2003). Constructivism itself is a broad term that relates to several different branches such as radical, strict, and contextual constructionism that differ in their particular epistemology and

ontology (Riegler, 2012). For the purposes of this thesis, I adopt a general constructivist approach that refers to the idea that experienced reality is actively constructed (Riegler, 2012). Under this paradigm natural phenomena are not seen as knowledge that is independent of discursive and social practices (Best, 1995). Instead, all knowledge and phenomena are perceived as interpretations, as social constructions; thus, the role of the researcher is that of an interpretivist researcher (Blaikie, 2009). As an interpretivist researcher I give meaning to the data through my interpretation (Manning, 1997). As such, I acknowledge my personal role in constructing reality when analyzing and presenting the findings of the data.

To analyze the data, I adopt a relativist epistemology and critical realist ontology. In this instance, epistemological relativism means that the knowledge we have about the world and our ideas about it are socially constructed, therefore different viewpoints can only be assessed in relation to each other and not with respect to some ultimate standard or truth (Burr, 2003). Relativism holds that the meaning of knowledge cannot be objective, but it is instead based on interpretation and decisions of the researcher who constructs a version of reality through their decisions (Manning, 1997). Meaning, therefore, is socially constructed and socially dependent, as there are no standards by which one can access a universal truth. In contrast to ideas of objective truth, agreements about truth and knowledge are negotiated at the community level (Denzin & Lincoln, 2005). For example, in the context of my data, the application of this epistemology entails that I seek to understand the construction of ideas of truth surrounding video evidence in the written judgements of the courts. This can be contrasted with a positivist epistemology which might suggest examining the accuracy or inaccuracy of truth claims with relation to video.

Ontologically, I adopt a critical realist stance because I believe that although it is impossible to access reality ‘out there’ in a way that is free of social interpretations, I orient myself with the belief that there is an external world that exists independently of being thought of or perceived – a reality exists independent of our perception of it (Burr, 2003). Searle (1995) calls this “ontological objectivity”, meaning that facts themselves exist independent of their perception by some sentient being (p. 8). For this research project, I adopt the viewpoint that our sensations and perceptions of the world do give us some kind of indications of the status of reality “out there” (Burr, 2003), though this is moderated by our particular social understandings. It is individuals engaged in discourse who shape these social understandings, as people create artifacts which help transform our reality (Burr, 2003). While I believe that accessing that reality is limited, I do not deny the existence of a material reality, but do question the possibility that we can directly know it ‘as is’ (Burr, 2003). Consequently, social constructionists adopting critical realist ontology engage in ontological gerrymandering, meaning that they treat some phenomena as socially constructed and others as not in order to problematize the phenomena under investigation (Woolgar & Pawluch, 2004).²¹ This “boundary work” is necessary because researchers cannot escape making assumptions about the world (Woolgar & Pawluch, 2004, p. 47). The best that researchers can do is to acknowledge their own subjectivity and justify the assumptions they are making throughout the research process. In the next section, I discuss the steps I have taken to stay reflexive.

²¹ Social constructionist researchers make distinctions between strict and contextual constructionism. Strict constructionists believe that researchers should avoid making assumptions about the status of objective reality and instead focus only on the perspectives of the actors (Best, 1995). Contextual constructionists, on the other hand, make ontological assumptions about the world in order to contextualize social problems in their environment (Best, 1995).

Intersubjectivity and reflexivity

As noted by Unger (2005), research within the social sciences can never be neutral, but instead is always dependent on historical and situational contexts that require the researchers' interpretation. Intersubjectivity "is a concept that denotes the act of according meaning between two or more subjects and establishing the objectivity of a claim made in research" (Unger, 2005, p. 3). According to Unger (2005), meaning is "inherently social", context-specific and "constituted by the social languages that actors use in a given situation" (p. 3). The act of conceptualizing data is dependent on interpretation, personal understandings, and the researcher's previous experiences (Unger, 2005). As an interpretivist researcher, I interpret the data within a particular construction of reality (Blaikie, 2009), bringing with me specific "pre-understandings", prejudices, and biases (Unger, 2005, p. 5). Hence, the subjectivity of the researcher must be acknowledged as any meaning interpreted by the researcher is ultimately contestable (Unger, 2005). While efforts have been made to ensure the trustworthiness and authenticity of the results as discussed in the following sections, the subjective interpretations and decisions I have made throughout the research project have shaped the results and conclusions that have been produced (Unger, 2005).

According to Lynch (2008), social constructionism requires attention to context and intersubjectivity, as well as incorporation of reflexivity into the research. In order to be reflexive, the researcher must acknowledge their own intrinsic involvement in the research process and the part that this plays in the research produced (Burr, 2003). Through reflexivity, the researcher acknowledges their subjectivity (Onwuegbuzie & Leech, 2005) and how they affect the research and participate in the negotiation of meaning (Unger, 2005). All researchers bring with them a pre-understanding to all interpretations and conceptualizations of the data (Unger, 2005). As a

social constructionist researcher it is important to openly acknowledge that my cultural, social, professional, biographical, and personal characteristics influence what I perceive, interpret, and conclude. As an individual with years of experience as both a student and a researcher in the criminological field, I approach the data with an experientially informed standpoint that necessarily impacts the way in which I approach and conceptualize the data (Onwuegbuzie & Leech, 2005). In particular, my previous experience engaging with the legal literature and criminological analyses of the legal system has informed my understanding of legal issues in a way consistent with the views typically presented within this literature. A brief example of this is in my understanding of the relativist nature of truth. Though I am actively seeking to understand the social construction of meaning around video evidence, as a researcher I often found myself adopting the language and ideas presented within the legal literature, specifically relating to ideas of a single objective Truth. To counter this and remain consistent with my theoretical approach I completed multiple critical reviews of my thesis drafts and analytical notes throughout the research process seeking to identify the particular constructions and discourses I was adopting as a researcher and how these might influence my understanding and presentation of the data.

According to Burr (2003), to be reflexive, one must include some commentary on the researcher's own values and background. In this chapter and throughout this thesis I have outlined my theoretical background as a social constructionist and assumptions about the nature of research (epistemology) and the nature of truth (ontology). In the introductory chapter and thereafter I have made clear the research interests and my personal agenda. Lastly, I want to acknowledge that throughout the research process I attempted to minimize biases by immersing myself in the literature, reading of the data, and by continuously reflecting on my position as a

researcher and my understandings of the perceived realities of the world, the criminal justice system, and the judiciary within it.

Methodology

Data sources

Some social constructionists maintain that knowledge is not solely constructed by individuals; instead people's ideas are given meaning by their social context (Best, 1995). In this view, truth, as a form of social knowledge, can be constructed and transferred through a process of communication that operates as a link between individuals and social groups. For this study I chose to analyze the creation of social knowledge reflected and constructed through legal communications in the form of written judicial decisions. Specifically, the data for this analysis consists of publicly available Canadian criminal court decisions involving video evidence. I selected these decisions through purposive sampling as I believed written decisions to be an excellent opportunity to gain some insight into "law-in-action" beyond the typical "law on the books" while still maintaining the ease of access and cost-efficiency of archival research.

Blaikie (2009) points out that in order to acknowledge the barriers of transferability, the researchers must explicitly identify what data will and will not be included in the research sample. In the interests of maintaining focus on the current state of video evidence in the courts, particularly given the dramatic technological and social developments regarding video in recent decades (see Ericson & Haggerty, 2006; Finn, 2012; Koskela, 2003; Pecora, 2002; Wood, 2009), the cases I selected were limited to those heard within the previous ten years (encompassing the years 2005 to 2015 inclusive).²² Furthermore, I limited the selection of cases to those that expressly discuss and analyze video evidence. More specifically, I selected cases that contained

²² This decision to limit the window of consideration to ten years was not motivated by any specific theoretical or methodological considerations other than the desire to remain relatively current while creating a large pool of potential cases to draw from.

at least one instance of what Sibley terms *evidence vérité* or “films that purport to be unmediated and unselfconscious film footage of actual events” (2004, p. 501). This criterion was established to exclude other instances where video may be present in the courtroom, such as expert reconstructions, day-in-the-life videos, or court appearances through live video link, as the processes used to evaluate these forms of video evidence may differ.

To collect my data, I used a series of keyword searches of the Lexis Nexis Quicklaw legal database. I opted for data collection through the Quicklaw database due to its comprehensive coverage of Canadian court records, its powerful search features, and its ability to easily export results of the searches to other file formats to facilitate data management²³. Initial searches were completed using the list of keywords in provided Table 1 below.

Table 1. Keyword Search Terms and Total Results

Keywords ¹	Results
Recorded AND Video	3,143
Camera AND Video	2,809
Surveillance AND Video	2,086
Cell phone AND Video	1,824
Nikolovski	262
Bystander AND Video	245
Car /15 Camera ²	223
Cellular phone AND Video	195

²³ During completion of the data collection through Quicklaw, some of the keyword searches were repeated on the Canlii legal database to determine the extent of the cross coverage between Quicklaw and Canlii. This process was inhibited by the inability to export cases from Canlii *en masse* necessitating review on a case by case basis. Analysis of approximately 200 cases revealed that there was a considerable degree of overlap between the coverage of the Canlii and Quicklaw databases. Searches of Quicklaw returned results for a significant number of cases that were unavailable through Canlii though the reverse was not true with only a handful of cases being available exclusively through Canlii. Given the difficulty in exporting cases from the Canlii search results and the relative paucity of original results, subsequent searches were performed through the Quicklaw database only.

Bystander AND Recorded	195
Mobile phone AND Video	49
Dash cam! ³	3
Total	11,034

1. In addition to the following keywords, each search also contained the term “case-name (r. v.) AND date (>2004)” to limit the results to criminal cases and those occurring in the last ten years.

2. “car /15 camera” was used to obtain results where the word “car” appeared within 15 words (approximately one sentence) of the word “camera”.

3. The exclamation point allows for searches of all possible words with the truncated “cam” prefix such as “dash cam”, “dash cams”, and “dash camera”.

Expansion of the keyword searches was halted after the completion of the above 11 keyword combinations as additional searches were not returning a sufficient number of unique results. After completing each search, I exported the results into an Excel spreadsheet and removed any duplicate cases. The removal of duplicate cases yielded a final case list of 5,754 unique cases.²⁴ After numbering the cases, I ordered individual cases for selection and sequential review using the random number generator feature of Excel. Due to the general nature of the search terms employed, over half of the cases reviewed (72 out of 124) failed to meet all of the inclusion criteria. Most commonly this was due to a lack of analysis of *evidence vérité*, for example, cases mentioning video only in relation to the possession of videotapes in cases involving child pornography or only mentioning video in the context of video games. There were also a number of cases excluded that mentioned the existence or even lack of existence of a video without providing any further analysis, and a few civil cases excluded that were beyond the scope of this study given my focus on exclusively criminal cases.

Each case that met all of the inclusion criteria was individually reviewed and coded before randomly selecting the next case for review. This process was repeated until no additional

²⁴ The case list derived from this search is by no means a complete record of all cases involving video evidence in Canada but rather an attempt to balance between targeted searching for cases involving *evidence vérité* and broad searches to ensure maximal coverage.

concepts were arising from the data and the concepts present were well-defined. At this point it was determined that theoretical saturation had been reached and the initial review completed (Sandelowski, 2008). Following completion of this initial stage, a total of 52 cases were included in the final sample. These include six trial decisions; 12 sentencing reports; 15 appeals; and 19 motions pertaining to the introduction of evidence, requests for stay of proceedings, and severance applications. Nearly half of the cases reviewed were heard in the province of Ontario (n=25), and over one quarter of the remaining cases heard in British Columbia (n=14). Though not excluded from the sampling structure, no cases from New Brunswick, North West Territories, Prince Edward Island, or Nunavut were present within the final collection of cases. The level of court ranged from provincial courts (n=29) to the Supreme Court of Canada (n=1). For a detailed breakdown of the case list by province and type of court, please refer to Table 2.

Table 2: Number of Cases by Province and Level of Court

	Total	Provincial	Superior	Appeal
Alberta	4	4		2
British Columbia	14	7	5	1
Ontario	25	12	12	
Nova Scotia	2	1	1	
Manitoba	1	1		
Saskatchewan	2	1	1	
Newfoundland	1	1		
Quebec	1	1		
Yukon	1	1		
Supreme Court	1			
Total	52	29	19	3

Method: Qualitative Content Analysis

This study relies on a qualitative content analysis to aid in the interpretation and organization of the data. Content analysis as a technique is frequently used to examine the symbolic content of communication (Berg, 2001). I chose this method to analyze my data due to its ability to reduce large amounts of textual data to a more manageable form, and its ability to assist the researcher in deriving meaning from that data (Berg, 2001; Julien, 2008).

The purpose of this thesis is to explore how judges construct the meaning of video evidence within criminal trials. Since my purpose was to explore and discover, rather than testing a theory, I opted to code my data in an inductive manner (Morse, 2008). According to Hsieh and Shannon (2005), inductive content analysis is used by researchers whose aim is to describe a phenomenon by avoiding using preconceived categories and instead allowing the categories to flow from the data. This process of inductive analysis is a process of coding the data without trying to fit it into a pre-existing coding frame (Braun & Clarke, 2006). Ideally, with a semantic approach to coding, the themes are identified with the surface meanings of the data and then, once organized, progressed from description and summary to interpretation, where the data is conceptualized within a theoretical framework to determine the significance of the patterns and their broader meanings and implications (Braun & Clarke, 2006).

The first step in thematic content analysis is to reduce the data into manageable and meaningful text segments (Denzin & Lincoln, 1998). Following the construction of the case list on Excel, I immersed myself in the data and began identifying codes or concepts that seemed relevant and meaningful to my research question, and guided by the recurrence of the issues in the text. While repeated readings of the data were used to ensure consistency in the application of the codes, this process of categorizing the codes was entirely subjective. I began coding

individual cases using open coding to create an initial coding frame (Berg, 2007). In the process of open coding, the concepts emerge from the raw data and are later grouped into conceptual categories (Berg, 2007). After categorizing all the cases into Excel, I reviewed the collected data and thematically divided the content into sub-themes. It is important to acknowledge here that the process of qualitative data analysis is non-linear; hence, the coding process described below was more fluid rather than linear with many of the codes and conceptual categories developing over time and being revisited as understandings of the data changed.

Although my aim was not to analyze based on prior research and understandings, the analysis of the data was influenced by my pre-existing knowledge of how the issue of judicial interpretations of video evidence in courts is framed in the academic literature. Acknowledging this, while I attempted to extract the themes inductively from the data, I recognize their interpretation is affected by what I have read in the literature review as well as my experiences as a researcher in criminology. Hence, despite my intention to keep the coding inductive, the final coding applied was a mixed inductive/deductive coding with many of the categories identified corresponding to key themes within the literature. In a hybrid approach to analyzing the data such as this, the information is shaped by the researcher's knowledge and understanding of the social phenomena however it is not analyzed deductively from a specific theory or prior research (Boyatzis, 1998). This is an entirely subjective process and thus the criteria used for the application of each code are difficult to outline fully. To address this, I follow the suggestion of Bryman, Bell, and Teevan (2012) and make frequent use of quotes from the data as a means of illustrating the application of the codes.

As a result of the mixed inductive/deductive approach, the themes derived from the data often coincide with the themes present in the literature review, and many of the themes I

considered significant were present in both the data and the literature review. Social constructionists recognize there are no objective means of developing themes (Best, 1995). While extracting themes is a subjective process, the significance of a particular theme was determined by analyzing how often it appears and how many judges discuss it in their decisions. This was not a quantitative endeavor based on calculating the exact frequency of references, although those codes that appeared more frequently did weigh more heavily in the subsequent analyses. This is not to suggest that unique occurrences were not considered. Unique or infrequent occurrences were included in the coding process when these appeared to show a meaningful relationship with the remainder of the data, particularly when serving as counterpoints to expand the understanding of existing patterns. Throughout this process, I used the constant comparison method identified by Ryan and Bernard (2003) in order to identify and confirm the themes and sub-themes. As a result of this mixed inductive/deductive process, I arrived at the following list of initial codes:

- Trust in video
- Video versus witness testimony
- Testimony consistent with video
- Limits of witness
- Conceding to video
- Evaluation of video
- Evaluation of testimony
- Silent Witness Theory
- Lack of video suspect
- Witness testimony
- Competing testimony

In addition to these codes, a final “catch-all” category was included for relevant passages that failed to fit within the previous codes but were retained for future code development.

Open coding was completed by categorizing data at the level of the reference. For the purpose of this study, a reference may be constituted by as little as a single sentence or as much as a paragraph. For example, the statement “the pictures shown in the video entered into evidence were very clear. It was shot in colour, in good light and had a number of different camera angles” (*R. v. Wood*, 2013) was coded as a single reference under the category of “Evaluation of video”. In other instances, however, a single reference might encompass a paragraph of 100-150 words or more. I completed the coding using direct quotes and retaining the judges’ comments in their own words as much as possible to preserve the terminology used by the authors.

Particularly during the initial coding, attention was paid to ensuring statements were not removed entirely from their context. This often resulted in a liberal approach towards the inclusion of statements surrounding the reference of interest, many of which were subsequently pared down in later stages of the analysis. Additionally, some references might be coded to multiple categories, for instance the statement “given the officers' lack of notes on material particulars and the variance in their evidence with what was observed on the DVD, the officers were not credible witnesses” (*R. v. Arkinstall*, 2011) was coded both as “Evaluation of testimony” and as “Video versus witness testimony”.

Once all the text was coded, themes were abstracted from the coded text segments. To develop each theme, I re-read the text segments within the context of the codes under which they were classified, which allowed me to reframe the reading of the text and identify underlying patterns (Denzin & Lincoln, 1998). Throughout the course of the analysis, this initial list of codes was revised and restructured to facilitate the further analysis of the data and better reflect the court’s approach to video evidence. Following the initial coding, the second phase of coding

focused on creating higher level analytical categories guided by the initial coding list. This included creating the following nested structure of codes and sub-codes.

Table 3. Coding Structure

-
- Constructions of trust in video
 - Characterizations of video
 - Hierarchies of evidence and truth
 - Judicial preference for video
 - Witness concessions to video
 - Strategies of countering video
 - The Regulation of video evidence
 - Legal criteria
 - Relevance (probative value)
 - Accuracy
 - Fairness and lack of intent to mislead
 - Witness verification of video
 - Prejudicial impact vs. probative value
 - Judicial response to issues with video evidence
 - Faith in visuality
-

Data collected during the first phase of coding was retained and referenced periodically through all later phases of coding, although the more focused coding structure adopted for the second phase generally proved more useful for informing the analysis. Because of the analytical focus in the second phase of coding, some of the codes were selected more for their conceptual importance than the frequency of their occurrence within the data. References to prejudicial impact, lack of intent to mislead, and strategies for countering video evidence were all relatively uncommon in the data set with some containing only a few references. These categories remained analytically useful, however, and were thus retained as distinct coding categories.

Methodological Limitations

While content analysis is an appropriate method to use with social constructionist research, like any other method, there are strengths and weaknesses associated with it. Content

analysis is a useful method to use in social scientific research as it is relatively efficient and inexpensive to build a representative sample. Since it is an unobtrusive and non-reactive method, it does not influence the data being studied (Bryman, Bell, & Teevan, 2012). The judges would have produced the communications of decisions regardless of whether a researcher would analyze them; the judges have their own agenda when writing the communications, they are not altering their decisions *because* a researcher is analyzing their message. Furthermore, since the phenomena I am studying occurred in the past, using pre-existing data is useful as it offsets the inaccuracy of memory (Bryman, Bell, & Teevan, 2012). It must also be recognized that judicial decisions are formulated within a relatively rigid set of conventions. In constructing their decisions, judges employ and reference legal language, conceptualizations, and other conventions that may shape the content and form of their decisions. It is important to stress that the legal decisions analyzed in this review must be approached as social artifacts produced by a particular set of social processes and interaction among actors within a given context. Though prepared by judges within the legal system, it is inappropriate to assume that these decisions are reflective of the personal thoughts and beliefs of the judges. Rather these are analyzed as a product of the interaction of those individuals' views with the social and in this case legal context in which they operate.

Using content analysis to analyze the data also has some limitations. For example, using the communications of judges as data only provides a snapshot of their understanding at a single point in time. This method is also better used for describing rather than explaining behaviour. Importantly, I am analyzing judicial decisions which limit the information that becomes public discourse; the data obtained and analyzed in this thesis is socially constructed through the decisions of the various judges, therefore the information obtained from the data is partial and

incomplete if being considered as evidence of the deliberations of judges within the courtroom. Instead, this data must be analyzed in its context as a particular form of social communication. Content analysis has also been criticized for not being objective because the researcher must make choices about how to interpret the data. This last criticism, however, is not a limitation in this qualitative, social constructionist study, but is instead the foundation of the research.

Evaluative Criteria: Trustworthiness

Given the constructivist paradigm adopted in this study, common evaluative criteria based on measures of reliability and validity are poorly suited to the structure of the project (Carter & Little, 2007). Instead, I rely on qualitatively oriented criteria such as credibility, transferability, dependability, and confirmability (Bryman, Bell, & Teevan, 2012; Guba & Lincoln, 1994). Credibility in qualitative studies is conceptually similar to internal validity (Bryman, Bell & Teevan, 2012). The credibility of this research project was strengthened by the continual engagement with and re-reading of the data, the coding schemes, and the interpretations in order to identify potential errors and to revise and re-evaluate my understandings and findings. Furthermore, through engagement with the data I attempted to ensure the appropriateness of the codes and interpretations was applied. Furthermore, I have attempted to remain reflexive and forthright in the decisions and considerations I have made so these can be evaluated when considering the results of my research. As a social constructionist, I accept that knowledge is never certain, but the best I could do is seek means of judging claims to knowledge and truth in terms of their likely truth in the world as I perceive it. To show this, I used the most convincing evidence I could find within the data. Transferability is used in qualitative studies to mean the same thing as external validity in quantitative studies, and dependability the same thing as reliability (Bryman, Bell, & Teevan, 2012). Transferability and

dependability were strengthened by ensuring extensive record keeping of all phases of the research and through the provision of the reasoning behind the methodological and analytical decisions made (Bryman, Bell, & Teevan, 2012). Nonetheless, Ruddin (2006) explains transferability is ultimately determined by the reader. Lastly, confirmability is harder to ensure, however it can be established through the good faith efforts to provide as accurate a dataset as possible (Ruddin, 2006). Regardless of its consistency with my pre-existing knowledge or assumptions while ensuring I remain self-reflexive of the limits of this approach and the ways in which these pre-understandings can influence my perception of the data.

Chapter Summary

This chapter presented the methodological framework of this thesis. The chapter began with an outline of the methodological considerations, discussed the impacts of intersubjectivity and reflexivity, and presented the methods, the data sample, and the limitations of the research study. With this methodology in place, I now turn to a presentation of the results of the content analysis.

Chapter 5 – Results

In this chapter, I present the findings of the research study. To maintain consistency with the content analysis, I present the results of the content analysis using the analytical categories and sub-categories created during the second phase of coding as a rough structure for the results discussed. The categorization of the data into themes and the particular conceptual categories discussed in this chapter represents an important component of the analytic process. This chapter focuses on the presentation of that particular stage of the analytic process without engaging in the more in-depth analyses and contextual discussions that will follow in Chapter Six.

My aim in this chapter is to present the results derived from the data set to address the following research question:

How do Canadian criminal court judges construct the meaning of video evidence in the context of a criminal trial?

As will be discussed throughout this chapter, two of the most prominent patterns that continually emerged at each area of analysis were the substantial trust that judges ascribe to video evidence throughout their written decisions and the limited trust they place in testimonial evidence relative to video.

The Construction of Video Evidence: Trust, Reliability, Objectivity

Throughout the sample, the communications of the judges point to the substantial trust they ascribe to video evidence. This is evident in all aspects of the judges' considerations. Here I focus on three key areas of the judicial decisions that illustrate this trust. First, I examine the terminology used by judges to discuss video evidence in an effort to identify the way in which the courts interpret this form of evidence. Second, I address the apparent position of video within the hierarchy of evidence as described in the legal decisions of the courts, particularly relative to

witness testimony. Third, I discuss the acknowledgement of this hierarchy by the other parties involved in the trial process, specifically with regard to witnesses faced with competing evidence in the form of video.

Constructing video through language

In reviewing judicial decisions involving video evidence, the language used when referring to the video submissions before the court heavily emphasizes the trust that judges place in this form of evidence. The characterizations of video provided in these judicial decisions depict video as a reliable, trustworthy, objective, and conclusive form of evidence. Throughout the sample, judges refer to “video images, which do not lie” (*R. v. Serafin*, 2013), video as “capturing” events as they occurred (*R. v. Barrie (City) Police Service*, 2012; *R. v. Bumesi*, 2014; *R. v. Burnett*, 2015; *R. v. St. Cloud*, 2015), or “showing” (*R. v. Kassa*, 2013; *R. v. Singh*, 2010; *R. v. St. Cloud*, 2015), “plainly showing” (*R. v. Canada [Royal Canadian Mounted Police]*, 2015) or even “proving” (*R. v. Neigum*, 2014) “what happened” (*R. v. Mcghie*, 2014, *R. v. Canada [Royal Canadian Mounted Police]*, 2015, *R. v. Neigum*, 2014) often in comparison to the “alleged” accounts presented in witness testimony (*R. v. St. Cloud*, 2015). Similarly, judges report the video evidence presented as “leaving no doubt” (*R. v. Serafin*, 2013; *R. v. St. Cloud*, 2015), being “beyond dispute” (*R. v. Mcghie*, 2014), and providing “insurmountable” evidence (*R. v. Bumesi*, 2014). This terminology suggests a high degree of trust in video, often bordering on *per se* proof. Such characterizations which typify the judge’s characterizations of video are rarely applied to testimonial evidence within the decisions reviewed, at least when such testimonial evidence is considered in isolation from supporting video evidence.²⁵

²⁵ This finding with regard to the lack of trust in testimonial evidence, while supported by the data within this study, should be interpreted with caution due to the specific selection of cases including video evidence in this study. It is possible more concrete language may be used towards testimonial evidence in other cases, particularly those where video evidence is not present and the court must rely solely on testimonial evidence.

Despite the strength of this finding, there are a number of decisions within the sample that contain instances of judges determining the video evidence was insufficient to support a claim, particularly in cases featuring poor video quality. One such example is the case of *R. v. D.S.* (2009) where the trial judge commented “the video recording filed at trial was of exceptionally poor quality and I caution myself on the dangers of relying on that evidence without other confirmatory evidence. The video recording, alone and without more, is accorded very little weight by this Court”. Similarly, in *R. v. Campbell* (2014), the trial judge refused to identify Mr. Campbell as the suspect captured on camera transferring narcotics to another prisoner in a provincial jail. Here Justice Chapin wrote:

As I indicated earlier, I found that the stills and the frames of the videotape were not of sufficient quality to allow me to identify Mr. Campbell as the individual shown in cell 2-27 of the security footage...Although I am suspicious, in the absence of any other evidence of identification I cannot say that I am satisfied beyond a reasonable doubt that Mr. Campbell is the person in the video and he is acquitted of this charge. (*R. v. Campbell*, 2014)

These cases illustrate that while there is a general tendency towards judges placing higher trust on video records, this trust is not without its limits. However, as will be discussed further in the analysis chapter, in those cases where judges proclaim some doubt despite the video evidence, it is typically the judge’s own perception of this video that produces this doubt rather than some other form of evidence being perceived as more reliable than the video.

The *Campbell* (2014) case illustrates an important limitation of the counter-evidence to the video-as-proof hypothesis within this study, namely that each time a video is deemed insufficient for determining a fact at issue it is being assessed against the standard of beyond a

reasonable doubt. In the sample analyzed, I found there is generally little discussion of how short of this standard the video evidence falls. It is worth noting, however, that in no cases within the sample does a judge accept evidence that contradicts what appears to be present on the video, no matter how poor the video evidence may be or how strong the testimonial evidence contradicting the video; at most, the judge reserves judgment and accepts that there exists a reasonable doubt that the video depiction is incorrect.²⁶ This speaks to the considerable trust judges within this sample seem to place in video as a medium. Instances of judges being left with a reasonable doubt are not uncommon within the sample. It is telling, however, that these instances are vastly outnumbered by cases where video is used to undermine witness testimony and “prove” the lack of accuracy in witness accounts.

Hierarchies of evidence and truth

The substantial trust judges seem to place in video is often reflected in the apparent elevation of video above other forms of evidence, particularly witness testimony, within the decisions contained in the sample. Most of the evidence of this hierarchy stems from the analysis of judges’ apparent confidence in one particular piece of evidence over another at trial, although, in some cases, judges explicitly refer to the hierarchy of evidence used in their deliberations. When referencing this hierarchy, judges typically expounded upon the strengths of video evidence while generally referring to only the relative frailties of eye witness testimony. In my sample, there was only one exception to be found where the strength of eye witness testimony was mentioned. In *R. v. Barrie (City) Police Service* (2012) the judge did acknowledge the

²⁶ Again, extrapolation of this result beyond the data included in this study should proceed with caution. Given the focus in this study on exclusively criminal cases, the standard of a reasonable doubt is required. Civil court decisions or other instances with a reduced standard such as a balance of probabilities may provide a better measure of the balance between video and testimonial evidence.

apparent reliability of a nurse who provided testimony, particularly referencing the detail and thoroughness of her testimony and her written notes.²⁷

When discussing judges' evaluation of the merits of a Crown's case against an accused, Justice Wagner, writing for the Supreme Court, wrote "physical evidence [such as video] may be more reliable than a mere statement made by a witness, and circumstantial evidence may be less reliable than direct evidence" (*R. v. St-Cloud*, 2015).²⁸ Similarly, when evaluating the evidence against St. Cloud in particular, Justice Wagner noted "the prosecution's case appears to be strong, since the incident was videotaped and there is eyewitness testimony. Real evidence such as a videotape is more reliable than circumstantial or testimonial evidence."²⁹ These results reflect a pronounced pattern of videotape being described as higher in the hierarchy of evidence than other forms of testimony.

Throughout judges' discussions within the sample, video appears to be the favoured form of evidence even among other forms of direct evidence. In the case of *R. v. Lindsay* (2005) the trial judge repeatedly referred to the primacy of video over even audio evidence, for example, stating:

All of the communications were audiotaped. While this is less effective than videotape as a means of assessing the declarant's demeanour, it provides a complete record of the conversations, and allows an assessment of the manner in which they unfolded. It is some compensation for the fact that the trier of fact was not present when the statements were made by Miller.

²⁷ While the strength of the witness's testimony was discussed in this case, the trial judge did not make any direct comparisons to video evidence so the relative value of testimonial to video evidence is unclear in this case.

²⁸ Paciocco & Steusser (2010) define direct evidence as "evidence, which if believed, resolves a matter in issue". It establishes a material fact without any inferences needing to be drawn (p. 30-31).

²⁹ Real evidence is defined as "objects produced for inspection at trial" or "tangible evidence directly involved in the underlying events of the case" (Wild, 2006)

The judge further emphasized these comments by stating:

The fact that the December, February and March meetings were videotaped as well as audiotaped compensates for the absence of the declarants. It provides a complete record of the words spoken, and permits the trier of fact some opportunity to observe demeanour at the time. (*R. v. Lindsay*, 2005)

This example highlights how judges describe video more favourably than they do other forms of evidence. Particularly in cases involving the consideration of out of court statements such as *Lindsay*, judges express a clear appreciation for video as a form of evidence. This appreciation for video evidence appears to be attributed to the ability to see into the event as it was unfolding. Similar reasoning is present in the case of *R. v. R. F.* (2009) involving an out of court statement by a child unable to testify in court. Here the judge commented:

This is a case where, in my view, it is necessary to see the videotape of the interview to determine the ultimate reliability of T.F. (1)'s declarations. She did not testify at trial because she was not competent under s. 16 of the Canada Evidence Act, R.S.C. 1985, c. C-5, as amended. A review of the transcript is not a reliable way of determining this important issue. The voice tone and inflection, the pace of the remarks and the body language of each, and all, of the parties to the interview at the material times can only be fully appreciated by considering the videotape itself. (*R. v. R. F.*, 2009)

The primacy of video evidence appears to be particularly clear in cases comparing this form of evidence to eye witness testimony. In the case of *R. v. Bassi* (2013), the trial judge referenced the history of such comments in the case law noting: “there are innumerable appellant authorities across Canada which discuss...the inherent fragilities of identification evidence arising from the psychological fact of the unreliability of human observation and recollection.”

Similarly, when evaluating the testimony of two eye witnesses to a robbery, the trial judge in the case of *R. v. Serafin* (2013) wrote:

Analysis of the testimony of Ms. Crépin and of Ms. Kanté reveals certain deficiencies in the visual identification evidence. There are differences in the description they gave to the police and those given to the Court... there are even differences with the video images, which do not lie. These discrepancies in the visual identification show the inherent fragility and danger in finding an accused guilty solely on the basis of this type of evidence. (*R. v. Serafin*, 2013)

The concerns expressed in *Serafin* are substantially similar to that expressed in the case of *R. v. Atkinson* (2007). This case involved the identification of the suspect Atkinson from surveillance videos depicting an attempted fraud at a drivers' license facility in British Columbia. Here the trial judge repeatedly acknowledged the frailties associated with judges making in-court identifications based on video evidence. Despite this concern however, the judge in this trial emphasized the strength of the video evidence in this case and his certainty in identifying the accused from the video, particularly given supporting identifications provided by two eye witnesses.³⁰

Judges within my sample discuss video evidence as though it holds higher status in the hierarchy of evidence. This apparent elevated position, especially over the spoken word, is clear not only in comments regarding generalities, but also in specific cases where judges were faced with competing accounts from video and witness sources, as discussed below.

³⁰ It is worth noting that in a second similar case within the sample that required the judge to identify the accused from surveillance footage of a break-in absent of any additional witnesses, the trial judge in that instance made no mention of the fragilities of such identifications (*R. v. Samuels*, 2014). As such, it is difficult to determine how prevalent the caution expressed by the trial judge in *Atkinson* is.

Evaluating Competing Narratives: Video Contradicting Testimony

Throughout the decisions in this sample, there are countless examples of contradicting video and testimonial evidence being presented at trial. The pronounced preference for accepting the version of events apparently depicted in the video provides ample illustration of the primacy of video over testimonial evidence. In many cases, this appears to be a simple determination. In the case of *R. v. Salmon* (2012), for example, the multiple accused claim they were the victims of a severe beating by police during their arrest and initial detention. In evaluating their claim, the judge comments that:

The accused's claim they were severely beaten by the police was implausible given the lack of injuries and their demeanour in the videos...They allege repeated violent and terrifying beatings at the hands of the officers, yet on the videos, which I have examined closely, they display no signs of physical pain or discomfort. (*R. v. Salmon*, 2012)

Similarly, in *R. v. Wood* (2013), the judge evaluating the defendant Wood's testimony claiming that he was not present when the alleged assaults occurred, reasoned:

The first aspect of his statement that didn't make any sense to me was the allegation that Mr. Wood first met S.M. in his mother's apartment, and she was there with three other men he didn't know. He suggested that she had been let in to the apartment by these unknown men and his statement suggests she was there before he got there the first time during the night in question. This is clearly contrary to the video evidence that shows Mr. Wood going up to the apartment with S.M. at around 1:17 am (*R. v. Wood*, 2013)³¹

The determinations described in the previous examples are perhaps unsurprising given the perceived straightforward nature of the contradictions present in the witnesses' testimony. I

³¹ See also *R. v. Barrie* (City) Police Service, 2012 where (among other claims later overruled by video evidence) the accused claimed that he was pushed down violently by the officers completing his booking, a claim promptly rejected by the judge upon viewing surveillance video of the booking area.

also found ample examples of judges' interpretation of the events depicted in video being selected above testimony of witnesses in far less clear-cut cases. These include many instances of judges determining the presence or absence of impairment due to substance abuse based on the appearance of an individual depicted in a video record, regardless of the testimony of the individual describing their state of mind. In the case of *R. v. Bumesi* (2014), the accused reported being severely impaired by his consumption of alcohol and marijuana at the time he committed an assault. In this case, both the trial judge and an expert witness from the Center for Addiction and Mental Health used their evaluation of a video of the assault to rule against this testimony with the judge commenting "in spite of Mr. Bumesi's claim that he was significantly impaired by alcohol and cannabis, the videotape suggests otherwise". A similar finding is present in the case of *R. v. Makris* (2013) which involved an individual who participated in the Vancouver Stanley Cup riot of 2011. Here the defense offered the intoxication of the accused as an explanation for his actions. Following review of the video record of the accused's participation in the riot, the judge disregarded this claim commenting:

I must conclude...that Makris' state of intoxication from alcohol was not what Makris wants to believe. In the very considerable video footage filed as exhibits, Makris can be seen walking, running, jostling and taking hold of others, shooting his own video footage, and kicking and throwing items, among several other physical acts depicted. In none of these images does he appear to have any physical difficulty or the "usual signs of impairment" such as swaying, stumbling, or erratic walking...It must be concluded there was little or no indication of alcohol impairment. (*R. v. Makris*, 2013)

The adoption of a judge's perception of a video over the testimony of a witness is not limited to cases involving witnesses who are described as lacking credibility. Also at issue in the

Makris case was the defendant's involvement in the assault of a Good Samaritan who attempted to limit the destruction of property during the riot and was subsequently set upon by the rioters. Here, not only did the defendant deny attacking the victim and testify that he was attempting to help by protecting him from the other rioters, but the victim himself testified that he believed Makris was trying to protect him from the onslaught. In the final decision, the judge stated that they were rejecting both these individuals' testimonies on the basis of their own interpretation of a bystander video of the assault (*R. v. Makris*, 2013).

Throughout my sample, instances where video must only raise a reasonable doubt regarding a witness's testimony rather than overcome the doubt raised by testimony are even more common. In the case of *R. v. Bassi* (2013), no fewer than six individuals identified the defendants from surveillance video of the assault that occurred. Two of these witnesses were the victims of the assault, two were eye witnesses present at the scene, and two were coworkers of the defendant who testified that they recognized one of the defendants from surveillance footage distributed by the media. The judge of the case, however, determined through "careful analysis of the video" that despite the acknowledged honesty of the witnesses and the testimony they offered, he perceived the quality of the video on which they were basing their identifications to be too poor to support their claims.

Cases such as those described above where the court determined that the video cannot support a ruling on an issue, particularly in cases involving poor quality video (see for example *R. v. D. S.* 2009) are not uncommon throughout the sample. It is telling, however, that while video is often used to contradict testimonial evidence, there are no cases within the sample which feature testimonial evidence being accepted by a judge when it contradicts what appears to be

present on video. At best, a judge will reserve judgment on an issue when faced with inconclusive video (*R. v. Campbell*, 2014).

Conceding to Video: Beyond the Judiciary

The above examples illustrate the proclivity of the courts to accept video evidence even when faced with contradicting witness testimony. This trust in video is not limited to the judiciary. Throughout the data in this sample, when witnesses were faced with video evidence contradicting their testimony, the vast majority chose to alter their testimony and concede to the events depicted in the video. In the case of *R. v. Bumesi* (2014), the defendant, who claimed to have no memory of the brutal assault with which he was charged, goes so far as to say he believed the police had arrested the wrong person until he saw himself in the video of the assault. Such concessions demonstrate the high degree of trust individuals as well as the courts place within video, and the recognition of the difficulty in arguing against this form of evidence.

Witness concessions to video appear to take several forms. In each instance, the concession remains an acknowledgement of the superior accuracy and reliability of the video recording over their own testimony. In some cases, the concession to video appears to be the result of a witness simply believing their recollection of the event to be inaccurate after viewing the contradicting video. For example, in the case of *R. v. Klassen* (2011), Mr. Tanino, an associate of the accused, had testified that a group of friends, including the accused, were at a particular night club at a given time only to concede to the “error” in his recollection when presented with video evidence suggesting who was with him at the time, how long they were there, and what time they left relative to an assault that occurred in the area. Similarly, in the assault case of *R. v. Bassi* (2013), upon viewing the video record of the event, one of the key eye witnesses, Mr Constantino...

readily agreed that the videos contradicted his recollection of the events leading up to the start of the fight. While viewing himself in the video holding onto the front entrance door, leaning out as far as he could and craning his neck to look towards the Taylor St. stairs, Mr. Constantino testified that watching the video threw him off his recollection that he had a clear view of the fight. Mr. Constantino agreed that the front entrance video showed he never left the front entrance door until after both aggressors had departed. This completely contradicted Mr. Constantino's recollection that he was standing next to the victims when he recognized Peter Bassi. (*R. v. Bassi*, 2013)

In the previous example, the admission of inaccuracies in the testimony of the witness Mr. Constantino was present despite the fact that he was an uninvolved bystander to the event with no apparent vested interest in the result of the trial. In other instances, witnesses will concede to the video evidence only after it becomes apparent that their testimony attempting to negate or minimize their responsibility or that of an associate is contradicted by a video record. One example of this can be seen in *R. v. Parlee* (2007) where the defendant facing an impaired driving charge testified at trial that he had consumed a single beer while at the home of a friend prior to an accident in which he was involved. While testifying in chief he denied consuming a second beer at that time. Following these statements “an excerpt from the breath room video was played. Mr. Parlee agreed that he had told Constable Brown (in the breath room) that he had consumed two beers at Mr. Komaromi's house but stated that he meant that he had had one beer at Komaromi's and one at the Mono Cliffs Inn.” As the trial judge pointed out,

The difficulty with this theory became apparent when the video was replayed for the witness since he carefully set out the circumstances of his consumption of two beer [sic] at Mr. Komaromi's. He then accepted that rather than his formerly sure recollection of

only two beer on the day of the collision, he may have consumed a second beer at Komaromi's and a third at the Inn. (*R. v. Parlee*, 2007)

A further example can be seen in the perjury case of *R. v. Canada (Royal Canadian Mounted Police)* (2015) in which an RCMP officer was involved in the Taser death of Robert Dziekanski in 2007. Throughout the officer's case notes and in his testimony during a public inquiry into the incident, Cst. Millington maintained that he believed Mr. Dziekanski remained standing after the first and second deployments of his Taser and was brought to the ground after being tackled by several additional officers. It was only after extensive cross-examination and the playback of a video of the incident in court that Cst. Millington conceded that this was not the case:

Q. Do you have a clear memory of that wrestling having taken place and the three officers jumping on him and taking him to the ground? A. I -- that's what I remembered at the time. I don't remember specifics. I remember that that's what I believed at the time, that they had moved in. Q. Well, if you had that memory at the time, do you still have that memory? A. Well, seeing the video has kind of distorted that, because it's what really happened is that he fell from the Taser. (*R. v. Canada [Royal Canadian Mounted Police]*, 2015)

The tendency for witnesses to concede to video evidence is not without exception. While not common, a number of cases within the sample contained examples of witnesses maintaining their version of events even when presented with contradicting video evidence. A prime example of this can be seen in the case of *R. v. Burnett*, (2015) where the accused was charged with first degree murder. In this case, the accused denied ever having been at the scene where the shooting occurred, this despite the surveillance video from the scene depicting an individual matching the description of the accused, walking with the same distinctive limp as the accused, and wearing

the same distinctive custom jacket as the accused. When faced with this evidence, the accused claimed that he had never owned a jacket similar to the one depicted in the surveillance footage, an assertion he maintained even after being presented with an additional YouTube video depicting him wearing a similar jacket.

A similar refusal to concede to video can be seen in the trial of *R. v. Serafin*, (2013) where the accused was charged with robbing a bank. The accused in this case conceded that he was the individual depicted in surveillance video at the bank some time before the robbery. He maintained, however, that he was not the individual captured on video returning to rob the bank at a later hour, but rather suggested it must have been a similar looking individual who had sought to pin the robbery on the accused.

Given the apparent substantial trust judges typically place in video records, attempts to argue directly against events as depicted in the video are rare within the sample and uniformly unsuccessful. A more common, and perhaps more strategic, approach I identified is attempting to redefine what is depicted on the video recording. One example of this can be seen in the Vancouver rioter case of *R. v. Makris*, (2013). Here the defense conceded to many of the charges following presentation of the extensive video evidence, however, counsel for the accused argued that the video showed that Makris “was ‘clearly out of his mind’ because of the amount of vodka and beer he had consumed, and continued to consume throughout the riot.” He argued that because such intoxication was unusual for his client and since his client has subsequently stopped drinking, the judge should view this as an isolated incident and sentence accordingly. While the judge ultimately rejected this argument due to an apparent lack of evidence of intoxication on the video, this strategy by the defense provided an opportunity to argue against

the what appeared to be otherwise incontrovertible video evidence and redefine the events depicted to a version more favourable for the accused.³²

A similar defense strategy was applied in the perjury trial of *R. v. Canada (Royal Canadian Mounted Police)* (2015). Here, much of the case rested on the testimony and notes provided by the accused that stated Mr. Dziekanski remained standing (and thus a threat) after receiving the first deployment of Cst. Millington's Taser—a state that would justify the second and subsequent Taser deployments that followed. Following the presentation of video evidence of the event recorded by a bystander Paul Pritchard, all parties (including Cst. Millington) agreed that Mr. Dziekanski fell to the ground at the first deployment of the Taser and was thus not a threat when receiving the subsequent deployments. Cst. Millington's defense was that while Mr. Dziekanski had fallen after the deployment of his Taser, he had misperceived these events due to the dynamic and high pressure nature of the event. The trial judge noted,

once he (Cst. Millington) had committed himself to a version of events in these notes and statements, Cst. Millington then had to come up with an explanation at the Inquiry for why his notes and statements were often contradicted by what is plainly shown in the Pritchard Video. The only available explanation was to claim that at the time of writing his notes and giving his statements, he had misperceived events.

After reviewing the video evidence, the trial judge chose to reject this statement by determining that Cst. Millington had a clear view, ample time, and was looking directly at Mr. Dziekanski as he fell to the ground after the first Taser deployment. The lack of credibility of Cst. Millington's statements given these considerations in combination with the motive to fabricate a more

³² Note, this was the same case discussed previously where both the accused and the victim argued that the accused was attempting to hinder rather than contribute to an assault against the victim during the riot. In determining both the accused's actions in that instance and his state of mind here, the judge disregarded the testimonial evidence in favour of his personal interpretation of what was depicted in the video, further emphasizing the importance of this form of evidence.

justifiable interpretation of the events led to the court's rejection of Cst. Millington's assertion that he misperceived the events and found that he had knowingly provided false testimony under oath. While this strategy of redefining events as they appear on the video recording appears more likely to succeed than outright disregard or contradiction with the video evidence, these cases illustrate that a judge will still often choose to make their determination based on the video evidence given the video is described as being of sufficient quality.

Discussions Surrounding the Regulation of Video

Beyond the characterization of the aspects of video evidence as discussed above, important insights can also be gleaned by examining the way in which judges discuss the regulation of video evidence within the courts. The particular rules, regulations, and practices mobilized (or not mobilized) with respect to video evidence speak to the construction of the dangers and complications associated with this medium.

As mentioned in the review of the literature, case law and the rules of evidence have identified five key criteria that are essential for the admission and weighting of video evidence: (1) the relevance of the evidence, (2) its accuracy in truly representing the facts, (3) its fairness and lack of intent to mislead, (4) its verification by a capable witness, and (5) the relative weight of its probative value versus its prejudicial effect (Goldstein, 2010). These criteria form the official basis of the regulation of video evidence and attempt to provide safeguards to ensure its proper use. With these official criteria in mind, I provide below a brief outline of the concerns judges within the sample typically express regarding video in their written decisions. Following this I close the chapter by discussing the means of addressing these concerns as discussed within the sample.

Concerns Raised Regarding Video Evidence

Perhaps more significant than the discussion regarding the evaluation and validation of video within the sample is the notable lack of such discussion in the majority of the cases. As a general trend, judges did not devote much comment to the basis of their evaluations of the video evidence or express many concerns (whether satisfied or not) regarding that evidence. In those instances where judges did provide some discussion of the video evidence, one of the key recurring themes was the focus on technical aspects of the video recordings. Throughout the decision, judges would frequently mention of features of the recording such as focus, colour, lighting, distance, angle, frame, and the time and location that the recording was captured. Comments regarding the clarity of the images in particular are exceedingly common with the majority of the cases within the sample containing at least some reference to the quality of the images obtained.³³ An example of the type of technical discussion seen in the decisions is present in the case of *R. v. Wood* (2013) where the trial judge noted,

A 15 paragraph agreed statement of fact concerning the video security system installed at [Text deleted by LexisNexis Canada] was admitted into evidence. Videos taken from various cameras engaged in this system during two specific time frames were admitted as evidence. The first time frame for the series of videos entered was for those taken between 1:15 am to 1:20 am December 30, 2011. The second time frame was 3:20 am to 4:10 am, December 30, 2011. Due to difficulties in transferring the videos from the original system to a format that could be disclosed to the defense and utilized at the trial, the original time and date stamps where not visible on the videos entered into evidence.

³³ The key exception to this was with cases involving videotaped interrogations and witness statements produced within a police department expressly for the purpose of showing in court. In many of these cases, judges do not reference the apparent quality of the images, perhaps because such quality is presumed from the outset.

However, the parties did agree on the time frames for the videos noted above. (*R. v. Wood*, 2013)

Similarly in *R. v. Serafin* (2013), the judge discussed the video by stating:

Sequences taken between 4:53 p.m. and 4:59 p.m. by one of the surveillance cameras at the entrance of the branch show the accused standing alone in the entrance, waiting nervously. The sharpness and excellent quality of the colour images leave no doubt that it is the accused. In fact, the accused admitted to being the individual in the video sequences. The images were captured at a point two to three meters from the bank cash counter. (*R. v. Serafin*, 2013)

The judge in *Serafin* further noted that “the quality of the images, in colour no less, is remarkable”. Similarly, in the case of *R. v. Wood* (2013), the judge commented that “the pictures shown in the video entered into evidence were very clear” and emphasized “it was shot in colour, in good light and had a number of different camera angles”. As is evident from the quotes above, when judges within this sample discussed the quality of the evidence, they focused heavily on the technical aspects of the recording.

While the comments above are typical of the discussion present in the sample, a small number of cases provided a somewhat more in-depth discussion of the video evidence, at least in terms of the technical features of the recording. These discussions were contained in small number of cases where judges expressed reservations regarding the video evidence. In the case of *R. v. Bassi* (2013), for example, the trial judge described at great length the images produced by various cameras at the scene, specifically noting the resolution of the images, the darkness and shadow present, and the extent to which the facial features of the suspects could be determined. Based on this analysis, the judge in *Bassi* ultimately determined that identifications

made by witnesses on the basis of the video were unreliable and afforded little weight. Similar analysis and comments are also present in the case of *R. v. Campbell* (2014) where the judge sought to identify an individual present in surveillance footage from a correctional facility. In analyzing still images isolated from the surveillance video the trial judge described the details of the images, stating:

I found that the stills and the frames of the videotape were not of sufficient quality to allow me to identify Mr. Campbell as the individual shown in cell 2-27 of the security footage. The two frames which show footage from two different cameras on the DVD are quite small, 3 1/2 inches. If one clicks on the frames they get larger; however, the clarity is lost. One cannot see the face of the individual clearly at all from the video from camera 58. The footage from camera 60 gives you a better look at the individual; however, the hood of the individual's jacket obscures a large portion of the forehead and the right side of the face. In addition to this it appears that the individual is looking down which makes identification even more difficult. Although I am suspicious, in the absence of any other evidence of identification, I cannot say that I am satisfied beyond a reasonable doubt that Mr. Campbell is the person in the video and he is acquitted of this charge. (*R. v. Campbell*, 2014)

In these comments as well, the judge's discussion is limited to the technical aspects of the video recording and image quality that are argued to impact decision-making. These comments, particularly in the cases with more thorough discussion, suggest a certain awareness of the technical issues that may affect the quality of the images in the recording. From a social constructionist perspective, however, the exclusive focus on these issues reinforces that the belief that these are the only issues of concern with regard to video evidence.

The exception to this general trend of focusing on the technical features of the recording appears in instances where the judge expresses concern regarding the editing of the footage. Here judges will stray from the technical discussions of the video to discuss the potential for video to present a particular perspective rather than some form of objective Truth. However, in these instances, this critical analysis of the video evidence appears to be limited to the impact of individuals compromising the tape rather than any inherent feature of the video evidence. In the case of *R. v. Doughty* (2009), for example, the trial judge discussed at length their reservations regarding the editing of the video footage and the resulting completeness of the video presented in court. In this case, the video entered into evidence was an edited compilation of various segments of surveillance footage from a retail store depicting the theft of a substantial number of electronics. The videos contained on the CD entered into evidence consisted of footage from various camera locations in and around the store edited into a single video in an effort to provide a complete picture of the event. Here, the trial judge rejected the admission of the evidence due to the Crown's failure to establish the way in which the video evidence had been edited, and inability to prove the video provided all the relevant material required to portray an accurate version of the events.³⁴ The Crown's evidence in this regard relied on the testimony of a regional manager for the retail chain, a witness that the judge determined lacked the relevant knowledge of this specific video to assure the court of the accuracy of the evidence.

In *Doughty*, the trial judge's comments regarding the video did not call into question the utility of video as a tool or raise concerns regarding the difficulty in making determinations from video but rather appeared to question whether the otherwise reliable video might have been by

³⁴ While the judge in the *Doughty* case excluded the video evidence over concerns regarding the witness called to authenticate the video and the lack of evidence regarding the editing process that produced the video, recent case law calls into question the standard applied in *Doughty* and advocates for a more liberal approach (*R. v. Bulldog*, 2015)

undermined by the interference of biased and subjective agents. This distinction is emphasized in a second case within the sample involving the concern over incomplete footage. In *R. v. Singh* (2010) the Crown submitted surveillance evidence that allegedly depicted the assault with which the accused was charged. This surveillance evidence was marred, however, by the frequent stopping and starting of the video recording, apparently due to the poorly operating motion activation system of the surveillance cameras. While the sporadic nature of this recording may have undermined the weight of this evidence to some degree, the judge wrote he was satisfied that the frequent interruptions in the recording were sufficiently explained by the poor operation of the equipment to counter any allegations of tampering and thus felt confident relying on the snippets of video recording to establish the events that occurred (*R. v. Singh*, 2010).

These aforementioned examples illustrate how judges engage in technical discussions pertaining to the video when weighing its worth as evidence. Judges frame video evidence as less trustworthy when either the quality of the video is considered unclear, or, most importantly, when they conclude that the video may have been tampered with. This is well illustrated in *R. v. Campbell* (2014) where the judge wrote:

...prior to using a video to establish identity, the trier of fact must ensure that the video *has not been altered or changed*, that it depicts the crime. The trier of fact must also ensure that *there is high degree of clarity and quality* and, to a lesser extent, show the perpetrator for a sufficient period of time in order to make the identification beyond a reasonable doubt. [*R. v. Campbell*, 2014; emphasis added]

These brief examples illustrate that while video is often discussed as being inherently trustworthy, this trust does not extend to video that is described as being unclear or is suspected of being influenced by subjective means.

Shifting from what judges put forward as the areas of concern with respect to video to their apparent view of how those concerns should be addressed reveals a pattern consistent with the findings throughout this analysis in that the focus remains on judges' individual interpretation of the video. The predilection for judges to settle issues relating to the video based on their own observation is particularly apparent in cases where there is a competing evaluation of the video brought forward by the participants within the trial. In the case of *R. v. Neigum* (2014), for example, the Crown presented testimony from two witnesses in an effort to validate a video recording of an armed robbery. Both witnesses were familiar with the video recording system and provided slightly varying testimony regarding its operation with one suggesting the time codes of the system were eight to ten minutes fast and the colour representation of the cameras were "a little off", while the other testified that the cameras were only five minutes fast and the colour representations true to life. In siding with the first witness, the trial judge ruled that "her memory of the colour distortion on the video recording is proven reliable by observing the recording". In this instance, it was the correspondence of the testimony to the judge's interpretation of the video evidence that was the determining factor in assessing the reliability of the witness, despite the fact that the witness was herself providing evidence to validate the video that was used to establish her reliability.

A similar reliance on the judge's interpretation of the video evidence is present in the case of *R. v. Bassi* (2013). Here surveillance footage of an assault was entered into evidence and subsequently relied upon to provide evidence of the identity of the accused. In this case, the judge expressed concern regarding the clarity of the images used by witnesses to provide their identification of the accused. The judge noted that:

Other than appearing in areas consistent with the human face, the right eye, right eye brow, and right half of the mouth, of the runner on the left of Exhibit 7 cannot be clearly seen. While the right side planes of the subject's face appear to be large, there is no definition of those planes and it cannot be determined from the photograph where they start or end between the subject's hairline and neck. It is difficult to be certain from the image where the subject's cheek area starts or finishes and how it is related to the subject's brow. At best, there is a large blur in the area of the subject's nose but no details of the nose can be seen so as to be certain as to its size. (R. v. Bassi, 2013)

The trial judge reported using this reasoning based on his own interpretation of the video to reject multiple identifications of the accused made by six separate witnesses, four of which viewed the assault and a further two who were acquainted with the accused and reported recognizing him from footage of the assault circulated by the media.

Chapter Summary

This chapter summarizes the findings of this study. It begins with a discussion of how judges characterize video evidence as more trustworthy, and continues with an explanation of how judges evaluate video evidence to give it a higher status on the hierarchy of evidence than other forms of evidence. Video enters new territory as means of fact finding is in cases where judges use video as a means through which they are able to view past events directly. In the following chapter I contextualize the findings in relation to the literature review, the research question, and my social constructionist informed theory.

Chapter 6 – Analysis

In the previous chapter I presented the results of the content analysis reporting on how Canadian criminal court judges discuss video evidence in their judicial decisions. In this chapter, I seek to build upon these results and situate them within a broader sociological framework. Here I apply a social constructionist theoretical perspective to explore and contextualize how judges create the meaning of video evidence through their written decisions. The aim of this research study is to answer the following research question:

How do Canadian criminal court judges construct the meaning of video evidence in the context of the criminal trial?

To answer this research question and explore the themes that came up throughout the research process in which I employed a qualitative content analysis with the aim of understanding of the meaning-making process outlined within judicial decisions. . I begin this section by discussing the link between the construction of video evidence within the legal communications and in broader social discourses. Following this, I highlight the features of video that judges bring into focus through their communications. Throughout the chapter I problematize the ways in which judges within my sample construct video evidence as the most trustworthy, reliable, and influential form of evidence within judicial decisions. Finally I close the chapter with a discussion of the potential implications of the current construction of video evidence and resulting use of this evidence within the criminal courts.

Before proceeding further in the analysis, it is important to clarify that when I refer to the terms used in the legal decisions, such as truth, reliability, or objectivity within this chapter these can only refer to the specific forms of truth, objectivity, and reliability defined and operationalized by actors within the system and not any potential objective or universal truth.

Within our culture, video and photographic evidence, perhaps more than any other medium, are frequently conceptualized as providing an objective portrayal of things “as they really are” (Sibley, 2014; Stedmon, 2011). Given the prevalence of these portrayals, it is important to stress that, while they may appeal to the standards of truth employed in many different systems, these standards of truth remain constructions of the system itself and must be interpreted as such. Because of this constructed nature, the analysis of these standards and terms of reference used for determining the epistemic value of various forms of evidence is essential to fully understanding how video is constructed, and ultimately how it is used, within the trial system.

Furthermore, a second caveat to note is that there are a number of issues complicating the examination of judicial evaluations of evidence within the sample decisions. One major issue is the lack of clarity and specificity in the terminology used by the judges when referring to evidence in general. Judges frequently use terms such as “credible”, “reliable”, “clear”, “convincing”, or even “trustworthy” with little clarification of what they mean by these terms. In addition to the lack of clarity in the terminology used by judges, identifying the criteria relied on by judges when evaluating video evidence in the cases within this sample is further complicated by the frequent lack of explicit reference to the criteria applied in a given evaluation. In some cases judges explicitly discuss the features of the evidence that lead their assessment of its reliability or lack thereof, however, in many cases this must be gleaned from more sporadic and passing references. Despite these limitations, the data sample I analysed provides a rich understanding of how discourses of truth pertaining to video evidence are (re)produced within Canadian criminal courts.

The Socio-Cultural Context and Legal Communications

As I have established throughout this thesis, the conventions and beliefs surrounding visual evidence in society at large both influence and are influenced by the conventions and discourses (re)produced within the legal system. Decision-makers, such as judges, operate within a pre-existing normative horizon comprising not only their subjective or private judgement but more importantly, of social judgements reflecting the expected outcomes of sense shared by the community in which they operate (Focarelli, 2012; Hutton, 2006). One argument claims that the criteria to identify what is acceptable, for judges or otherwise, stems from “practical reason”—i.e. reason operating in society where the community accepts the reasons as persuasive and justificatory (Focarelli, 2012). As Tata (2002) points out, the reasons provided by the judiciary stem, not only from routine practice, but also from the role of culture, public attitudes, and conventional knowledge that they subscribe to. When people, including judges, share a pervasive “common sense” a certain type of social conceptualizations prevail (Focarelli, 2012). In our Western, modern, positivist society, video evidence is socially understood as objective, factual, and irrefutable; a view that is reflected within the sample of court decisions in this study.

The significance of this becomes clear when considering how each discourse contextualizing a phenomena brings different aspects of that phenomena into focus, raises different issues for consideration, and has different implications for what ought to be done (Burr, 2003). Within the decisions in the sample, judges rarely raise questions regarding the accuracy of video in truly representing the facts. Instead, video of an event is consistently described as “the most accurate, independent, and unbiased evidence of what actually transpired” [*R. v. Canada (Royal Canadian Mounted Police)*, 2015]. This trust of video showing “what happened” is not contained to the legal realm, but instead is adopted by the legal world from discourses that are

used to describe video in society more generally. In our current society, discourses that value sight over the other senses are deeply entrenched into the social consciousness (Stocchetti & Kukkonen, 2011; Zizek, 1999). Phrases such as “seeing is believing” and “a picture is worth a thousand words” are common expressions. Hence, it follows that, as a society, we readily accept descriptions of video as neutral, objective, and showing events as they occurred precisely because we value the visual and the technical over the social (Goldstein, 2011; Stocchetti & Kukkonen, 2011). In the following section of this analysis, I outline the ways in which discourses of truth are (re)produced by the legal communications when constructing the meaning of video evidence within Canadian criminal court.

Discourses of truth: Constructing video evidence

As a social constructionist researcher I am interested in exploring how meaning is constructed by social actors through social processes (Burr, 2003). This typically involves analyzing the language people use, the discourses they tap into, and the truth-claims they make (Burr, 2003; Elder-Vass, 2012). Within the legal system, judges produce communications, particularly in the form of decisions, in an effort to formally explain their reasoning process and justify their decision. These decisions, and the reasoning they represent, are guided not only by an institutionalized legal method but most importantly by hegemonic social discourses (Burr, 2003; Seidl, 2005; Tata, 2002). Since social constructionists stress that it is through language that we construct and communicate facts, truth, and reality (Burr, 2003; Comack, 2006), it is this language around video evidence that I seek to explore in order to uncover the assumptions embedded in the forms of language used.

Within the decisions analyzed in this study, perhaps the most prominent trend I identified is the extent to which judges construct video evidence as particularly trustworthy, reflective of

reality, and being free of the need for subjective interpretation. As discussed in the results section, the trust afforded to video evidence is depicted through the language judges use to typify video, the characterizations of video in the comparisons that are made between video and other forms of evidence, and the tendency for judges to use video evidence to overturn other forms of evidence, particularly witness testimony. In each case, the findings drawn from the sample reflect broader trends identified within the legal and sociological literature. To analyse these trends, first I discuss how judicial decisions typify video evidence as trustworthy and superior to other forms of evidence.

Characterizations of Video Evidence

The characterizations of video evidence within the sample as “capturing” events as they occurred (*R. v. Barrie (City) Police Service*, 2012; *R. v. Bumesi*, 2014; *R. v. Burnett*, 2015; *R. v. St. Cloud*, 2015), “showing” (*R. v. Kassa*, 2013; *R. v. Singh*, 2010; *R. v. St. Cloud*, 2015), “plainly showing” (*R. v. Canada [Royal Canadian Mounted Police]*, 2015) or even “proving” (*R. v. Neigum*, 2014) “what happened” (*R. v. Mcghie*, 2014, *R. v. Canada [Royal Canadian Mounted Police]*, 2015, *R. v. Neigum*, 2014), being “beyond dispute” (*R. v. Mcghie*, 2014) or “leaving no doubt” (*R. v. Serafin*, 2013; *R. v. St. Cloud*, 2015) highlight how judges construct video as inherently reflecting the truth of the event as it occurred. Beyond reflecting the standards applied within the legal system to this form of evidence, such characterizations also function to reproduce the conceptualization of video as inherently trustworthy (Focarelli, 2012; Seidl, 2005). The language judges use to describe video evidence portrays it as objective, accurate, and reliable. Within law in particular, this claim to objectivity and being free of interpretation is important because it allows for the conceptualization of the content shown in the video look

more like objective facts, in that their existence as portrayed in the video is rooted in reality “out there” rather than dependent on the interpretation of the observer (Focarelli, 2012).

This conceptualization of video as capable of showing the truth extends beyond the sample of this study and into the legal literature and case law which are similarly full of characterizations of video as being trustworthy, accurate, and objective (Kahan, Hoffman, & Brahman, 2009; Goldstein, 2011; *R. v. Nikolovski*, 1996; *R. v. Smith*, 1986, *Rodger v. Strop*, 1992; Robinson, 2012). Such characterizations of video set the stage for the ways in which video evidence is conceptualized and addressed within Canadian courts. These understandings of video stem from “common sense” ways of arriving at the truth in modern society, all of which are derived from positivistic features valuing objectivity, rationality, logic, consistency, narrative coherence, and empirical support (Comack, 2006; Scheppele, 1994; Smart, 1989). Since dominant discourses about video conceptualize it as encompassing all these features, video has become a particularly trusted tool both in society and in courts. When judges repeatedly reference how video is trustworthy because of its inherent features, they (re)create and reinforce not only expectations regarding the appropriate approach to video evidence and its role in determining the facts at issue in a trial, but also hegemonic understandings of video as objectively *showing* the events as they occurred.

Given that law is a powerful legitimizing institution with the ability to legitimize and perpetuate or to dismantle discourses (Hunt, 1993; Norrie, 2001; Scheppele, 1994; Snider, 2000), communications from its actors establish a specific type of language people can use to frame social issues in a particular way.³⁵ Hence, the ways in which the judiciary frames video evidence provide powerful language that is adopted by other groups throughout society to conceptualize

³⁵ As Hutton (2006) argues, the language and actions of judges are similarly influenced by the broader society in which they operate. This forms a dynamic relationship with mutual influence in each direction.

and discuss this issue. By accepting and reproducing dominant discourses featuring “common sense” understandings of video without questioning our perception of its ability to represent reality, the type of storytelling it conveys, and the role of the interpreter in analyzing what they see and hear, judges are ignoring how what is captured on video is a particular version of an event, captured from a certain angle, telling only a small part of the larger narrative (Sibley, 2008). Hence, as video is described as the best means of accessing the truth in court, the dominant discourses that conceptualize video footage as a means of accurately accessing “what happened” continue to be perpetuated, internalized, and reproduced.

Privileging the Technical

The “common sense” ways of arriving at the truth in modern society are derived from positivistic features valuing objectivity, rationality, consistency, and empirical support (Comack, 2006; Scheppele, 1994; Smart, 1989). Each of these features is presented as inherent in video evidence within the sample and throughout the legal and social literature (Goldstein, 2011; Mnookin, 1998; *R. v. Nikolovski*, 1996; Scheppele, 1994). Judges within the sample frequently commented that video images, unlike witnesses, “do not lie” (*R. v. Serafin*, 2013) provide “independent, and *unbiased* evidence” [*R. v. Canada (RCMP)*, 2015], and therefore, they always show the truth as it unfolds. In particular, judges emphasize the objective nature of video evidence noting that there is no motive guiding the camera – but rather video “continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed” (*R. v. Nikolovski*, 1996). The focus on objectivity and reliability stemming from the automated and mechanistic features of the video evidence tie in closely to dominant discourses of truth present in other social spheres such as the physical sciences. This focus dismisses the necessary interpretation of

narrative and general meaning-making that must occur when making determinations from any visual record. Though rarely acknowledged within the sample many scholars are concerned that there is a gap between the real and perceived objectivity of video evidence, a gap that some argue leads to overconfidence in the video recordings (Panian, 1992; Robinson, 2012; Sibley, 2004; 2005; 2008).

The elevated trust in video evidence is particularly apparent in the frequent comparisons with testimonial evidence. Video evidence is described as “more reliable than circumstantial or testimonial evidence” (*R. v. St-Cloud*, 2015) and more effective even than audiotape (*R. v. Lindsay*, 2005), while testimonial evidence is typically characterized as “fragile” and “unreliable” (*R. v. Atkinson*, 2007; *R. v. Bassi*, 2013; *R. v. Serafin*, 2013) throughout the sample. This type of comparison highlights the current elevated position of video evidence, and further strengthens the discourses that lead to video evidence holding an influential position within the criminal trial process. Such comparisons to witness testimony in the sample do not stand in isolation from the greater body of case law. Judges have repeatedly stressed the strengths of video evidence, in particular relative to witness testimony, through comments such as “video provides an objectivity that the oral evidence cannot provide” (*Rodger v. Strop*, 1992), and when referencing photographic evidence claiming:

A photograph can often more clearly and accurately portray or describe persons, places, or things than a witness can by oral evidence. They are not subject to the difficulty inherent in oral evidence of absorbing and relating the mass of detail and then remembering it. (*R. v. Smith*, 1986)

Just as previous programs established with reference to testimonial evidence may now have an impact on video, the current discourses surrounding video necessarily produce an impact

on testimonial evidence (Andrejevic, 2004). The reinforcement of decision making programs that define reliability and, to a large extent, value in terms of features such as objectivity and consistency diminish the role that can be played by testimonial evidence. With each repetition of the superiority of video evidence to testimony within the courts, these decisions recreate the legal system as a system in which testimony has increasingly little value. In the communications analysed for this study, judges continuously reproduced discourses that value visuality over narrations of lived experience.

The use of testimony as a point of reference for evaluating the merits of video evidence produces important implications for the function of the trial system. Many of the issues and concerns traditionally associated with (testimonial) evidence in the courts appear to have little application to video. Given the central position historically played by testimony in court, it is not surprising that judges adopt testimony as the point of reference for discussing and evaluating other forms of evidence, including video. However, by evaluating both video and testimonial evidence based on the proclaimed weaknesses of testimony, the strengths of video are emphasized while any of its own weaknesses ignored. This position of video as superior to testimony could be reversed if the established legal rules and the dominant socio-cultural discourses privileged truth claims associated with the lived experience and individuals' subjective interpretation of an event. As Sheppelle (1994) has pointed out, by relying on features such as internal consistency, narrative coherence, and physical evidence, the legal system and actors within it privilege some forms of evidence over others in ways that systematically diminish the significance of the lived experience. She argues that this becomes particularly problematic when applied to more marginalized social groups, such as sexual assault survivors. She points out that revised or delayed testimony, as is common in cases of sexual assault, is

disregarded by the legal system in favour of relying on the first version of events, as though truth decays over time and is subject to subsequent distortion. This understanding of the first version of a story as the ultimate truth ignores that *all* versions of a narrative are strategies for organizing and making sense of what happened. If judicial communications construct video as more believable because its story never changes, they continuously perpetuate the mentality that video alone is conclusive evidence of an event, thereby effectively dismissing other narratives.

The distrust of human motive extends beyond the evaluation of testimony. As seen within the cases in the sample, one of the few instances where the value of video (barring issues of image quality) is called into question is in instances where the judges describe being suspicious of processes used to edit the video footage provided in court. Specifically, judges will express concern when they are not satisfied that the recording reflects an unconscious depiction of the narrative of events and instead reflects the narrative created by the individual selecting the relevant footage to include. This is seen clearly in the case of *R. v. Doughty* (2009) where the judge rejected the video recording entered into evidence after stating that they were unsatisfied that all of the relevant footage was present. The attribution of this mistrust to the actors who might have edited the tape is clarified in a second case involving incomplete footage where the judge reported being satisfied given that the omissions were the result of a poorly operating motion activation system rather than the conscious efforts of an individual (see *R. v. Singh*, 2010).

It is important to note here that the communications produced by judges within my sample, as per the wider socio-cultural conceptualizations of truth in video, privilege the technical components of video rather than the social. Provided the image quality of the video is deemed to be sufficiently clear, the video is privileged over other forms of evidence. Judges

within the sample would refer to such features as the angle, lighting, resolution or frame to justify their understanding of events regardless of the supporting or contradicting testimony of witnesses (see for example *R. v. Bassi*, 2013; *R. v. Campbell*, 2014; *R. v. Makris*, 2014; *R. v. Serafin*, 2013). This conceptualization of video as infallible due to its technical features fails to take into account the idea that video is merely a tool, a social construct that cannot inherently tell the one true story, but instead relies on agents to give meaning through their experience of the video (Stocchetti & Kukkonen, 2011). Like all social interactions, truth finding is a socially situated practice.

Implications of evidence “speaking for itself”

At the heart of many of the concerns raised with respect to video evidence is the apparent failure of judges to acknowledge the subjective and interpretive role they play in determining the meaning of images contained in the video record (Harris, 2010; Panian, 1992; Sibley, 2005; 2008). Social constructionist authors problematize the legal system’s apparent acceptance of video as capable of “speaking for itself” (Goldstein, 2011, p. 2-6) and being able to clearly represent a true reflection of events. As a social constructionist researcher I conceptualize video as being a culturally constructed tool that requires the users to give it meaning. As stated by Jessica Sibley, “film no more reveals the world than it reconstructs the world. Like any representational form, film requires an interpreter to analyze its specific language and account for how it creates meaning” (2008, p. 32). In other words, video is a social construction that does not simply possess meaning, but is instead *given* meaning by social actors.

Within a courtroom, when a trier of fact makes determinations based on their perception of the video record, they are transformed from one who simply weighs the claims made before them to an interpreter of the events recorded—one who applies meaning to the images in

accordance with their particular knowledge, values, and beliefs. The failure to recognize this interpretive role can be particularly problematic with film given its substantial potential to determine the course of a trial. This becomes strongly emphasized in cases where video is admitted as proof of an event and the entirety of the case rests on the judge's interpretation of the video evidence.

In the sample, judges' reliance on video evidence in the absence of a witness to introduce the evidence is common. Instances of video being seen to "speak for itself" range from simple determinations regarding the presence of an individual (identified or not) at a given place, the movements of that individual, or the objects they were holding (see for example *R. v. Canada (Royal Canadian Mounted Police)*, 2015 and *R. v. Leggette*, 2015), to more complex determinations such as the identity, emotional state, or honesty of an individual depicted in a video recording (see for example *R. v. Serafin*, 2013; *R. v. J.J.G.*, 2014; *R. v. T.C.*, 2005). Very frequently, judges determined the level of intoxication of the suspect based on their appearance and behaviour in the video record (*R. v. Bumesi*, 2014; *R. v. Duchek*, 2013; *R. v. Makris*, 2013; *R. v. Ouellette*, 2012; *R. v. Parlee*, 2007; *R. v. Shanks*, 2014). In these instances, the perceptions of the judges come to the forefront as much of the legal process of argumentation between litigants is circumvented in favour of judges making determinations directly from the video.

The willingness for judges to allow their interpretation of the video evidence to play such an important role in the trial speaks to a shift in the role and responsibility of the judge within the legal system. Under the traditional adversarial approach, the role of a judge is as an arbiter of truth, weighing the claims made by the two opposing parties before them. In making their own determinations from the video evidence, judges adopt a much more inquisitorial role, actively searching out the truth rather than weighing one claim against another. The perceived direct link

between video and truth plays an important role in this development as it facilitates this shift by empowering judges to move beyond the discursive social processes that typify the adversarial system without being seen to undermining the fairness of the trial.

Within the sample, judges appear to express little hesitation in determining the facts of a case based on their interpretation of the video evidence, often weighing these interpretations above all else. In the case of *R. v. Neigum* (2014), for example, when validating the video evidence, the judge stated she was accepting the manager's testimony over the owner's because "her memory of the colour distortion on the video recording is proven reliable by observing the recording". In this instance, the trial judge relied on her own observation of the video record to determine which witness was more reliable (in terms of their testimony matching the video record) rather than evaluating the video in light of the testimony of the more credible witness. Thus the testimony to authenticate the video was itself authenticated using the video in a line of reasoning that allowed the judge to more heavily rely on their interpretation of the video evidence, even before the reliability of that evidence had been determined.

Despite the precedent for judges adopting a more inquisitorial role in some instances (e.g. the authority of judges to call assessors to provide expert testimony), the shift towards this role in the case of video evidence remains an important trend. Many of the checks, balances, and protections that exist within our current legal system are predicated on the existence of an adversarial contest and the discursive processes between litigants this entails. Judges' apparent reliance on their own interpretation of the video evidence represents a shift away from these adversarial principles upon which the Canadian legal system has been based. Within the adversarial system, the role of judges is that of an arbiter of competing claims brought forward by the litigants. The competition between litigants was adopted under the perception that it

would be the most effective means of ensuring a legally accurate, fair, and just result (Dufraismont, 2008). When judges seek to determine the facts based on their own interpretation of the video evidence, they adopt a much more active and inquisitorial role in the truth seeking process. In these instances, judges' determinations are not subject to the checks and balances that normally apply to ensure all evidence is assessed fairly, as per the legal method. As noted by Justice Sopinka in *R. v Nikolovski* (1996), judges' interpretations of video evidence are not subject to any form of cross-examination, a process central to the adversarial systems' approach of ensuring justice (Dufraismont, 2008, p. 223; *R v. Nikolovski*, 1996)³⁶. Furthermore, the determinations made by judges are often not made available to the litigants until their decision has been rendered, thus affording no opportunity to counter the arguments made by the judge (*R v. Nikolovski*, 1996; Sibley, 2008).

Critical scholars such as Jessica Sibley (2008) and Shannon Panian (1992) argue that judges' use of video in this way reflects their unwillingness to recognize their role as the interpreter of the film, and their active role in establishing the truth depicted in the video. Legal procedural and Charter rights require that when a witness or litigant introduces evidence at trial these arguments must be open to cross-examination by the opposing party and furthermore made part of the case record and thus available for appellate review. This is not the case when judges make determinations directly from the video. It appears that by the legal system's own rules and method to achieving a fair trial this changing role of judges falls short. These are the contradictions within law that Norrie discusses in his book, pointing to the elements of reason and principle which are constantly in conflict with other elements in law itself (2001).

³⁶ As Sibley (2008) points out, "a lawyer cannot literally cross-examine a film; rather, a lawyer either examines or cross-examines a witness about the film in evidence. The examination is a "cross-examination" of film because it aims to fortify or destabilize the dominant story the film appears to be telling." (41)

While there is potential for judges to remain cognizant of these issues and attempt to remain forthright in their interpretation of the film in an effort to highlight the grounds on which they base their conclusions, the protection this could provide is still limited. In the case of *R. v. Bassi* (2013) within the sample the trial judge outlined in detail the features of the video that tended to support or contradict the identification of Mr. Bassi, the limits of the recording with regard to these, and the presence or lack of supporting evidence. Such discussion is doubtless helpful for ensuring video recordings receive critical analysis during the trial and would facilitate any appellate review, however, if this discussion is not present until the judge formulates their reasons, it provides little opportunity for the parties to address the judge's interpretation of the film. The reliance solely on judicial decisions as the data in this study provides no foundation for me to address the extent to which judges discuss their interpretation of the film before the Crown and defense have completed their submissions, however, the comments made by Justice Sopinka in *R. v. Nikolovski* suggest there is some cause for concern regarding this issue³⁷.

This shift in the role of the judge generally goes unquestioned within the decisions in the sample. This is unsurprising given the underlying assumptions about the characteristics of the judge within the legal system. According to "The Official Version of Law", the judge is conceptualized as an objective and reasonable individual who will universally apply the rules of the legal method in order to indiscriminately achieve formal justice. The judge does not act on a "whim" or "caprice of the moment" but is instead applying a logical, comprehensive system of rules, which when applied properly, results in the discovery of "the truth". Judges are portrayed as unbiased and just. The personality of the judge is removed from the process, as they can only

³⁷ It is worthwhile to note that despite *Nikolovski* remaining the authoritative case on Silent Witness Theory, comments with regard to judicial practices at the time are likely somewhat dated given the two decades since *Nikolovski* was heard in the Supreme Court. More research is needed to determine the extent to which judges may seek to address these concerns in recent years.

act in accordance to the rules of the legal method. Judges in the sample do not question these dominant discourses regarding their role as arbitrators in the truth-finding process. Instead, they appear to adopt these discourses and portray themselves as unbiased representatives of the law who are capable of “finding” the truth through the application of the legal rules (see for example *R v. Lindsay*, 2005).

This is in contrast to post-modern theories which conceptualize judges as products of their society who can never be unbiased, as their role and ability to make decisions are historically, culturally, and socially situated (Comack, 2006; Hutton, 2006; Norrie, 2001). Seeing as the language and meaning of law are socially constructed, judges make decisions based on meanings they derive from the law based on their own class and gender norms and of those of other legal professionals (Norrie, 2001; Snider, 1994). Norrie explains “The law is administered from the perspective of a body of, mainly, men drawn predominantly from one social class and applied to another body, again mainly of men, drawn predominantly from another social class” (2001, p. 35). The elite social status of judges necessarily impacts their ability to make decisions as they cannot be apolitical, unprejudiced, and always principled (Norrie, 2001; Scheppele, 1994). As Scheppele says, “the practice of judging can hardly be said to be above those contaminating influences” (1994, p. 95), no matter how many provisions the law enacts to try and ensure the impartiality of the interpreters of the law.

Chapter Summary

Throughout this analysis chapter I used a social constructionist lens to contextualize the findings of the research study. This study identified how judges, through legal communications, construct video evidence as trustworthy, objective, and reliable because it is described as possessing an inherent ability to show what happened “out there”. I argued that describing video

in this way is not unique to the legal system but rather pointed to judges tapping into and perpetuating existing discourses that value the features of unconscious, automated technology while devaluing lived experience. Following this I problematized the way in which video evidence is currently conceptualized within Canadian legal communications. By failing to challenge the dominant discourses concerning the relationship between truth, video evidence, and the judge's role as an interpreter of the film, judicial communications function to reproduce and further legitimize such discourses without engaging in critical assessment of their emergence and reproduction as influenced by history, politics, and culture. In the following chapter, I conclude the thesis by tying the significance of this study to current social events, give recommendations for future studies and points to the limitations of this current study.

Chapter 7 – Conclusion

At the outset of this study, this project was guided by the following research question:

How do trial judges construct the meaning of video evidence in the context of a criminal trial?

This question arose out of the observation of the dramatic increase in the prevalence and significance of photo and video recordings in modern society and the impact this level of video surveillance might have on society. Estimates of the number of photographs and videos taken annually already exceed one trillion and are expanding exponentially (Heyman, July, 29th, 2015). This dramatic increase in the prevalence and accompanying importance of visual recordings suggests visual records of events have never been so important in shaping social life. The expansion of affordable and accessible video cameras along with the growing popularity of public and private surveillance systems have resulted in video having a near ubiquitous presence in modern life, the impacts of which are not well understood. In critical criminology, some scholars point to the emancipatory potential of video, since it can act as a tool of power with which disenfranchised social groups can bring attention to their concerns (Koskela, 2004; 2008; Toch, 2012). Others point to the complexity of the relationship between video and society where heightened conditions of surveillance invite particular practices of social and self-control (Koskela, 2000; 2008). For others still, video is analyzed as misused and misunderstood means of representing events, the limitations of which are frequently overlooked (Sibley, 2004; 2008; 2010). Developments around video recording systems have brought forward varying scenarios in the legal system. Of particular interest to me, as a criminologist, was exploring the potential impact of this trend on the function of the criminal justice system and the lives of those who come in contact with it.

Within the legal system, video has played a significant role in bringing legitimacy to truth claims. In recent years the western world has witnessed the development of a powerful social movement calling for justice in the legal system. Marginalized groups have gained traction through the use of video footage to substantiate their claims and mobilize social support. These stories, as narrated in the media, aim to expose the longstanding history of systemic abuse experienced by these groups, particularly Black men, at the hands of police. Cases such as the police shooting of Alton Sterling in Baton Rouge L.A., Keith Lamont Scott in Charlotte N.C., Sammy Yatim in Toronto, and the strangulation of Eric Garner in New York have brought widespread attention to the issue of police violence directed against Black men, and sparked large-scale international protests (Blau, M., Yan, H. & Young, R., Dec. 1st, 2016; CBC News, Jul. 10th, 2016; CTV News, August 13th, 2013; Ford, D., Botelho, G., & Brumfield, B., Dec. 8th, 2014). The aforementioned cases sparked public concern and rose to such prominence precisely because of the video footage that accompanied the accusations. The perceived relationship between video and truth has allowed claims that are accompanied by video to achieve high levels of legitimacy, despite the social capital or lack thereof of the individuals capturing the footage. Thus far, no movement has been more vocal about the experiences of Black people with police than Black Lives Matter—a movement arising after the murder of Trayvon Martin, an unarmed 17-year-old, that has risen to international prominence.

At the same time disenfranchised groups are advocating for increased use of video. As such, police forces are responding to such communal concerns for accountability by introducing their own video recording programs, namely body worn video cameras. Police agencies around the globe are in the process of introducing or expanding video recording programs in their facilities, in their cruisers, and increasingly, mounted on their officers. Advocates within police

organizations claim that recording police activities allows forces to demonstrate the relative rarity of police misconduct when put in perspective with the typically reasonable, fair, and just behaviour of police officers. Furthermore, they argue that police recording technologies have the potential to benefit both police members and the communities they serve by facilitating evidence collection and by reducing problematic behaviour of police officers as well as citizens. The latter point is one of the primary drivers of the social support for recording police interactions. Beyond this, social activists agree that recording the police as they carry out their duties provides a means of dissuading inappropriate or abusive behaviour and facilitate efforts to hold officers to account. In these cases, police forces themselves are seeking to benefit from the perceived reliability and legitimacy of video evidence to reinforce their claims.

The observation of these aforementioned trends piqued my interest in the topic of video surveillance. After beginning the literature review, my interest gained newfound significance. Beyond the explosion of the prevalence of photo and video recording devices in recent decades, a variety of scholars have noted a critical shift in the overall significance of visual images, particularly pertaining to the reliance of video evidence as means of verifying the truth (Andrejevic, 2004; Zizek, 1999). I quickly became interested in analyzing how the criminal justice system conceptualizes the meaning of video evidence, especially in relation to truth-seeking. I questioned how trusted video evidence is within courts, and if the presumption of video availability might produce a distrust of narratives that lack video verification, as has been noted by some scholars (Robinson, 2012). Furthermore, I became curious about the potential impact this could have in a society where recording technologies are virtually omnipresent.

Canadian criminal courts are an important social institution which has been afforded the power to not only enact and enforce laws, but also to act as the arbiter of truth in solving social

disputes. The decisions of the courts and the findings they produce carry significant weight in society more broadly and play a strong role in influencing what version of truth society deems most accurate. In this way, court decisions play an important role in the dismantling or perpetuation of dominant discourses. The creation and recreation of discourses necessarily occurs in an active, ongoing, and fluid manner, however, this process favours the established discourses that become legitimized through adherence to “common sense” conceptualizations and other socio-cultural discourses as communicated through legal decisions. Throughout my sample, these “common sense” conceptualizations pertaining to video characterize it as reliable, objective, and neutral, and therefore trustworthy and truthful.

In this study, I adopted a social constructionist lens to analyze the way in which judicial decisions in Canadian criminal courts conceptualize the meaning of video evidence. Within my sample, video evidence is typically portrayed as having the capacity to reproduce events as they occurred and provide clear insight on the facts of a case. Judges in the sample, through their written decisions, claimed to rely heavily on what they perceived to be happening in the video footage. While some scholars raise concerns over the level of trust that is placed in video by the courts and the ways in which this trust affects how video is interpreted (Sibley, 2008; Panian, 1994), few judges in my data sample expressed any such concerns. Instead, they continuously referenced video evidence as trustworthy and reliable, and therefore truthful due to the perceived strength of the medium. These decisions reflect, perpetuate, and further legitimize dominant discourses pertaining to video conceptualizations in our culture and society. An important observation that I noted is that in their judicial decisions, judges did not question their role as interpreters producing the meaning in response to the video evidence. Such a result is perhaps

unsurprising given the values within the legal system, and society more broadly, of rationality, objectivity, and empiricism.

While video has been lauded as providing a useful tool for the determination of cases and importantly as a means of providing a voice for many disenfranchised groups as discussed at the outset of this chapter, its use within the courts is not entirely unproblematic. The way video is constructed as inherently trustworthy carries the potential of overwhelming any alternate understandings of events. In my sample this became evident in instances such as witnesses conceding to video by altering their story and questioning their memory based on what they saw on video; judges consistently believing the story “shown” in the video over any other evidence; and judges failing to question the possibility of alternate interpretations of the images. The case of *Scott v. Harris* (2007) introduced in the review of the literature illustrates how varying interpretations can be made based on the same video evidence with each side claiming to clearly see their and only their interpretation of events. This can similarly be seen in the recent case of Walter Scott who was shot by police in South Carolina in 2015. The publication of a bystander video of this shooting that appeared to depict Mr. Scott being shot as he fled police lead to substantial public outrage and ultimately the officer responsible being charged with murder. In the documentary film “Frame 394” (2016) Rich Williamson investigates this shooting and notes that analysis by a videographer who stabilizes, enhances, renders in 3-D the footage of the event reveals the original video may be misrepresenting a critical component—Mr. Scott reaching for and grabbing the police officer’s Taser prior to attempting to flee. If believed, this substantially changes the interpretation of the video footage to more closely align with the testimony of the officer. Despite the alternate interpretations, individuals on both sides argue that the video

clearly supports their position and their discussions leave little room to acknowledge alternate forms of interpretation.

Importantly, the way in which a given social phenomenon is discussed in social institutions shapes the way in which it is conceptualized within society. This is particularly true when influential legitimizing institutions, such as the courts, reproduce truth discourses that become embedded in the social, cultural, political, and economic fabric of society. While it is always fluid and ever-changing, the dominance of any given ideology is maintained by claims supporting its position being perceived as legitimate, while the legitimacy of any claim is increased by their accord with the beliefs and understanding outlined by dominant ideologies within society. The movement toward using video footage to establish truth is being adopted by various social groups, both those claiming to be marginalized and those representing powerful social institutions. As such, it is particularly important for social scientists to analyze and contextualize the relationship between society, video, and truth-finding.

The completion of this study has further emphasized the need for continued research examining law's interaction with video evidence. Both the courts and society at large are experiencing dramatic cultural and technological changes. The explosive growth in the prevalence of video and the cultural shift towards valuing visual evidence above all others has important implications for the criminal justice system. Because of the rapid changes in this area, much of the previous knowledge of the way in which the courts interact with video evidence is at risk of rapidly becoming outdated. Furthermore, as courts and society come to rely on video evidence to a greater and greater degree, accurate understanding of this issue will only grow in importance.

Limitations of Study and Directions for Future Research

This study represents an early foray into the analysis of the role of video in Canadian criminal courts. Given that there has been relatively little research conducted on this subject, the scope of this thesis was necessarily broad in some respects yet narrow in others and contains a number of limitations. To begin with, while my intention was to analyze how judges construct meaning pertaining to video evidence, it is important to note that the decisions they are producing and the language they are framing their points is highly formulaic. Judges are representatives of the legal institution. Hence the language and discourses that they use to frame an issue are more of a reflection of the legal system rather than the individual beliefs of each judge. The data set I chose to analyze could only provide access to the way judges structure their arguments within the legal sphere, not necessarily the interpretations or beliefs of the individual judges themselves. A potentially interesting future study would be to analyze more directly the way judges conceptualize rather than simply discuss video evidence to gain a sense of the deliberations that occur prior to the construction of a decision.

Another limitation of this study is that my analysis focused solely on cases where discussions of video were present. While I gained some insight on the relative differences between how video and other forms of evidence are conceptualized through the study of comparisons with video evidence and general comments from the literature, additional studies should include more systemic sampling of cases that both feature and lack video evidence. This would provide useful insights on the way non-visual forms of evidence are constructed when not necessarily affected by comparisons to visual evidence. This comparison can offer some insight on the potential impact of the presence or lack of video evidence on decision-making in Canadian courts.

The focus on criminal cases should also be addressed through future research. As noted in the analysis, in many cases in the sample judges would make determinations based on video evidence after being convinced or not concerning their interpretations of the video, up to the required legal standard. Given my focus on criminal cases, in this study that standard was typically beyond a reasonable doubt. In many instances, judges provided little information regarding how far short or beyond this standard their confidence in their interpretation of the video was. Additional studies examining outcomes with various standards of proof might further illuminate the confidence judges have in video evidence.

Another major limitation of this study is the lack of temporal analysis. The technology and social practices around video evidence are rapidly evolving. The ten year snapshot of cases considered in this sample provides an important view of that period, however, as practices change observations made of the past provide less relevant information on the current and future states of those practices.

The analysis of this study was largely exploratory and often gave rise to more questions than answers. Additional research on this topic could examine more closely the specific aspects of the role played by video in the courts, and especially pertaining to the discourses that are produced and legitimized and the effect those have on truth discourses in society at large. Analyzing the factors that influence perceptions of video as trustworthy and reliable among judges deserve more rigorous attention than this study was able to provide. Similarly, analysis of the outcomes of trials and the factors that influence these was beyond the scope of this study, but is of prime importance to the pursuit of understanding the role of video in the courts. Of particular interest in studying the outcomes of trials is to explore the emancipatory potential of video evidence. Understanding the significance of video giving voice to marginalized groups in

society is a particularly worthwhile future project that may provide insight on methods of furthering social justice.

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- R v. L. (DO), 4 R.C.S. (1993).
- R v. Lifchus, 3 S.C.R. 320 (1997).
- R v. Mohan, 2 S.C.R. 9 (1994).
- R v. Nikolovski, 3 R.C.S. (1996).
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Appendix A: Sample Case List

- R v. Arkinstall, A.B.P.C. 23 (2011).
- R v. Atkinson, B.C.J. 1423 (2007).
- R v. Barrie (City) Police Service, O. J, 2519 (2012).
- R v. Bassi, B.C.J. 58 (2013).
- R. v. Bhandar, A.J. 570 (2007).
- R. v. Black, S. J. 141, (2007).
- R. v. Brissonnet, O. J. 432 (2006).
- R. v. Brown, N. S. J. 272, (2010).
- R v. Bumesi, O.J. 1161 (2014).
- R v. Burnett, O.J. 481 (2015).
- R. v. C. D. C., A. J. 741 (2007).
- R v. Campbell, O.J. 821 (2014).
- R v. Canada (Royal Canadian Mounted Police), B.C.J. 627 (2015).
- R v. Cantelon, O.J. 3296 (2010).
- R v. Colomb, M.J. 209 (2012).
- R v. Doughty, A.J. 34 (2009).
- R v. Duchek, S.J. 333 (2013).
- R v. D. S., O.J. 5358 (2009).
- R. v. Edwards, N. J. 265 (2013).
- R. v. I. J. W. C., B. C. J. 1866 (2006).
- R. v. J. D., O. J. 1007 (2015).
- R v. J. J. G., B.C.J. 3283 (2014).

R. v. Jageshur, O. J. 4729 (2014).

R v. Kassa, O.J. 1034 (2013).

R v. Klassen, B.C.J. 630 (2011).

R v. Leggette, N.S.J. 211 (2015).

R v. Lindsay, O.J. No. 61 (2005).

R v. Makris, B.C.J. 2038 (2013).

R v. Mcghie, S.J. 566 (2014).

R. v. Miazga, B. C. J. 2013 (2014).

R. v. Molakandov, O. J. 2482 (2013).

R. v. Muller, O. J. 5765 (2005).

R. v. Munro, O. J. 399 (2009).

R v. Neigum, B.C.J. 2642 (2014).

R. v. Ng, B. C. J. 2885 (2012).

R v. Ouellette, O.J. 3992 (2012).

R v. Parlee, O.J. 997 (2007).

R v. Peepre, B.C.J. 502 (2013).

R. v. Proulx, B. C. J. 272 (2005).

R v. R. F., O.J. 2165 (2009).

R v. R.W., O.J. 1993 (2009).

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R v. Salmon, O.J. 1070 (2012).

R v. Samuels, O.J. 5594 (2014).

R v. Serafin, Q.J. 3303 (2013).

R v. Shanks, O.J. 5362 (2014).

R v. Singh, Y.J. 188 (2010).

R v. St. Cloud, S.C.J. 27 (2015).

R. v. Thomson, O. J. 4331 (2014).

R v. Tyerman, O.J. 1833 (2006).

R v. T. C., O.J. 4586 (2005).

R v. Wood, O.J. 1446 (2013).

R v. Yoon, B.C.J. 765 (2012).