

# The HR Space

Your weekly e-bulletin on Canadian Legal Labour Issues

February 23, 2010

Fasken Martineau DuMoulin LLP

## “Smile, You’re On Candid Camera...” – How Arbitrators View Video Surveillance

Author: Derek Knoechel

Canadian arbitrators have been dealing with the issue of how to deal with video surveillance of employees for over two decades. Early decisions dealt with off-site surveillance of employees suspected of faking or exaggerating illnesses. But countless battles have since been waged over the use of video surveillance cameras in and around the workplace. When can such equipment be used in the workplace? When can the resulting evidence be relied upon?

### Video Cameras in the Workplace

There have been numerous skirmishes over the use of security cameras covering entrances and exits to the worksite and other non-working areas. The use of hidden cameras at the worksite as part of an investigation has also been the subject of much controversy. By far the most fever-pitched battles have been over the surveillance of production work, monitoring employees for disciplinary reasons or conducting surveillance of social or sensitive areas of the workplace.

In each instance, the employer’s property rights and right to manage the workplace has been weighed against employees’ privacy interests. Those privacy interests find some support in privacy legislation and Canada’s *Charter of Rights and*

*Freedoms*, where applicable. There has been considerable debate, particularly in Ontario, regarding whether there exists a freestanding legal right of privacy in workplaces. Despite this debate, in English Canada a general consensus has begun to emerge amongst arbitrators that more intrusive methods of employee monitoring such as video surveillance will only be permitted if it is justified and reasonable in the circumstances.

In Quebec, it is important to note that both the Quebec Civil Code and the Quebec Charter of Rights and Freedoms contain specific legislative provisions which protect the right of privacy and more precisely, the right not to be subject to certain forms of intrusive observation. The essential criteria analyzed by arbitrators is whether the employee has a reasonable expectation to privacy in the circumstances.

Of course, context is particularly critical in these types of cases. The manner in which video cameras are deployed and the purposes for which resulting images are to be used are vitally important. Those factors may be considered in determining the extent to which such cameras invade employees’ reasonable expectations of personal privacy. The language of a

Vancouver

Calgary

Toronto

Ottawa

Montréal

Québec City

London

Paris

Johannesburg

governing collective may create additional hurdles or rights for an employer.

Some arbitrators have upheld the installation of cameras at various locations but placed limits on how they are used. Continuous real-time observation of video images has generally been seen as more intrusive than the review of images in response to incidents that are reported by other means. Specific tracking of individual employees will be objectionable unless there are convincing reasons for doing so. The fact that an employer has previously installed video cameras without objection will not preclude a union challenge if the employer expands the use of such cameras.

For example, in a decision following five years of arbitration hearings, [\*Cargill Foods and UFCW, Local 633\*](#) (2008), an Ontario arbitrator ruled that the expansion of the employer's video surveillance system to investigate incidents relating to food safety, plant security and discipline was a legitimate exercise of management rights. However, the arbitrator also found that the employer had failed to provide the union with the notice required by the collective agreement. The arbitrator directed the employer and the union to discuss outstanding implementation issues.

Following unsuccessful discussions between the parties, the arbitrator issued another decision in 2009. In that decision, the arbitrator directed the employer to remove some cameras, provided express directions regarding the retention of the recordings, and imposed procedural requirements upon the use of such recordings in future proceedings.

### **Use of Video Evidence at Arbitration**

At an arbitration hearing, the use of video evidence obtained from employer-installed cameras is not always straightforward. While it may be relevant,

and often more reliable than eye-witness accounts, that's not the end of the matter.

In Quebec, the test is clearly set out in Section 2858 of the Civil Code, which states that "the Court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedom are breached and that its use would tend to bring the administration of justice with disrepute.

Elsewhere in Canada, arbitrators have the discretion to receive and accept such evidence as they consider proper. They can allow or disallow evidence whether or not it would be admissible in court. However they must provide a fair hearing. Although some arbitrators have held that their discretion should not be used to exclude relevant evidence, however obtained, others have taken the opposite view in the context of video surveillance.

The same qualities that may make video evidence a more reliable form of evidence (the precise depiction of behavior and events), presents a greater potential violation of employees' privacy. As a result, some arbitrators have engaged in a "balancing of interests". They impose a "reasonableness" test for the admission of video evidence. Under this approach, employers are required to justify both the decision to use video surveillance and the manner in which video evidence was ultimately collected.

Most Canadian arbitrators recognize that excluding relevant evidence from a hearing is an extraordinary step. As a result, they will generally allow video surveillance evidence if there are adequate signs that there was a breach of trust by the employee. If the employer has reasonable cause to believe that this is the case, video surveillance may well be an appropriate response, if undertaken in a reasonable manner. On the other hand, arbitrators have tended to exclude such evidence where video surveillance is found to be abusive or unduly intrusive. In light of

the privacy concerns involved, employers are generally advised to only engage in video surveillance where they can clearly justify their actions.

For more information on the subject of this bulletin, please contact the author.

**Derek Knoechel**

604 631 4911

*dknoechel@fasken.com*

**The HR Space weekly bulletins are edited by:**  
**Dominique Launay, Karen M. Sargeant, and**  
**Brian Smeenk**

## Our Labour, Employment and Human Rights Group

### Vancouver

**Kevin P. O'Neill**  
604 631 3147  
koneill@fasken.com

**Gavin Hume**  
604 631 3153  
ghume@fasken.com

### Calgary

**Katie Clayton**  
403 261 5376  
kclayton@fasken.com

### Toronto

**Brian A. O'Byrne**  
416 868 3347  
bobyrne@fasken.com

### Ottawa

**Stephen B. Acker**  
613 236 3882  
sacker@fasken.com

### Montréal

**Dominique Monet**  
514 397 7425  
dmonet@fasken.com

### Québec City

**Jasmin Marcotte**  
418 640 2030  
jmarcotte@fasken.com

### London

**Cerys Williams**  
+44 207 917 8599  
cwilliams@fasken.co.uk

*This publication is intended to provide information to clients on recent developments in provincial, national and international law. Articles in this bulletin are not legal opinions and readers should not act on the basis of these articles without first consulting a lawyer who will provide analysis and advice on a specific matter. Fasken Martineau DuMoulin LLP is a limited liability partnership and includes law corporations.*

© 2009 Fasken Martineau DuMoulin LLP

### Vancouver

604 631 3131  
vancouver@fasken.com

### London

44 (0)20 7917 8500  
london@fasken.co.uk

### Calgary

403 261 5350  
calgary@fasken.com

### Paris

33 1 44 94 9698  
paris@fasken.com

### Toronto

416 366 8381  
toronto@fasken.com

### Johannesburg

27 11 685 0800  
johannesburg@fasken.com

### Ottawa

613 236 3882  
ottawa@fasken.com

### Montréal

514 397 7400  
montreal@fasken.com

### Québec City

418 640 2000  
quebeccity@fasken.com