

**SURVEILLANCE EVIDENCE SHOULD BE ADMITTED WITHOUT PRECONDITION WHERE IT DOES NOT VIOLATE AN EMPLOYEE'S RIGHT TO PRIVACY**

*Toronto Transit Commission and ATU, Local 113 (1999) 88 L.A.C. (4th) 109 (Shime)*

**Facts**

The employer terminated the Grievor's employment for fraudulent use of sick benefits. In support of its actions, the employer relied upon a surveillance videotape of the Grievor's activities while she was in receipt of sick benefits.

**Arbitrator's Decision**

In a preliminary award, Arbitrator Shime determined that the videotape surveillance evidence was admissible at the hearing. Although there are a number of Ontario decisions on point, Arbitrator Shime declined to follow those cases, and began his analysis from first principles. Arbitrator Shime concluded that there is a right to privacy in Ontario. Such a right to privacy is drawn from the Supreme Court of Canada's decisions in the *Charter* cases, in which the Supreme Court has recognized that individuals in a free society can reasonably expect to enjoy a degree of privacy. Arbitrator Shime relied on the *Charter* cases for this principle notwithstanding his acknowledgement that *Charter* cases are not relevant in private disputes.

Employee's privacy rights have limits. Privacy rights ought only be respected where an individual has an actual (subjective) expectation of privacy and where that expectation is objectively reasonable. Activities that are conducted in the plain view of outsiders are not protected because the individual demonstrated no intention to keep those activities to himself. Arbitrator Shime found that there are three components to surveillance: the conduct of the employer, the act of surveillance itself, and the right of the employee.

Where an employee claims benefits from a fund that the employer maintains, Arbitrator Shime concluded that the employer is entitled to verify the employee's claim by investigating the employee's off-duty behaviour or conduct. The employer should not be prevented from verifying absenteeism based on the fact that there exists a power and balance between the employer and the employee.

With respect to the act of surveillance itself, Arbitrator Shime concluded that surveillance evidence is not wrong and may be more accurate than other evidence based on observation and memory. Arbitrator Shime recognized that surreptitious measures might be necessary because persons who engage in fraudulent behaviour also do so surreptitiously. Arbitrator Shime disagreed with previous arbitrators who have concluded that the employer must pursue any available alternate methods of investigation before resorting to surreptitious videotape surveillance. Arbitrator Shime found that this requirement unduly fetters the employer given the surreptitious nature of the activity that the employer seeks to investigate.

With respect to the right of the employee, Arbitrator Shime found that surveillance evidence might be found inadmissible where an employee's right may be infringed. Surveillance that takes place in a public place where there is either no subjective or no objectively reasonable expectation of privacy should not be restricted as evidence in an arbitration case. Such evidence should be admitted without precondition.

Arbitrator Shime also concluded that the use of surveillance videotape to verify absenteeism does not violate the *Human Rights Code* and does not negatively impact labour relations to the extent that relevant and reliable evidence should be refused.

## **Conclusion**

Arbitrator Shime's decision represents a compromise between the earlier Ontario jurisprudence with respect to the admissibility of surveillance videotape evidence.

Several prior arbitration decisions have followed a "privacy rights" analysis. Such cases as *Labatt Ontario Breweries* (1994), 42 L.A.C. (4th) 151 (Brandt), *Centenary Health Centre* (1999), 77 L.A.C. (4th) 436 (Albertyn), and *Toronto Transit Commission* (1997), 61 L.A.C. (4th) 218 (Saltman) followed British Columbia arbitral jurisprudence to find that surveillance evidence will be admissible if the following test is met:

- (a) the employer's decision to request surveillance was reasonable;
- (b) the surveillance was conducted in a reasonable manner; and
- (c) no other alternatives were open to the company to obtain the evidence it needed.

Two later arbitrators (Arbitrator Bendel in *Kimberly-Clark Inc.* (1996), 66 L.A.C. (4th) 266, and Arbitrator Solomatenko in *Toronto Transit Commission* (1999), 79 L.A.C. (4th) 85) have criticized this approach, holding that there exists no right to privacy in Ontario as there does under statute in British Columbia. Accordingly, Arbitrators Bendel and Solomatenko held that B.C. jurisprudence should not be followed in Ontario. The arbitrators applied a "rules of evidence" approach, holding that surveillance evidence should only be required to meet the same test as any other evidence: it should be admitted if it is reliable and relevant.

Arbitrator Shime's decision agreed with the advocates of a "privacy rights" approach insofar as he agrees that there is a right to privacy in Ontario. However, Arbitrator Shime found that the test applied by the privacy rights advocates is not necessary.

Arbitrator Shime agreed with the advocates of the "rules of evidence" approach that evidence should be admitted where it is reliable and relevant. However, he disagreed with Arbitrators Solomatenko and Bendel by holding that there is a right to privacy in Ontario.

By accepting parts of each of the "privacy rights" and the "rules of evidence" approaches, Arbitrator Shime created a new approach. According to Arbitrator Shime's approach, videotape surveillance evidence should be admitted where it is relevant and reliable, unless it infringes upon an employee's right to privacy that is both subjectively held by the employee and objectively reasonable.