

Employee video surveillance and the new federal privacy legislation

The *Personal Information Protection and Electronic Documents Act (PIPEDA)* is federal privacy legislation that applies to the collection, use and disclosure of personal information in the course of commercial activities. It also applies to the personal information of employees of federally-regulated businesses (see "[The Personal Information Protection and Electronic Documents Act: What it means for federally regulated businesses and their employees](#)" and "[Ensuring compliance with the Personal Information Protection and Electronic Documents Act: what your organization should do](#)"). Essentially, the Act requires that personal information be collected, used and disclosed only with the knowledge and consent of the person to whom it relates, subject to limited exceptions. This article will discuss how the legislation has been applied to the gathering by employers of videotaped surveillance evidence of alleged employee misconduct.

TEAMSTERS LOCAL UNION NO. 419 v. SECURICOR CASH SERVICES (FEB. 6, 2004)

This case concerned a grievor who was terminated for alleged sick leave abuse. The grievor handled large amounts of cash for the employer, an armoured car service. After having been informed that he was suspected of having stolen cash, he called in sick two days in a row. The employer's investigator became concerned that the grievor was preparing to flee, so he drove to his house. There he observed the grievor on the street in front of his house.

The investigator videotaped what he saw, and it was the admissibility of the videotape evidence that was at issue in the hearing. The arbitrator noted that there were three lines of authority on the issue of admissibility of such evidence:

- Surveillance evidence may be admitted if it is reasonable to do so.
- Surveillance evidence is admissible if it is both relevant and probative.
- Surveillance evidence gathered in a public place is always admissible, as there is no expectation of privacy in such a setting.

The arbitrator expressed the view that, before deciding which approach to adopt, it was necessary to determine whether there was a right to privacy in the circumstances and, if so, whether the right justified excluding relevant and probative evidence.

PIPEDA – A PROHIBITION AGAINST UNREASONABLE SURVEILLANCE

The arbitrator held that there is a common law right to privacy recognized by the courts but that, in this case, there was also a statutory right to privacy by virtue of *PIPEDA*'s application to the workplace. Subsection 5(3) of *PIPEDA* provides that

"[a]n organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the

purposes that a reasonable person would consider are appropriate in the circumstances."

Paragraph 7(1)(b) of *PIPEDA* provides that personal information about an individual can be collected without consent if "it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province"

In the arbitrator's view, these provisions meant that, in workplaces covered by *PIPEDA*, unreasonable employee surveillance is prohibited by statute.

ARBITRAL VIEWS ON INTRUSIVE EMPLOYEE SEARCHES ALSO APPLY TO SURVEILLANCE

Apart from *PIPEDA* and the common law, the arbitrator noted that, "for decades", arbitrators have subjected intrusive employee inquiries – such as searches, medical exams and drug testing – to a standard of reasonableness. There was no reason, the arbitrator held, to adopt a different approach to video surveillance:

"Whether it is a drug test or surveillance, the employer is conducting an investigation for the purposes of obtaining information that it believes is necessary to run its business. ... In the normal course, this type of information would be understood to be part of the sphere of the employee's private life and of no legitimate interest to an employer. For these reasons, the same type of analysis which applies to searches or medical examinations should apply to the issue of surveillance – which is that a collective agreement should be read to include an implicit term that such intrusive inquiries are only permitted if reasonable in the circumstances."

Having concluded that unreasonable surveillance is a breach of the collective agreement, the arbitrator then held that the appropriate remedy for evidence unreasonably obtained was to exclude it. He added that, while there must be "extremely compelling" reasons to exclude evidence, in such rare circumstances, exclusion is the only remedy that can restore the grievor to the position he or she would have been in but for the employer's breach of the agreement.

SURVEILLANCE ADMITTED INTO EVIDENCE

When he turned to the facts of the case, however, the arbitrator held that the evidence should be admitted. The employer's investigation was legitimate and necessary, and the investigator had good reason to attend at the grievor's house after his two-day absence. The decision to videotape the grievor was taken only after the investigator saw the grievor in front of his house; and it was unreasonable to assume that there was a less intrusive way to obtain the information the investigator needed at that time. Moreover, the surveillance took place on one occasion only, for a short period of time and in a public setting where the grievor's expectation of privacy was low. Summing up, the arbitrator stated:

"The surveillance evidence in my view is reasonably obtained both in terms of the employer's reasons and the methods used when balanced against the grievor's privacy interests. Being reasonably obtained, the employer's "inquiry" is not contrary to the collective agreement. As such, there is no appropriate basis to exercise my discretion to exclude what is in all respects relevant and probative evidence."

evidence."

ROSS v. ROSEDALE TRANSPORT LTD. (MAY 26, 2003)

This case concerned the dismissal for fraud of a truck driver with eight years of service and no prior disciplinary record. Ross had sustained a back injury at work and was off work for four days, during which he received Workplace Safety and Insurance benefits. He was then placed on modified clerical and administrative duties for two months until his dismissal.

During this period, Ross's employer became suspicious of the assessments conducted by Ross's family physician and began to question whether Ross was genuinely incapable of performing his regular duties. When Ross announced that he was taking a vacation to help move his family out of their house, the employer engaged a private investigator to conduct video surveillance of Ross at his home.

The investigator went to Ross's house and videotaped him carrying furniture from the house to a pick-up truck parked nearby. After viewing the videotape, the employer told Ross that, if he did not resign, his employment would be terminated and the Workplace Safety and Insurance Board would be advised of the results of the surveillance. Efforts to arrange an accommodation between Ross and the employer failed, and Ross eventually filed an unjust dismissal complaint under the *Canada Labour Code*.

REASONABLE TO INVESTIGATE EMPLOYMENT BREACH?

At the hearing into his complaint, Ross objected to the admissibility of the videotaped evidence on the grounds that it was personal information collected without his knowledge and consent, contrary to *PIPEDA*. At issue was whether the exception in paragraph 7(1)(b) of the Act applied to collection by the employer. As noted above, paragraph 7(1)(b) provides that personal information may be collected without an individual's knowledge and consent if "it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province"

The adjudicator applied this provision and held that there was no doubt that, if the employer had attempted to obtain Ross's consent for the videotaping, the accuracy of the information would have been compromised. The sole question, therefore, was whether collection of the information for the purpose of investigating a breach of the employment agreement was reasonable.

ADMISSIBILITY FACTORS

The adjudicator noted that, before *PIPEDA* came into force, arbitrators had considered the following factors when balancing the employer's interest in preventing fraud and the employee's privacy interest:

- Was it reasonable, in all the circumstances, to initiate the surveillance?
- Was the surveillance conducted in a reasonable manner?
- Did the employer have other alternatives to obtain the evidence it sought?

According to the adjudicator, these principles continue to be relevant when determining whether the collection of information without consent is reasonable. Noting that an employer's interest does not extend to conducting surveillance of an employee whom it has no reason to suspect of dishonesty, the adjudicator held that the surveillance was not

no reason to suspect of dishonesty, the adjudicator held that the surveillance was not justified:

"In the instant case, there is absolutely no evidence that Ross had ever been anything other than an honest employee. ... There were a number of other means that were available to the employer to test the true extent of Ross' restrictions. ... [I]t was open for [the employer] to ask for an independent medical examination. ... This was a case where the employer, without any evidence that the employee was malingering or had made misrepresentations or spread disinformation as to his physical abilities, orders a surreptitious video surveillance in the hope of trapping the unsuspecting employee during the course of moving furniture at his place of residence at a time and place that he had voluntarily disclosed to his employer."

Holding that it was not reasonable for the employer to "cast an electronic web" to catch Ross in the act of moving, the adjudicator ruled that the collection of Ross's personal information without his knowledge and consent violated *PIPEDA* and, accordingly, the videotape was not admissible into evidence.

In Our View

It appears that the application of *PIPEDA*'s rules to the workplace may strengthen the traditional arbitral approach to the admission of evidence that involves the invasion of employee privacy. That approach balances the employee's right to privacy with the employer's interest in investigating a suspected infraction. (For more on how most arbitrators approach this issue, see "[Video surveillance: Invasion of privacy or reasonable response to misconduct?](#)".) The traditional analysis is the dominant one but is not universally accepted, as some arbitrators will admit the evidence as long as it is relevant and probative. In workplaces falling under *PIPEDA*, it may be easier for employees to assert that there is, in fact, a right to privacy against which the employer's interests must be balanced.

Once a right to privacy is found to exist, it may also be somewhat easier to assert that the remedy for breaching it is to exclude the evidence obtained by the breach. This proposition was accepted without hesitation by the adjudicator in *Ross*, despite the fact that the primary remedy available to successful complainants under *PIPEDA* is a "recommendation" by the Privacy Commissioner.

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