

**CANADA LABOUR CODE ADJUDICATOR USES PIPEDA TO PROHIBIT EMPLOYER'S USE OF EMPLOYEE VIDEO SURVEILLANCE IN THE COURSE OF ITS "MALINGERER" INVESTIGATION**

*Ross v. Rosedale Transport Ltd.*, unreported dated May 26, 2003 (Adjudicator Brunner)

**Bottom-line:** Under the *PIPEDA* regime (the "*Personal Information Protection and Electronic Documents Act*" in full), employers seeking to rely on employee video surveillance to combat job malingerers are required to engage in a "contextual analysis" to determine whether pre-existing reasonable and probable cause properly justifies the "extraordinary step" of such surveillance (e.g. examine the employee's employment record, consider whether there are any past incidents of employee dishonesty, investigate whether other alternatives are open to the company to obtain the evidence etc.).

**Facts:** Ross, a driver with a federally-regulated employer, was fired after the Company's private investigator videotaped him moving furniture when he was supposed to be injured. According to the available medical documentation, Ross could only perform clerical-type functions at the time because of a lower back injury that he had sustained on the job.

Ross filed a complaint under the *Canada Labour Code*, alleging that he was dismissed without just cause. At the hearing, the Company sought to rely on its video surveillance evidence in its defence. Ross objected to the admissibility of the videotape on the grounds that it constituted the collection of "personal information" without his consent in breach of section 7(1) of *PIPEDA*. Section 7(1) of *PIPEDA* states in part:

[A]n organization may collect personal information without the knowledge or consent of the individual only if

...

(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...

**Decision:** As a first step, the Adjudicator ruled that the videotape surveillance did involve the collection of "personal information" within the meaning of the *PIPEDA* ("the video surveillance as captured on tape contains personal information, namely, the physical movements of an identifiable individual in carrying furniture from his house to a truck parked in his driveway"). The Adjudicator then proceeded to interpret section 7(1)(b) of the *Act* and defined the issue before him as follows:

There can be no doubt that had Rosedale advised Ross that it intended to conduct the video surveillance and attempted to obtain his consent to videotape his activities, that this would likely have compromised the accuracy of the information. The sole question which was the subject of the argument was whether or not the collection of the personal information was reasonable for purposes related to investigating a breach of his employment agreement. [Emphasis added]

In determining whether video surveillance was “reasonable for any purpose related to the investigation of a breach of the employment agreement”, the Adjudicator turned to the pre-*PIPEDA* arbitral jurisprudence. Specifically, the Adjudicator referred to *Canadian Pacific Ltd.* (1996), 59 L.A.C. (4th) 111 (M. Picher) for the following proposition:

Surveillance is an extraordinary step which can only be resorted to where there is, beforehand, reasonable and probable cause to justify it. What constitutes such cause is a matter to be determined on the facts of each case. [Emphasis added]

In the instant case, the Adjudicator ruled that the Company’s video surveillance breached *PIPEDA* and was therefore inadmissible. In conducting his contextual analysis, the Adjudicator stated:

[T]here was absolutely no evidence that Ross had ever been anything other than an honest employee. He had no disciplinary record. He had never submitted a false or fraudulent claim for insurance or other benefits. There were a number of other means that were available to the employer to test the true extent of Ross' restrictions and the bona fides of his recovery as of April 6, 2002. ... If the employer really thought that Ross was malingering or pretending that he was not yet fully able to resume the duties of a driver/associate, it was open for Rosedale to ask for an independent medical examination a matter that was conceded by Topping. His failure to do so was left unexplained. This is a case, where an employer, without any evidence that the employee was malingering or had made misrepresentations or spread disinformation as to his physical abilities, orders a surreptitious video surveillance in the hope of trapping the unsuspecting employee during the course of moving furniture at his place of residence at a time and place that he had voluntarily disclosed to his employer.

Without the fruits of its video surveillance, the Company could not make out its case and Ross was awarded approximately 58 weeks’ pay plus legal costs.