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## Ontario arbitrator admits video surveillance evidence because it is relevant and reliable

Readers of *FOCUS Alerts* will recall that labour arbitrators must consider from time to time whether to admit videotaped surveillance into evidence (see [“Video surveillance: Invasion of privacy or reasonable response to misconduct?”](#) and [“Employee video surveillance and the new federal privacy legislation”](#) on our Publications page). This issue has arisen again in a decision by an Ontario arbitrator in *Olmstead Foods Ltd. and United Food v. Commercial Workers Union, Local 459* (May 24, 2005).

The case involved an alleged campaign of harassment by some employees against another employee. There was a practice of employees always sitting in the same seat in the lunchroom, and graffiti had been written on the table and walls near the place occupied by the targeted employee. One employee was caught in the act and discharged. On the day of that employee's discharge, the employer installed a camera above the targeted employee's place in the lunchroom and images were captured of another employee, the grievor, writing a harassing message on the table. The issue before the arbitrator was whether those images could be entered into evidence.

The union raised a number of arguments against admitting the evidence:

- The *Personal Information Protection and Electronic Documents Act (PIPEDA)* created a right to privacy that should be balanced against the employer's interests.
- An implied right to privacy should be read into all collective agreements, based upon the principle that collective agreements should be reasonably applied and administered.
- The installation of a camera in the work place was a new "rule", subject to a test of reasonableness.
- The employer had failed to show that it had a legitimate business interest in using such a device.

The arbitrator rejected all of these arguments, noting that the employer had good reasons to install the camera in the first place:

“What is really going on here? An Employer sets up a camera to view a place, not a person's activity. It has reasons for this, said to be threefold. It is concerned that others might be involved in the harassment. It is concerned that a new individual might take up where the discharged employee left off. It is concerned that someone might continue the practice to draw suspicion away from the discharged employee. It is not a matter of speculative spying, ... but of watching a place with at least a strong suspicion that such an activity will provide information about a problem considered by both the Employer and the Union to be serious. I distinguish this from watching an individual for no particular reason. If there were a right to privacy that might engage it.”

## A SIMPLE TEST

In the arbitrator's view, what was called for was the "simple test" applied by courts: relevant evidence should be admitted if its probative value outweighs its prejudicial effects. The tape clearly had strong probative value because the grievor could be identified from it. As for the tape's prejudicial effect, the arbitrator held that the fact that it could weaken the grievor's defence was not relevant. Moreover, the camera had not caught anything of a personal or intimate nature or anything embarrassing to the grievor or his family. Nor was the grievor singled out as the target of the taping.

The arbitrator concluded that the tape should be admitted into evidence:

"Rules governing admissibility of evidence rest first upon an assumption that the evidence, if relevant, is admissible. Exclusionary rules have been created based upon reliability (hearsay, for example), protection of relationships (privileges, for example), on statutory protections as in the *Charter*, on disciplining authorities, or for other reasons. Here I have no evidence of prejudice to a person or principle."

## In Our View

The arbitrator's approach to the issue of admitting video surveillance evidence is not that of a majority of Canadian arbitrators. The more usual approach is that such evidence should be admitted only if it is reasonable in all the circumstances to request surveillance and the surveillance is conducted in a reasonable manner.

By contrast, this arbitrator appeared to apply the test applied by courts in a civil litigation context, which is that relevant evidence should be admitted unless it is excluded based on other rules of evidence (see "[Videotaped evidence and employee privacy rights](#)" on our Publications page). However, it is possible that, even applying the more common arbitral test mentioned above, he would have arrived at the same conclusion, given the context in which this surveillance was conducted. In particular, both the union and the employer were concerned about stopping the harassment at the core of the dispute.

Readers should also note that, while *PIPEDA* applies to personal information in connection with commercial activity in Ontario, it does not apply to employee personal information in provincially-regulated workplaces. Such information is caught by *PIPEDA* only in the federally-regulated sector (see "[Privacy Commissioner rules company must release personal information to former employee suing for wrongful dismissal](#)" on our What's New page). In this case, the arbitrator stated:

"I do not accept that a right to privacy can be transported from *PIPEDA* into a collective agreement. That legislation creates such a right for limited purposes, protection of individual personal information by a complaint to a Privacy Commissioner and a possible enforcement in Federal Court."

This appears to close the door to the argument that *PIPEDA* creates any privacy rights for employees in the provincially-regulated sector of the economy.

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