

**VIDEO SURVEILLANCE
AND THE
EMPLOYMENT RELATIONSHIP**

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INTRODUCTION

Video surveillance of employees is not a new issue for labour arbitrators. The early cases are summarized in Re Puretex Knitting Co. Ltd. -and- Canadian Textile and Chemical Union (1979), 23 L.A.C. (2d) 14 (Ellis). This was an interest arbitration concerning the union's demand for removal of video cameras which the employer had installed at the workplace. Arbitrator Ellis held in Puretex, supra, at pp 29-30:

In the use of electronic surveillance, it is apparent that we confront conflicting social values of considerable significance. There is on the one hand the principle of the right to privacy and beyond that the more general idea, of which the right to privacy is only one facet, of the crucial importance of preserving and nurturing the historically fragile concept of human dignity. The Orwellian construct of the ultimately socialized man and, as suggested in the EICO case[(1965), 44 L.A. 563 (Delany)], the programmed factory of Chaplin's "Modern Times" are widely accepted in this society as classic illustrations of a world gone wrong – of anti-human societal tendencies. Electronic surveillance is the ultimate socializing device and the public controversy which always attends its use attests to people's instinctive identification of its fundamentally anti-human character.

Arbitrator Ellis went on to express a balancing of interests test, as between an employee's right to privacy and an employer's right to manage the workplace; Puretex, supra, p. 30:

It is clearly a matter of balancing competing considerations after recognizing that any use of cameras that observe employees at work is intrinsically seriously objectionable in human terms, with the degree of objection depending on the way the cameras are deployed and the purpose for which they are used and ranging from unacceptable in the case of constant surveillance of conduct and work performance to probably non-objectionable in the case of short-term individual application for training purposes.

Arbitrator Ellis ordered the removal of cameras from the production areas, but, not from the storage and loading dock areas where there had been a history of theft or pilfering.

The Puretex decision, supra, reflects the typical arbitral opinion in Canada, which follows that first expressed by an American arbitrator in Re Electronic Instrument Co. Inc. -and- Int'l Union of Electrical, Radio & Machine Workers, Local 431 (1965), 44 L.A. 563 (Delany), at p. 564:

The device at hand is not only personally repugnant to the employees, but it has such an inhibiting effect as to prevent the employees from performing their work with confidence and ease. Every employee has occasion to pause in the course of his work to take a 'breather,' to scratch

his head, to yawn, or otherwise be himself without affecting his work. An employee, with reason, would hesitate at all times to so behave, if his every action is being recorded on TV.

To have workers constantly televised is, to me, reminiscent of the era depicted by Charlie Chaplin in 'Modern Times' and constitutes in my mind an affront to the dignity of man.

Video surveillance is considered to be an affront to the “dignity” of the person. On the one hand, the employer owns the business, and it has the authority to manage the workplace as it reasonably sees fit. On the other, employees are free persons who are party to an employment contract. Arbitrators have sought to reconcile their competing interests. They have sought to uphold the employer’s right to manage its business, while preserving the employee’s dignity as a member of a free society.

There has been debate as to whether a general common law right to privacy would exist. Where statutory privacy rights would now apply, that debate is no longer relevant. Current privacy legislation has, in effect, codified the arbitral common law, and given it broad application.

CHARTER VALUES, REASONABLENESS, AND BALANCING INTERESTS

The Canadian Charter of Rights and Freedoms (“the Charter”), Constitution Act, 1981 applies only to the public sector, and it does not expressly speak to privacy rights. Nevertheless, the Charter has had a confirming impact upon privacy rights in the private sector, stemming from Section 8 which provides that “Everyone has the right to be secure against unreasonable search or seizure.” It is this provision which led the Supreme Court of Canada in R. v. Duarte (1990), 64 D.L.R. (4th) 240 (S.C.C.) to attempt to describe the right to “privacy”, and to express it as a value to be upheld in a free society.

Duarte, supra, was concerned with surreptitious police surveillance, without a warrant. The police had rented an apartment for an informer, and had installed audio-visual recording equipment in a wall. The Court concluded that the recording of conversation between individuals and police or informers, would be improper without prior judicial authorization. Lamer J. concluded that such authorization would have to be subject to balancing “the right of the state to intrude on the private lives of its citizens and the right of those citizens to be left alone” (Duarte, supra, p. 254). Lamer J. was not inclined to give the police a free hand on their assertion that their surveillance would be concerned only with illegal activity; Duarte, supra, p. 257:

To countenance this practice would not strike only at the expectations of privacy of criminals and those concerned with wrongdoing. Rather, it would undermine the expectations of privacy of all those who set store on the right to live in reasonable security and freedom from surveillance, be

it electronic or otherwise. And it has long been recognized that this freedom not to be compelled to share our confidences with others is the very hallmark of a free society.

So, should any less be expected by employees? In Re Doman Forest Products Ltd., New Westminster Division -and- International Woodworkers, Local 1-357 (1990), 13 L.A.C. (4th) 275 (Vickers), the employer suspected that an employee was falsely alleging medical incapacity to attend work, and it retained a private detective to videotape the activity of the employee at home. The then-applicable Privacy Act, R.S.B.C. 1979, c. 336, merely declared it a tort to violate another's privacy, and the right to privacy was described as "that which is reasonable in the circumstances, due regard being given to the lawful interests of others." (Section 1(2)). Arbitrator Vickers referred extensively to Duarte, supra. While acknowledging that Section 8 of the Charter did not apply to a private sector dispute, Arbitrator Vickers nevertheless concluded that, "those fundamental Charter values" could not be ignored.

Arbitrator Vickers also looked to the Supreme Court of Canada decision in Hunter et al. v. Southam Inc. (1984), 11 D.L.R. (4th) 641 (S.C.C.). This case concerned a search pursuant to the Combines Investigation Act, R.S.C. 1970, c. C-23. Dickson J. concluded in Hunter et al. v. Southam, supra, at p. 650:

[A]n assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective.

Arbitrator Vickers concluded that "the right to privacy is not absolute" (Doman, supra, p. 280); he considered privacy to be a "freedom", and he formulated a three-question test for balancing the competing interests; Doman, supra, pp. 281-282:

I accept that an employee has a right to freedom of privacy.... In my opinion, it is a balancing of interests that is required. The employee's right to privacy weighed against the company's right to investigate what it might consider to be an abuse of sick leave. Questions to be answered include:

- (1) *Was it reasonable, in all of the circumstances, to request a surveillance?*
- (2) *Was the surveillance conducted in a reasonable manner?*
- (3) *Were other alternatives open to the company to obtain the evidence it sought?*

Some arbitrators have considered the third question regarding "other alternatives" as already encompassed by the first question concerning reasonableness in all of the

circumstances. Nevertheless, whether expressed as three questions or two, the questions form what has continued to be the test for admissibility of videotape evidence.

Re Steels Industrial Products -and- Teamsters Union, Local 213 (1992), 24 L.A.C. (4th) 259 (Blasina) was also concerned with the admissibility of videotape evidence obtained by a private detective retained to monitor an employee at home. Here too, the employer suspected the employee of abusing sick leave. Arbitrator Blasina followed Doman, supra. He accepted Arbitrator Vickers' three-question test for balancing the competing interests, although he considered that the standard was encompassed in the first two questions. Arbitrator Blasina opined that an employer should have no greater discretion to conduct electronic surveillance of an employee, than would the state over any citizen; Steels Industrial Products, supra, p. 274:

As a general principle, I would not think that a private citizen – specifically here an employer – should have greater freedom or authority to monitor another private citizen than does the state, even if the private citizen is one's employee.... I would think that great circumspection is called for when an employer seeks to electronically monitor the activity of an employee off the job – albeit during otherwise working hours. The employer-employee relationship is based on an employment contract and the videotaping of an employee clearly is at the extreme of the employer's authority under such a contract.

Domtar v. Communications, Energy and Paperworkers Union, Local 789 (Ally Grievance), [2000] B.C.C.A.A.A. No. 285 (McPhillips) was concerned with the admissibility of tape recordings the grievor had made of conversations in the lunchroom. The grievor was asserting that these tapes would prove that he had been the victim of discrimination and harassment by his fellow employees, while managerial personnel were present. Arbitrator McPhillips affirmed that the critical test for admissibility of evidence was whether it was relevant, probative, and material; however, he stated, "there are also other matters to be considered with regard to the use of surreptitiously obtained evidence such as tape recordings and video surveillance evidence." (Domtar, supra, ¶23). Arbitrator McPhillips affirmed that there was a balancing of interests to be considered; he affirmed the three questions expressed by Arbitrator Vickers in Doman, supra; and, he provided a helpful summary of the factors that have been considered relevant; Domtar, supra, at ¶29:

Some of the factors which have been considered by arbitrators in this balancing of interests include whether the tapes were central to the issue at hand, the reasons for the surveillance, i.e. the basis for the suspicions or mistrust, expectations of privacy including the location of the surveillance, the degree of surreptitiousness, the degree of intrusiveness and the seriousness of the loss of privacy, to whom the surveillance was directed (eg., all employees or only individuals about whom there is some suspicion), how the evidence was recorded, when the

evidence was recorded, the accuracy and reliability of the taped evidence, the efforts which have been made to solve the problem in alternate ways, the availability of other information, the existence of previous threats, and the nature of the previous relationships between the parties involved on the tape. As well, it has been often stated that an arbitration board must consider whether the admission of the evidence would bring the arbitration process into disrepute or whether that would be the case if the evidence was not admitted.

The cases do not make clear the relationship between reasonable cause and balancing of interests. Perhaps it is because the same factors may be considered in addressing each principle. First, the employer must have reasonable cause to initiate surveillance. In other words the asserted need and purpose for the surveillance must be substantive. If so, then the balancing of interests comes into consideration and the circumstances are weighed to determine whether the surveillance as conducted was reasonable. A more cogent case would have to be made for surreptitious video surveillance than for non-surreptitious video surveillance: Re Saint Mary's Hospital -and- Hospital Employees Union (1997), 64 L.A.C. (4th) 382 (Larson).

ONUS OF PROOF

In Re Brewer's Retail Inc. -and- United Brewer's Warehousing Workers' Provincial Board (1999), 78 L.A.C. (4th) 304 (Herman), it was held at p. 317 "that employees have a right to privacy, [and] that surreptitious videotaping of employees is presumptively an invasion of that right..." The onus of establishing justification for surveillance would rest with the party which undertook it; i.e. likely the employer. In Re Alberta Wheat Pool -and- Grain Workers' Union Local 333 (1995), 48 L.A.C. (4th) 332 (Williams), it was held, that the employer must be able to justify the video surveillance based on the circumstances of the case. Alberta Wheat Pool, supra, was concerned with the videotaping of an employee rumoured to be building a house instead of reporting to work. Arbitrator Williams noted, that although the employee's right to privacy was not absolute, the employer was obliged to show that other investigatory methods were not available; Alberta Wheat Pool, supra, p. 341:

The right of privacy in the workplace is an important right but it is not absolute. The employer has every right to expect its employee to honour his or her commitment to the employer for which compensation is paid. This includes an obligation to be honest and forthright with the employer in all respects, including absence from employment for sickness or disability. In this regard, the employer has every right to investigate the reasons for an employee's absence, particularly where suspicious circumstances exist. In the course of that investigation, however, before the employer goes so far as to intrude on the right to an employee's privacy, it must be able to justify that such a course is the only one open to it and the only way in which the truth can be ascertained.

Particularly where the surveillance was clandestine, the employer would be obliged to prove that the circumstances were such that it was given reasonable cause to initiate surveillance and, to discount other options as being unrealistic or unreasonable. However, this does not mean that the employer must have exhausted all the alternatives to surreptitious video surveillance, regardless of their reasonableness: X v. Y (Z Grievance), [2002] B.C.C.A.A.A. No. 292 (Taylor).

The above citation from Domtar, supra, provides a helpful and non-exclusive list of the kind of factors that may be considered. Where the employee has, by his previous conduct, undermined his own credibility, or, where the cause for investigation is conduct which goes to the person's integrity, such as theft, then direct confrontation of the suspect would seem to be naive, and, clandestine video surveillance would seem to be an appropriate investigative tool: Steels Industrial Products, supra; British Columbia Maritime Employers Assn. -and- International Longshore and Warehouse Union, Local 500 (Iannattone Grievance), [2002] C.L.A.D. No. 310 (Munroe); Unreported: June 27, 2002; Re Pope & Talbot Ltd. -and- Pulp, Paper and Woodworkers of Canada, Local No. 8, (2003), 123 L.A.C. (4th) 115 (Munroe); Re Ebco Metal Finishing Ltd.-and- International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers, Shopmen's Local 712 (2004), 134 L.A.C. (4th) 372 (Blasina). For a case on surreptitious video surveillance undertaken to investigate suspected drug use on company property, see Re La-Z-Boy Canada Ltd. -and- Communications Workers of America, Local 80-400 I.U.E. (2005), 143 L.A.C. (4th) 1 (Surdykowski).

PIPA

The Personal Information Protection Act, S.B.C. 2003, c. 63 ("the BC PIPA") and the Personal Information Protection Act, S.A. 2003, c. P-65 ("the Alberta PIPA") have been deemed by the Federal Cabinet to be substantially similar to the federal Personal Information Protection and Electronics Documents Act, S.C. 2000, Chap. 5 ("the PIPEDA"). The BC PIPA and the Alberta PIPA apply to the private sector in their respective provinces. The PIPEDA would apply to federal works, undertakings, and businesses located in these provinces. These would include a small proportion of the overall workforce.

The BC PIPA and the Alberta PIPA contain an inclusive definition of "employee" which would include a volunteer. The PIPEDA does not contain a definition of employee; however, the PIPEDA is concerned with the collection of "personal information" about an "individual", and this would certainly include an employee, or volunteer. Finally, the "purpose" of all the legislation is to govern the collection, use, or disclosure of personal information by organizations. "Organization" includes employers, and there has been no dispute that video surveillance amounts to the collection of personal information.

The following provisions from the BC PIPA are noted:

Definitions

1. In this Act,

“employee personal information” means personal information about an individual that is collected, used or disclosed solely for the purposes reasonably required to establish, manage or terminate an employment relationship between the organization and that individual, but does not include personal information that is not about an individual’s employment;

“investigation” means an investigation related to

- (a) a breach of an agreement,
- (b) a contravention of an enactment of Canada or a province,
- (c) a circumstance or conduct that may result in a remedy or relief being available under an enactment, under the common law or in equity,
- (d) the prevention of fraud, or....

if it is reasonable to believe that the breach, contravention, circumstance, conduct, fraud or improper trading practice in question may occur or may have occurred;...

“personal information” means information about an identifiable individual and includes employee personal information but does not include

- (a) contact information, or
- (b) work product information;

Purpose

2 The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of individuals to protect their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

Compliance with Act

4(1) In meeting its responsibilities under this Act, an organization must consider what a reasonable person would consider appropriate in the circumstances.

Collection of personal information without consent

12(1) An organization may collect personal information about an individual without consent or from a source other than the individual, if...

(c) it is reasonable to expect that the collection with the consent of the individual would compromise the availability or the accuracy of the personal information and the collection is reasonable for an investigation or a proceeding,...

Collection of employee personal information

13(1) Subject to subsection (2), an organization may collect employee personal information without the consent of the individual.

(2) An organization may not collect employee personal information without the consent of the individual unless

(a) section 12 allows the collection of the employee personal information without consent, or

(b) the collection is reasonable for the purposes of establishing, managing or terminating an employment relationship between the organization and the individual.

(3) An organization must notify an individual that it will be collecting employee personal information about the individual and the purposes for the collection before the organization collects the employee personal information without the consent of the individual.

(4) Subsection (3) does not apply to employee personal information if section 12 allows it to be collected without the consent of the individual.

Use of employee personal information

16 (2) *An organization may not use employee personal information without the consent of the individual unless*

(b) the use is reasonable for the purposes of establishing, managing or terminating an employment relationship between the organization and the individual.

The following provisions from the Alberta PIPA are noted:

Section 1: Definitions

1. In this Act,

(f) “investigation” means an investigation related to

(i) a breach of agreement,

(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or

(iii) circumstances or conduct that may result in a remedy or relief being available at law,

if the breach, contravention, circumstances or conduct in question has or may have occurred or is likely to occur and it is reasonable to conduct an investigation;

....

(j) “personal employee information” means, in respect of an individual who is an employee or a potential employee, personal information reasonably required by an organization that is collected, used or disclosed solely for the purposes of establishing, managing or terminating

(i) an employment relationship, or

(ii) a volunteer work relationship

between the organization and the individual but does not include personal information about the individual that is unrelated to that relationship;

(k) “personal information” means information about an identifiable individual;....

Section 2: Standard as to what is reasonable

2. Where in this Act anything or any matter

(a) is described, characterized or referred as reasonable or unreasonable, or

(b) is required or directed to be carried out or otherwise dealt with reasonably or in a reasonable manner,

the standard to be applied under this Act in determining whether the thing or matter is reasonable or unreasonable, or has been carried out or otherwise dealt with reasonably or in a reasonable manner, is what a reasonable person would consider appropriate in the circumstances.

Section 3: Purpose

3. *The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.*

Section 11: Limitations on collection

11(1) *An organization may collect personal information only for purposes that are reasonable.*

(2) *Where an organization collects personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is collected.*

Section 14: Collection without consent

14. *An organization may collect personal information about an individual without the consent of that individual but only if one or more of the following are applicable:*

(d) the collection of the information is reasonable for the purposes of an investigation or a legal proceeding;

Section 15: Collection of personal employee information

15(1) *Notwithstanding anything in this Act other than subsection (2), an organization may collect personal employee information about an individual without the consent of the individual if*

(a) the individual is an employee of the organization, or

(b) the collection of the information is for the purpose of recruiting a potential employee.

(2) *An organization shall not collect personal information about an individual under subsection (1) without the consent of the individual unless*

(a) the collection is reasonable for the purposes for which the information is being collected,

(b) the information consists only of information that is related to the employment or volunteer work relationship of the individual, and

(c) in the case of an individual who is an employee of the organization, the organization has, before collecting the information, provided the individual with reasonable notification that the information is going to be collected and of the purposes for which the information is going to be collected....

(4) *Nothing in this section is to be construed so as to restrict or otherwise affect an organization's ability to collect personal information under section 14.*

Section 18: Use of personal employee information

18(1) *Notwithstanding anything in Act other than subsection (2), an organization may use personal employee information about an individual without the consent of the individual if*

(a) the individual is an employee of the organization, ...

(2) *An organization shall not use personal information about an individual under subsection (1) without the consent of the individual unless*

(a) the use is reasonable for the purposes for which the information is being used,

(b) the information consists only of information that is related to the employment or volunteer work relationship of the individual, and

(c) in the case of an individual who is an employee of the organization, the organization has, before using the information, provided the individual with reasonable notification that the information is going to be used and of the purposes for which the information is going to be used.

The BC PIPA and the Alberta PIPA are both intended “to govern the collection, use and disclosure of personal information by organizations”, and both assert recognition of privacy rights for employees, subject to incursion based upon a standard of reasonableness. The PIPEDA is similar. In other words, privacy rights are not absolute; there is still a balancing of interests to consider; and, the arbitral authorities continue to be useful as a body of common law. Pope & Talbot, supra, followed the enactment of the BC PIPA; and, Arbitrator Munroe simply stated, at p. 125:

...I do not regard the Act as altering the substance of the issue in cases of this kind.

Arbitrator Munroe referred at length to Re Unisource Canada Inc. -and- Communications, Energy and Paperworkers’ Union of Canada, Local 433 (2003), 121 L.A.C. (4th) 437 (Kelleher). Unisource, supra, was a case of non-surreptitious surveillance where the employer had installed video cameras in the warehouse and office to monitor entrance and exit points. Arbitrator Kelleher held that not so strong a foundation would be required to justify non-surreptitious video surveillance as would be required were the surveillance surreptitious. He stated in Unisource, supra, at pp. 446-447:

In my view surreptitious surveillance can only be justified where: (i) there is a substantial problem; (ii) there is a strong possibility that surveillance will be effective; (iii) there is no reasonable alternative to surreptitious surveillance.

The threshold is lower with respect to surveillance that is not surreptitious, i.e., announced to the employees affected. There is no blanket prohibition. Rather, the test is whether the surveillance is a reasonable exercise of management rights in all the circumstances of the case; See Lenworth Metal Products, supra [(1999), 80 L.A.C. (4th) 426 (Armstrong)].

Arbitrator Kelleher found that the employer had led sufficient evidence to support a legitimate concern about theft. There were seven cameras, he concluded, whose purpose was to deter and detect theft, and which represented a reasonable use of video surveillance pursuant to a legitimate exercise of management rights.

However, there was a camera covering the cutting area which permitted observation of employees working. Arbitrator Kelleher concluded that the presence of this camera was not shown to be consistent with a concern for theft, and he directed that

its use be terminated. There was another camera which covered an employee entrance, but which also could permit observation into the lunchroom. Arbitrator Kelleher held that there was no reason to restrict the camera from monitoring the entrance way, however he ordered that the focus of this camera be adjusted to the extent possible to prevent intrusion into the lunchroom.

Returning to Pope & Talbot, supra, this case concerned a union policy grievance protesting the employer's installation of a fixed video camera at a barge unloading facility attached to its pulp mill. The barge unloading facility was located approximately 800 yards from the building where the supervisors' office was located. The barge loader operator would be visible to the camera only when climbing in or out of the cab, or standing nearby. This video surveillance was not surreptitious; and, the employer characterized the surveillance as intended to observe equipment, not employees. Consistent with the prior arbitral authorities, Arbitrator Munroe concluded; Pope & Talbot, supra, p. 125:

One begins with a clear appreciation that as between employer and employee, the latter's reasonable expectations of privacy are not set aside simply by the entering into the employment relationship; and further, that while the Charter is not per se applicable to private sector disputes like this one, the values embedded in the Charter do appropriately influence the development of our common law and arbitral jurisprudence: cf., Re British Columbia Maritime Employers Assn. and I.L.W.U., Local 500 (Iannattone), June 27, 2002 (Munroe) [summarized 70 C.L.A.S. 74]

But just as an employee's privacy interests require protection against the overzealous exercise of management rights, so also must an arbitrator acknowledge the employer's legitimate business and property interests. What is required, then, is a contextual and reasonable balancing of interests. There is no absolute rule affording precedence to one legitimate interest over the other. It is a question of whether the particular camera surveillance, in the purported exercise of a management right, is reasonable in the circumstances.

Arbitrator Munroe looked to the substance of what would be observable by the camera. He did not accept, without question, the rationale offered by the employer that the camera was only intended for "security" or "process" purposes; Pope & Talbot, supra, pp. 119-120:

...I think it overly simplistic, and inaccurate in substance, to describe this camera surveillance as being of equipment activity only. This is not a "security" camera (of which there are a number of security-sensitive points at the mill site). Neither is it purely a "process" camera (of which there also are a number at the mill site), monitoring automated

or unmanned equipment or processes and only incidentally capturing the movements of employees who may briefly be within the camera's field of vision. While the surveillance camera monitoring the BUF is not intended to capture (and generally would not capture) the personal movements or activities of the Barge Unloader, the camera is intended, at least in part, to monitor and supplement the human supervision of the Barge Unloader's work production, and to act as a deterrent to inappropriate down time. It is the only such camera – i.e., installed for that purpose – anywhere in the mill.

Arbitrator Munroe concluded that the employer was legitimately concerned about unnecessary downtime at shift changes, and unnecessary delays during transitions when a towboat would deliver a loaded chipbarge from a tie-up area to the barge unloading facility. He found the video surveillance to be reasonably justified as a supervisory tool to monitor the production process at a quasi-remote area of the work site.

Nevertheless, Arbitrator Munroe concluded that the surveillance was excessive in that it was constant. He considered this to be “an unreasonable exercise of management rights which cannot be sustained.” (Pope & Talbot, supra, p. 126) He therefore proceeded to make orders for regulating who would be entitled to activate the monitor, and when and for how long.

Where the circumstances support a need for video surveillance, and the need leans to the “benign”, and the video surveillance meets that need in a genuine substantive way, the balancing of interest in favour of the employer is more easily established: Re Saint Mary's Hospital, supra. Included in the “benign” would be videotaping for training purposes, or, more commonly, video surveillance of machinery in operation or video surveillance for the security of persons or property at the workplace. This type of video surveillance is less likely to be clandestine. It is unlikely therefore that a visible video camera focused at the doorway of a financial institution or retail outlet, or at the till of a cash register, or at an isolated area of the workplace, would be regarded as an unlawful affront to privacy rights. However, where the video surveillance is surreptitious, or constant, and intended to observe employees, the employer will have to make a weightier case. The employer would have to prove substantial cause to suspect employee wrongdoing; it would have to show that surreptitious video surveillance was an effective method of surveillance to meet the purpose intended; and, it would have to persuasively explain why it would not have been reasonable to resort to other alternatives.

BRITISH COLUMBIA

In Re Ebco Metal Finishing Ltd. -and- International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers, Shopmen's Local 712 (2004), 134 L.A.C. (4th) 372 (Blasina), the two grievors were discharged in July, 2004 for malingering on the job and limiting their productivity. The Employer relied on videotapes surreptitiously obtained at the worksite over a number of days in May and

June. The videotape evidence was ruled to be inadmissible as having been obtained in contravention of the BC PIPA, in particular Section 13(2)(b):

Collection of employee personal information

13(2) An organization may not collect employee personal information without the consent of the individual unless....

(b) the collection is reasonable for the purposes of establishing, managing or terminating an employment relationship between the organization and the individual.

Ebco, supra, concerned the re-activation of hidden video cameras which had been installed in the polishing department some years earlier and turned off. The grievors worked an unusual shift, from noon to 8:00 p.m. By 5:00 p.m. all supervisors and managerial personnel would have left the workplace, leaving the grievors alone and completely unsupervised. The video cameras were turned on for the last three hours of the grievors' shift because they had been unable to achieve, by what would have been a 3.3% margin, the minimum productivity which the employer had expected. The employer's intent was to find out what was going on. However, it seemed that the employer had been unduly uninformed.

At the arbitration hearing, it was shown that management had not objectively reviewed the production records; that one of the grievors had at times met the minimum productivity target; and, that the grievors' productivity was no different from that of everyone else in their department who regularly worked a supervised dayshift. Also, management was unaware of the metal-polishing procedure which was then in practice, and which had been in practice for the preceding two years. The General Manager testified that he was "very suspicious" of the grievors; but, no consideration was given to interviewing the grievors, or to simply having a managerial person stay late one evening to supervise their last three hours, or to supervising production during the regular dayshift, which production was equal to that of the grievors. The employer had undertaken the serious measure of surreptitious video surveillance in the sense of "fishing" for information. The employer failed to show cause for reasonable suspicion of wrongdoing, or for doubting the integrity or credibility of the grievors. It also failed to show that less intrusive alternatives would have been unrealistic and unreasonable.

Ebco, supra, appears to be the first arbitration award in which the BC PIPA was applied. The union did not challenge the quality or reliability of the videotapes. The only matter raised by the union was a challenge to the very reasonableness of the employer's decision to undertake the surreptitious video surveillance. Although the reasonableness test as expressed in Section 13(2)(b) the BC PIPA did not specifically mention "other alternatives", Arbitrator Blasina considered the arbitral authorities and concluded; Ebco, supra p. 401:

There is no express requirement that reasonable and less intrusive alternatives be exhausted. It is my understanding that there is one fundamental requirement; i.e. that the surreptitious video surveillance be reasonable in the circumstances. In other words, given the circumstances, was this clandestine and intrusive form of supervisory surveillance reasonably warranted? The question is pragmatic, and therefore it is inescapably inclusive. One of the considerations in testing reasonableness must still be the sensible presence of other less-intrusive means. The PIPA does not “[alter] the substance of the issue in cases of this kind.”; Pope and Talbot, supra....

Arbitrator Blasina concluded that the employer had contravened the BC PIPA, particularly Section 13(2). He ruled that the videotape evidence was inadmissible; and, as a result, the employer was unable to prove its case. The parties later settled.

INADMISSIBILITY OF EVIDENCE OBTAINED CONTRARY TO THE PIPA

Ordinarily, evidence which is relevant and probative is ruled to be admissible. However, arbitrators have held that the purpose for restricting video surveillance would be defeated, were the evidence admitted regardless that it was improperly obtained: Re Toronto Transit Commission -and- Amalgamated Transit Union, Local 113 (Belsito) (1999), 95 L.A.C. (4th) 402 (Chapman); Re Securicor Cash Services -and- Teamsters, Local 419 (Mehta) (2004), 125 L.A.C. (4th) 129 (Whitaker); and, Ebco, supra.

A contrary approach was taken in Richardson v. Davis Wire Industries Ltd., [1997] B.C.J. No. 937 (B.C.S.C.). Kirkpatrick J. of the British Columbia Supreme Court held that the Privacy Act, R.S.B.C. 1979, c. 336 “merely provides the foundation for a claim in tort and does not prohibit the admission of evidence, even if gathered contrary to the Act.” (Richardson v. Davis Wire, supra, ¶48) This case concerned a suit for wrongful dismissal by a supervisory employee who was terminated after having been videotaped sleeping on the job.

By 2004 when Ebco, supra, was decided, the BC PIPA applied, and Arbitrator Blasina declined to follow Richardson v. Davis Wire, supra, holding instead that evidence obtained in contravention of the BC PIPA could not be admitted; Ebco, supra, pp. 401-402:

The PIPA is clearly intended to apply to the employment relationship. The authority of the legislation would not be given effect were an employer to breach its provisions and be permitted to rely on the unlawfully obtained evidence anyway. For an arbitrator in British Columbia to admit the evidence in such a case would amount to error of law and abdication of jurisdiction.

Not referred-to in Ebcq, supra, was the then-recent decision of the Ontario Supreme Court in Ferenczy v. MCI Medical Clinics et al (2004), 70 O.R. (3d) 277 (S.C.J.). This was a medical malpractice suit. The plaintiff had been treated for a cyst on her left wrist. She testified in cross-examination that she afterward was unable to hold a cup of coffee in her left hand. This testimony was unanticipated. The defendant sought then to enter into evidence a videotape taken by a private detective showing her doing just that at a Tim Horton's restaurant. Counsel for the plaintiff argued that the surveillance evidence had been obtained in contravention of the PIPEDA. Dawson J. concluded that the videotape evidence had become relevant, and admitted it for the purpose of assessing credibility, stating; Ferenczy v. MCI Medical, supra, at p. 281:

At the outset I wish to point out that the Act does not contain a provision which prohibits the admissibility into evidence of personal information collected or recorded in contravention of the Act. Rather the Act provides that an individual or the Privacy Commissioner may bring a complaint which results in an investigation and report under the Act. Thereafter, certain steps described in the legislation may be taken in the Federal Court. Consequently, if the collection of surveillance evidence in this case is said to be a violation of the Act a complaint may be filed pursuant to the Act to commence that process. However, that has no direct impact on the issue of the admissibility of evidence in this trial.

However, Dawson J. did go on to apply the PIPEDA. He concluded that the private investigator was the agent of the defendant. Therefore the collection of personal information was not a “commercial activity”. The plaintiff had been videotaped in a public place, Tim Horton's, for the defendant's personal purpose of defending against the lawsuit. Dawson J. concluded that, by commencing legal action, the plaintiff had given the defendant an implied consent to collect personal information insofar as was relevant to its defence.

In the alternative, Dawson J. concluded that the plaintiff's consent was not necessary, because of Section 7(1)(b) of the PIPEDA. This provision permits the collection of personal information “without the knowledge or consent of the individual” if,

7(1)(b) 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;

Dawson J. held that the “laws of Canada or a province” included the common law, including the law of tort; and, he stated in Ferenczy v. MCI Medical, supra, at p. 286:

For all of the foregoing reasons, I conclude the evidence here in question was not collected, recorded, used or disclosed in contravention of the Act.

Neither the BC PIPA, the Alberta PIPA, nor the PIPEDA exactly “prohibits the admissibility into evidence of personal information collected or recorded in contravention of the Act.” Ferenczy v. MCI Medical, supra, was a case (like Richardson v. Davis Wire, supra) where the plaintiff’s conduct would not merit sympathy from the court. It is suspected that Dawson J. harboured some displeasure that, because of the plaintiff’s unanticipated testimony in cross-examination, there was introduced into the trial a debate regarding legislation which he opined “leaves a lot to be desired in terms of clarity and usefulness.” (Ferenczy v. MCI Medical, supra, at p. 286). Indeed, the arguing of privacy legislation with respect to an evidentiary issue can greatly complicate and encumber any trial.

It is submitted however that the legislation need not contain a specific provision prohibiting the admission of evidence obtained in contravention, nor would the presence of a complaint process to some other forum absolve an adjudicator from the obligation to uphold the law. The BC PIPA, the Alberta PIPA, and the PIPEDA “govern the collection, use and disclosure of personal information” and contain specific provisions regulating those purposes. If there has been a violation of the legislation with respect to the collection of information, but the adjudicator nevertheless permits the information to be used or disclosed, then would the adjudicator not be permitting an additional violation?

Just as the Supreme Court of Canada held in Duarte, supra, and Hunter v. Southam, supra, in the context of Section 8 of the Charter, so too in the context of current privacy legislation would more than the pursuit of some valid objective need to be considered. The BC PIPA, the Alberta PIPA, and the PIPEDA are regulatory in nature. A contravention would amount to an offence under the legislation. By their operation the legislation creates privacy rights, which are akin to the protection granted by human rights legislation. One cannot by contract exclude the application of any part of legislation unless the legislation itself expressly permits it; and no adjudicator, arbitrator, or judge can escape the obligation to apply the legislation, and to apply it correctly. One would think therefore that any violation of the BC or Alberta PIPA (or the PIPEDA) would be intolerable, and therefore any evidence obtained as a result would be inadmissible in any judicial or quasi-judicial forum.

Employers would be prudent to consider the admissibility issue in advance. Were the surveillance later to be held to have been excessively intrusive, there would not only be the prohibition from admission, which would be potentially fatal to the employer’s case; but, given the current legislation, there would also be the risk of liability or sanctions. A breach of statute would itself enable a claim in tort; and, both the BC PIPA and the Alberta PIPA contain a complaint process whereby an individual may be fined up to \$10,000.00, and an organization up to \$100,000.00. Video surveillance is not a strategy to be undertaken liberally or speculatively.

Richardson v. Davis Wire, supra, fed an additional concern that the contents of the later-obtained videotape were relied upon in order to find that there was reasonable

cause for undertaking the surveillance in the first place. In EbcO, supra, it was the pre-surveillance circumstances which were considered material, supra, at pp. 391-392:

Were surreptitious video evidence admissible in any case where it had probative value, and regardless of “the company’s legitimate right to investigate”, then the circumstances at the time that the decision was taken would be irrelevant, and could effectively be ignored. An employer might institute surreptitious video surveillance at its pleasure; just to see what turned up. The law does not contemplate such discretion in the hands of employers; not in British Columbia nor in other jurisdictions in Canada: e.g. Re The Calgary Herald and G.C.I.U., Loc. 34M (2004), 126 L.A.C (4th) 386 (Tettensor, Landry, Thompson); Re Toronto Transit Commission and A.T.U., Loc. 113 (1997), 61 L.A.C (4th) 218 (Saltman); Re Brewers Retail Inc. and United Brewers’ Warehousing Workers’ Provincial Board (1999), 78 L.A.C. (4th) 394 (Herman); Re Rosedale Transport Ltd. and Ross, [2003] C.L.A.D. No. 237 (Brunner), and the there-cited Re Canadian Pacific Ltd. and B.M.W.E. (Chahal) (1996), 59 L.A.C. (4th) 111 (M.G. Picher).

And, in EbcO, supra, at p. 393:

...Were surveillance evidence admissible whenever it had probative value, or to express it differently, were surveillance evidence admissible because it had probative value, the PIPA would have no meaning or purpose at the workplace, and the required reasonable cause justification would be nullified. It is the circumstances preceding and at the time the decision was taken which pertain to the application of the PIPA, and to the question of reasonable cause to initiate surveillance. The contents of the videotape may confirm that the earlier decision to conduct surveillance was well-founded, but the contents did not exist at the time the decision was taken, and therefore cannot establish the reasonableness of the decision. The contents are relative to the merits, which must be determined on the basis of the properly admitted evidence.

WHETHER TO WATCH FIRST AND DECIDE ADMISSIBILITY LATER

The prevailing practice has been for arbitrators to view the videotape evidence during the evidentiary phase, and to decide the admissibility issue at the conclusion of the case. This practice precedes current privacy legislation, and it seems to have evolved, mostly consensually, from an interest in moving the process forward expeditiously. Arbitrators have offered little if any explanation, except in those cases which presented issues regarding the quality of the videotape: British Columbia Maritime Employers Assn. -and- International Longshore and Warehouse Union, Local 500 (Iannottone Grievance), [2002] C.L.A.D. No. 310 (Munroe); Canada Safeway Ltd. -and- United Food and Commercial Workers International Union, Local 2000 (Falbo Grievance), [1997] B.C.C.A.A.A. No. 708 (Sanderson).

In Ebco, supra, the union objected to a viewing of the videotape evidence prior to a decision being taken on admissibility. There was some discussion regarding the expediency of doing so; however, Arbitrator Blasina decided not to view the videotape evidence prior to deciding whether or not it was admissible. He explained, Ebco, supra, p. 398:

...[T]he decision on admissibility is independent from the decision on the merits, and therefore attention must be given to the circumstances at the time the decision to surreptitiously videotape was taken. The later contents of the videotape may confirm that the employer's earlier suspicion was well-founded, but the contents would not establish reasonable cause at the time the decision was taken. The contents of the videotape may only be relevant to the question of whether the manner of videotaping was reasonable. This has more to do with technicalities or circumstances insofar as matters of authenticity, timing, clarity, location, or alleged egregious conduct on the part of the person undertaking the video surveillance.

On day-one of the arbitration hearing, I advised Counsel that I would not view the videotapes prior to deciding on their admissibility.... This was not a compelling case for overruling the Union's objection to a viewing based on expediency – particularly considering that privacy rights were in issue.... I do not take from the authorities that there is a presumption at law in favour of look-now-and-decide-later. It depends on the circumstances, and, in the circumstances of this case a viewing was not yet required.

In sum, expediency should not trump privacy rights when the admissibility of the videotape depends on whether the evidence was collected in accordance or in contravention to law. It would seem prudent, and duly deferential to the legislation, to consider the law and the circumstances prior to viewing the videotape. If any presumption can be taken, it may be, “don’t look before you leap.”

FEDERAL

Erwin Eastmond v. Canadian Pacific Railway and Privacy Commissioner of Canada, [2004] F.C.J. No. 1043 concerns an application to the Federal Court of Canada following a successful complaint which an employee had taken before the Privacy Commissioner of Canada. The employee had protested the installation of six digital recording surveillance cameras at the employer’s mechanical facility in Scarborough, Ontario. Section 5(3) of the PIPEDA provides that “An organization may collect...personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.” The complainant had asserted that the cameras were installed without consultation with the union, that there was no security problem, that the cameras could be used to watch employees and that this was offensive to their

dignity and detrimental to morale. The employer responded that the cameras were necessary for the security of its property and its employees, citing two incidents where female employees stated they had felt vulnerable. The Privacy Commissioner posed four questions:

- 1) Is the measure demonstrably necessary to meet a specific need?
- 2) Is it likely to be effective in meeting that need?
- 3) Is the loss of privacy proportionate to the benefit gained?
- 4) Is there a less privacy-invasive way of achieving the same end?

The Privacy Commissioner upheld the complaint, and recommended removal of the cameras. His reasons are summarized in PIPEDA Case Summary No. 114 published by the Federal Privacy Commission.

Similarly, he was not convinced that the digital system was in fact effective. Although there had been no incidents since the cameras were installed, he noted that this could equally be explained by the fact that the signs warning people entering the site also served as a deterrent to would-be vandals.

While acknowledging that the system provided poor picture resolution and was not trained on areas where there was a reasonable expectation of privacy, the Commissioner noted that it might be possible to identify an individual during the day.

He also noted his concern that the mere presence of these cameras may have given rise to the perception among employees that their comings and goings were being watched, even if that was not objectively the case, and that the adverse psychological effects of a perceived privacy invasion may have been occurring.

Finally, he noted that the company did not appear to have evaluated the cost and effectiveness of less privacy-invasive measures, such as better lighting in the parking lots, which could address the issue of employee security with no effect on employee privacy.

Based on this analysis, the Commissioner did not believe that a reasonable person would consider these circumstances to warrant taking such an intrusive measure as installing digital video cameras. Therefore, the company's use of this type of video surveillance for the stated purposes was not appropriate and the company was in contravention of s. 5(3).

The Commissioner's finding was that the complaint was well founded. In addition, the Commissioner recommended that the company remove the digital video cameras.

The complainant then took the matter to the Federal Court of Canada where he sought confirmation of the Privacy Commissioner's report, and an order requiring implementation of the Privacy Commissioner's recommendation. An application to the Federal Court is taken pursuant to Section 14(1) of the PIPEDA, and it is not an action in the nature of judicial review, but rather, it requires a hearing de novo. Lemieux J. affirmed the same four-question analysis as expressed by the Privacy Commissioner.

However, Lemieux J. took a different view of the facts. He concluded that past incidents justified the installation of the cameras; that the cameras were effective in deterring theft, vandalism, and trespassing; and, that the cameras did offer greater security for employees. He noted that the cameras did not operate continuously; that the cameras recorded images of anyone on site, not just employees; and that the cameras were not used to monitor work performance or productivity. Lemieux J. concluded that the employer's reasons were "only for purposes that a reasonable person would consider appropriate in the circumstances." He concluded that the employees' loss of privacy was minimal, and that there was no less intrusive reasonable alternative. Lemieux J. held that the employer had not violated the PIPEDA, and he dismissed the complainant's application.

The employer had originally argued that the Federal Court had no jurisdiction based on the Supreme Court of Canada decision in Weber v. Ontario Hydro, [1995] 2 S.C.R. 929; i.e. the employer argued that the essential nature of the dispute arose from the collective agreement. Lemieux J. stated; Eastmond, supra, ¶100:

I have no hesitation in classifying PIPEDA as a fundamental law of Canada just as the Supreme Court of Canada ruled the federal Privacy Act enjoyed quasi-constitutional status (see Justice Gonthier's reasons for judgment in Lavigne v. Canada (Office of the Commissioner of Official Languages, [2002] 2 S.C.R. 773 at paragraphs 24 and 25.

Lemieux J. concluded that an arbitrator appointed under the collective agreement would not have had any jurisdiction, because it was a violation of the PIPEDA which was in dispute. Arbitrators can expect to have their jurisdiction challenged in future. In those cases where the PIPA or PIPEDA are raised collaterally with respect to evidentiary issues, it is not expected that arbitrators would decline jurisdiction. It is also noted that Section 60(1)(a.1) of the Canada Labour Code, R.S.C. 1985, c. L-2 empowers an arbitrator under a collective agreement "to interpret, apply and give relief in accordance with a statute relating to employment matters"; and, Section 89(h) of the British Columbia Labour Relations Code, R.S.B.C. 1996, c. 244 empowers an arbitrator to "interpret and apply any Act intended to regulate the employment relationship". There would seem to be some scope for concurrent jurisdiction. The Alberta Labour Relations Code, R.S.A. 2000, c. L-1 does not contain such a provision; however, arbitrators can be

expected to apply the collective agreement subject to and in conformity with statutory law.

Lemieux J. affirmed that the PIPEDA was concerned with balancing interests; Eastmond, supra, ¶s 128-129:

As argued by all parties, these considerations or factors enumerated by the Privacy Commissioner are those which, over the years prior to PIPEDA, arbitrators adjudicating privacy issues under collective agreements involving camera surveillance have taken into account in balancing privacy interest of employees with the legitimate interest of employers.

There is no doubt parliament mandated the balancing of interests. The need for balancing is clear from the purpose clause which is section 3 in PIPEDA. The purpose is to establish rules that govern the collection, use and disclosure of personal information in a manner that recognizes on the one hand the right of privacy of individuals with respect to their personal information and, on the other hand, the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

He confirmed that regard had to be had for the particular circumstances; Eastmond, supra, ¶s 131-133:

Parliament clearly provided the appropriateness of purposes or why personal information needs to be collected must be analysed in a contextual manner looking at the particular circumstances of why, how, when and where collection takes place. Also, the appropriate purposes for collection may be different than the appropriate purposes for use and the appropriate purposes for disclosure of collected information, all of which suggest flexibility and variability in accordance with the circumstances.

In terms of surveillance cameras, arbitrators have drawn a bright line between surreptitious collection of information and collection of information by cameras whose locations are known, where employees and others are told recordings are being made and the use of those recordings.

Arbitrators have also generally condemned the use of surveillance cameras to record the productivity of workers.

The evidence in Eastmond, supra, was that no employer official would be looking at the monitor at the time the cameras might capture a person's image; but, that the person's image would be recorded on videotape, and the videotape would only be viewed if there were some "triggering event". The system was such that the recording was erased after 96 hours; and therefore, if there had been no incident requiring investigation,

the person's image would never be seen. Lemieux J. considered Section 7(1)(b) of the PIPEDA, cited above which permits "Collection without knowledge or consent" where the availability or accuracy of the evidence would otherwise be compromised. Section 7(1)(b) is comparable to Section 12(1)(c) of the BC PIPA, and Section 14(d) of the Alberta PIPA. He held that the employer did not require consent.

Lemieux J. based his decision in Eastmond, supra, on a review of the arbitration awards: Puretex, supra; Ross v. Rosedale Transport Ltd., [2003] C.L.A.D. No. 237 (Brunner); Pope & Talbot, supra; Unisource, supra, and some of the cases cited therein. After reviewing the arbitral authorities, Lemieux J. stated; Eastmond, supra, ¶ 174:

Applying the appropriate factors to all the evidence before me, I conclude a reasonable person would consider CP's purposes for collecting by recording the images of CP employees and others on video camera appropriate in the circumstances.

This statement is in line with Section 5(3) of the PIPEDA.

The "reasonable person" test is also expressed in the BC PIPA and Alberta PIPA. When the propriety of video surveillance is expressed to be based upon what a reasonable person would consider appropriate in the circumstances, one might imply some allowance for subjectivity.

Recalling Lemieux J.'s statement cited above that he had "no hesitation in classifying PIPEDA as a fundamental law of Canada" having in effect "quasi-constitutional status", and recalling that the BC PIPA and the Alberta PIPA are substantially similar, it is submitted that an objective standard applies. Privacy rights would have the same status as those civil rights expressed as protected categories under human rights legislation; and, just as an objective standard would apply there, it should apply here. It is the matter of substance that is relevant, and not the matter of intent. If there has been an incursion into another's privacy contrary to the legislation, a lack of intent would not excuse it.

However, there is no escaping the reality that the more equivocal the evidence, the less predictable the outcome. Where subjectivity may arise, is in the conclusions of fact. The circumstances may allow different adjudicators to come to different conclusions of fact, although they have given reasonable consideration to the same body of evidence. This appears to have been the case in Eastmond, supra.

Three months after Eastmond, supra, the Federal Privacy Commission published PIPEDA Case Summary No. 279. This was a decision of the Assistant Privacy Commissioner of Canada concerning a complaint by a former employee of an internet service provider. The employer had installed two web cameras at one of its offices – one pointed toward the sales and marketing staff, and the other toward the technical support employees. The cameras were fixed, with no pan or zoom function, and did not record; and, individuals captured on camera were clearly recognizable. The employer asserted

that the cameras were installed to ensure security and manage productivity. Other supervisory measures already in place for monitoring security and employee conduct included; alarm system, monitoring of telephone calls and outgoing e-mail, swipe cards, performance reviews, disciplinary policy, and direct supervision and spot visits. The employer provided the employees with a policy statement on privacy, which expressed the purposes for the cameras; and employees were free to choose to work behind a moveable partition. The employer argued that it was involved in a highly competitive industry and that the cameras were the most cost-effective way to manage staff performance.

The Assistant Privacy Commissioner concluded that the evidence supporting the employer's asserted security concerns was not "so prevalent and compelling that they justified the introduction of such a privacy-invasive measure." She also concluded that the employer already had methods in place to measure employee productivity, impliedly questioning the need to add the camera surveillance. She noted also that the employer was not open to other cost-effective and less privacy-invasive options such as having certain staff members undertake some supervisory role, or modifying the schedules of existing managers. The Assistant Privacy Commissioner was concerned that, by its general surveillance, the employer was "tarring all employees with the same brush". She also concluded that the employees' ability to remove themselves from view of the cameras was not a material consideration "when the measure itself contravened the spirit of the Act." PIPEDA Case Summary No. 279 concludes:

The Assistant Commissioner commented that the underlying purpose for the cameras really appeared to be one of deterrence – deterrence of theft, harassment, malingering, criticism, or other behaviour an employer may not like. She noted that privacy-intrusive measures can always fulfil such objective at minimal financial cost. The Act, however, demands that the cost to human dignity form part of the equation. Continuous, indiscriminate surveillance of employees, she noted, was based on a lack of trust and treats all individuals with suspicion when the underlying problems may rest with a few individuals or with a management plan that may not be entirely sound. The effect, she commented, of such omnipresent observation was stifling. While it may prevent undesirable behaviour, it also forces the employee to call into question every potential action, every potential comment no matter how benign. The goal of ensuring adherence to the company's vision comes at too high a price to our individual autonomy and freedom.

The Assistant Commissioner determined that by using web cameras in the manner described in this complaint, the company was not fundamentally recognizing the right of privacy of its employees, as enshrined in section 3 of the Act, and the balance was thus tipped too far in favour of the organization's needs. She could not, therefore, support the use of cameras to monitor employees at work since to do otherwise would be to undermine the purpose of the Act.

ALBERTA

A concise summary of the law with respect to video surveillance by employers is found in Re: R.J. Hoffman Holdings Ltd., Investigation Report P2005-IR-004, May 13, 2005 of the Alberta Information and Privacy Commission. The employer operated an oilfield maintenance service from two locations; at Lloydminster, Alberta and St. Walburg, Saskatchewan. The complainant was a former non-unionized employee at the Lloydminster location who complained that the employer was conducting video surveillance contrary to the Alberta PIPA, and that the employer had intercepted a private verbal communication between the complainant and another employee, which the employer then used to support his dismissal. The investigation of the complaint revealed that this was not surreptitious video surveillance, and that there was no audio, zoom or pan capability on any of the cameras. The cameras were activated by movement, and the videotape was automatically erased after a month. The videotape could be viewed via the Internet, and only the Operations Manager had access to the password. The employer cited two reasons for installing the cameras; safety/security and loss prevention, and, employee performance management.

It was readily concluded that the ex-employee's particular complaint was unfounded. However, the employer's response to the complaint had raised issues regarding the use of video surveillance for the purpose of managing the employment relationship. The matter was subjected to the following three-question analysis:

1. Does this collection involve "personal information" or "personal employee information" under the Act?
2. Was the collection reasonably required for the organization's purposes of establishing, managing or terminating the employment relationship?
3. Did the organization provide adequate notice that the personal information was going to be collected and the purposes for which the personal information was going to be used?

The first question was aimed at determining whether the legislation applied. With respect to the first question, it was found that the video cameras captured "information about an identifiable individual", and therefore captured "personal information" as defined in Section 1(k) of the Alberta PIPA. "Personal employee information" was described as "a sub-category of personal information" and is defined in Section 1(j) as including "personal information reasonably required by an organization, that is collected, used or disclosed solely for the purposes of establishing, managing or terminating ... an employment relationship...." It was held that the employer was indeed collecting personal employee information, and that the PIPA applied.

The second question, whether the collection of information was "reasonably required", addressed the circumstances of the case, and the reasonable cause and

balancing of interest concerns expressed in the arbitral jurisprudence. Reference was taken to Puretex, supra, Unisource, supra, Pope & Talbot, supra, Ebc, supra, Calgary Herald, supra, Amalgamated Transit Union, Local 569 v. City of Edmonton (2004), 124 L.A.C. (4th) 225 (Alta. Q.B.), and Eastmond, supra. Amalgamated Transit, supra, was a judicial review decision of the Alberta Court of Queen’s Bench which held that there was no persuasive authority to the effect that there was a general right to privacy under the Charter. In Doman, supra, Arbitrator Vickers had simply stated that “those fundamental Charter values” could not be ignored. The three questions that were expressed by Arbitrator Vickers in Doman, supra, were noted, along with the four-question analysis expressed in Eastmond, supra. Hoffman, supra, concluded with a three-question subset for answering the second question, at ¶35:

PIPA provides that personal employee information is limited to personal information that is “reasonably required” solely to establish, manage or terminate an employment relationship. PIPA also says that an organization can only collect and use personal employee information without consent if it is “reasonable for the purposes for which the information is being collected”. We conclude that the determination of “reasonableness” in this regard can be determined by considering these questions:

- a) *Are there legitimate issues that the organization needs to address through surveillance?*
- b) *Is the surveillance likely to be effective in addressing these issues?*
- c) *Was the surveillance conducted in a reasonable manner?*

These questions, although different, were treated similarly to the three questions expressed by Arbitrator Vickers in Doman, supra.

With respect to the installation of the video cameras for reasons of shop safety, security, and loss prevention, the employer was found to have “demonstrated a legitimate concern about theft and property damage, as well as employee safety.” at ¶38:

In respect of the shop cameras, Hoffmans described several prior instances of theft of company-owned equipment from the shop area, as well as instances of theft of equipment and clothing belonging to employees. Hoffmans also described two instances where fires had started in a truck in the shop, causing significant damage. Hoffmans had originally suspected employees of wrongdoing, but the cameras provided important information to investigators which vindicated the employees. The front office camera is located at the front entrance, focused on the reception area. This area is normally occupied by one or two female dispatcher/office workers. Office hours are from 6:30 a.m. to 11:00 p.m. During these hours, there is often only one person working the desk, and

she is likely to be the only person in the building, with all other staff working out in the field.

It was found that the video cameras had been effective in addressing the employer's concerns; that the surveillance was non-surreptitious and therefore the loss of privacy was less pronounced; and, that the images were recorded, and watched only in case of an investigation, and otherwise automatically deleted within thirty days. It was also found that "in respect of the purposes of deterring theft and property damage, there is no reasonable alternative to the surveillance as conducted." (Hoffman, supra, ¶45).

However, with respect to the collection of personal employee information for the purpose of monitoring employee performance, this was found not to be reasonable; Hoffman, supra, at ¶48:

While Hoffmans has an interest in ensuring employees are fulfilling their work commitments, this general interest alone does not mean that collection and use of personal information through video surveillance is reasonably required for managing employees. Hoffmans did not describe any specific difficulties with worker productivity in the Lloydminster location. There was no evidence presented that the employees were doing anything other than performing their job duties as expected. We conclude that the use of the cameras for purposes of employee management was not, in this case, reasonably necessary to address a legitimate [need] to manage employee performance.

The expression "managing an employment relationship" is sufficiently vague that it could have been interpreted as permitting video surveillance as a normal supervisory tool for monitoring employee activity. However, this would have run contrary to the case authorities. It was held at ¶s 51-52 of Hoffman, supra:

Even if one accepts that the location and non-surreptitious nature of the cameras in this case results in a lower employee expectation of privacy, the notion of constant supervision of employees who have not given reason for Hoffmans to suspect them of wrongdoing, and hence have not given rise to any need for surveillance, is not reasonable for the purposes of ss. 1(j), 15 and 18 of PIPA. Unlike the injury or property damage that could ensue from another truck fire or similar incident, the possibility that management might at some point witness an employee avoiding work or taking longer breaks than they are entitled to does not justify the constant and invasive supervision of their daily activities.

With respect to the management of employee performance, we conclude that PIPA does not in these circumstances authorize Hoffmans to collect or use personal information for that purpose. It is worth noting that, on the facts in this case, Hoffmans would have great difficulty convincing us that surveillance cameras would be any more effective in

meeting the perceived need to monitor employee performance than a well-timed visit from a supervisor. This could, we believe, be easily accommodated in a smaller workplace, such as Hoffmans' Lloydminster site. The cameras capture the activities of the mechanics at work, and these employees tend to work the same hours as the on-site Operations Manager and the front-office dispatchers. Any of these other employees can monitor the progress of the mechanics. Such managerial supervision should be instituted before resorting to video surveillance in these circumstances.

“Managing an employment relationship” is explained in “Information Sheet 5: Personal Employee Information” published by the Office of the Information and Privacy Commissioner of Alberta:

Managing an employment or volunteer work relationship means the carrying out of that part of human resource management that relates to the duties and responsibilities of employees. Managing also refers to activities carried out to administer personnel (PIPA Regulation, section 3), such as classification and compensation, training and development, succession planning, and administering a benefits program.

With respect to the third question of the “Hoffman analysis”, Section 15(2)(c) of the Alberta PIPA prohibits the collection of personal information without consent “unless” the employer has first provided the employee “with reasonable notification that the information is going to be collected and of the purposes for which the information is going to be collected...” Arguably, the matter of notice would attach to the distinction between surreptitious and non-surreptitious. If the video cameras are not readily visible to the employees, would the surveillance still be surreptitious if the employees had been given notice of their presence? Up to now, there does not seem to have been any decision directly on this point. Section 15(2)(c) of the Alberta PIPA in effect would permit non-surreptitious video surveillance without consent, provided of course it is still for the safety, security, or “process” purposes associated with the reasonable exercise of management rights. Section 14(4)(d) permits the collection of information without consent when that “is reasonable for the purposes of an investigation or a legal proceeding”. Section 14(4)(d) is not subject to Section 15(2)(c), the notification provision. Section 14(4)(d) would therefore permit surreptitious video surveillance.

Again, a reasonableness standard would apply and the latitude for conducting surreptitious video surveillance would be less permissive. In Hoffman, supra, the video surveillance was non-surreptitious. It was found however that the notice had been inadequate; Hoffman, supra, ¶55-56:

The question of whether Hoffmans has adequately notified its employees about the purposes for the surveillance cameras remains unclear. There has been no formal, written notification. Hoffmans' Operations Manager has some recollection of alerting his employees

orally, but this is not documented. Both the complainant and Hoffmans agree that the cameras are located in plain view of employees and any member of the public who enters the shop. Further, the complainant understood that the cameras were likely there for reasons of ensuring safety and security.

Despite this, it is our view that Hoffmans should explicitly notify employees about the cameras and their purposes, preferably in writing through a written policy with each employee acknowledging the notice in writing, or through a posting in a conspicuous location within the premises. A posting would, in our view, be desirable because customers and others might also be in the areas under surveillance from time to time and they should be notified of the surveillance.

The Hoffman, *supra*, Investigation Report concluded with the following recommendations being directed to the employer, at ¶61:

- *Amend its employee orientation package materials to include references to privacy compliance generally and the presence of and purposes for the video cameras specifically and provide this Office with a copy of this amended package on or before June 30, 2005;*
- *Post clear signage in conspicuous locations throughout the premises giving notice of the presence of the video cameras and provide this Office with written confirmation that this has occurred on or before June 30, 2005;*
- *Adopt policies and practices to support privacy compliance and provide this Office with copies of them on or before June 30, 2005;*
- *Appoint a privacy officer accountable for Hoffmans' privacy compliance and identify that individual to this Office on or before June 30, 2005.*

Section 13(3) of the BC PIPA, would be the equivalent of Section 15(2)(c) of the Alberta PIPA. While Section 13(3) would require an employer to provide notice of its intent to collect employee personal information, Section 13(4) excludes the application of Section 13(3) “if Section 12 allows the information to be collected without the consent of the individual.” Similarly, notice provisions are present in Schedule 1 of the PIPEDA, albeit only “recommended”.

CONCLUSION

The right to privacy, in the words of Lamer J. of the Supreme Court of Canada in Duarte, *supra*, is considered to be “the very hallmark of a free society.” This paper has been concerned with the collection of employee personal information, by private sector employers in British Columbia and Alberta, via the use of video surveillance. Such surveillance has been considered to be an affront to the dignity of the individual;

however, it is an affront which may reasonably be permitted, depending on the circumstances.

The passage of privacy legislation has largely codified the earlier arbitral jurisprudence. Neither privacy rights nor managerial rights are absolute. A balancing of interests is required. Video surveillance of employees is considered to be “intrinsicly seriously objectionable in human terms”; however, it is accepted as a reasonable management tool where it meets a demonstrated need to protect property or personnel or to deter or investigate incidents of malfeasance. Even so, adjudicators may order restrictions if contemporaneously there is unnecessary or excessive intrusion into employees’ privacy. Video surveillance for the purpose of monitoring employee productivity would be such an intrusion. Video surveillance is not a ready substitute for traditional supervision.

It is the particular facts of the case which will determine the final outcome. An adjudicator will consider the reasons being asserted for the surveillance, and will consider what is actually being monitored, and the method of monitoring. The more intrusive the surveillance, the weightier the supporting circumstances must be.

Although it preceded the current privacy legislation, the three question analysis expressed by Arbitrator Vickers in Doman, supra, remains helpful, particularly with respect to the evidentiary issue of admissibility:

- (1) Was it reasonable, in all of the circumstances, to request a surveillance?
- (2) Was the surveillance conducted in a reasonable manner?
- (3) Were other alternatives open to the company to obtain the evidence it sought?

It is submitted that the above three questions are encompassed by the four questions expressed in Eastmond, supra, with respect to the application of the PIPEDA:

- 1) Is the measure demonstrably necessary to meet a specific need?
- 2) Is it likely to be effective in meeting that need?
- 3) Is the loss of privacy proportionate to the benefit gained?
- 4) Is there a less privacy-invasive way of achieving the same end?

However, Hoffman, supra, also encompassed consideration of the statutory notice requirement, and the following three-question analysis was expressed:

1. Does this collection involve “personal information” or “personal employee information” under the Act?
2. Was the collection reasonably required for the organization’s purpose of establishing, managing or terminating the employment relationship?
3. Did the organization provide adequate notice that the personal information was going to be collected and the purpose for which the personal information was going to be used?

With respect to deciding “reasonableness” pursuant to the second question, the following three question analysis was expressed:

1. Are these legitimate issues that the organization needs to address through surveillance?
2. Is the surveillance likely to be effective in addressing these issues?
3. Was the surveillance conducted in a reasonable manner?

There is little point to collecting personal employee information contrary to current privacy legislation. The information would not be admitted into evidence; the employer would risk liability in tort and risk punitive sanctions; and, the adjudicator would restrict the use of the monitoring equipment or order removal outright. Prior to engaging in video surveillance, therefore, employers ought to be familiar with the above analyses and ought to give the matter dispassionate consideration.