Use of Video Surveillance Cameras to Ensure Workplace Security

**BENEFITS**

On June 15, the new workplace violence requirements of Bill 168 take effect in Ontario. Of course, Ontario didn’t invent the obligation to safeguard workers from violence at work. It just became the latest in a long line of provinces to spell out what was only implied before.

One method to minimize the threat of violence is to install video surveillance cameras at your workplace. But there are important legal obstacles you need to take into account before using surveillance cameras—especially if you conduct the surveillance surreptitiously.

**HOW TO USE THE TOOL**

Here’s a briefing that you can download and give to your CEO, Board or members of senior management to educate them on important aspects of OHS law that impact them personally or the company in general.

**ADDITIONAL RESOURCES**

Community:  [Post a question in the discussion forum to identify other members who have dealt with this issue.](#)
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1. THE RULES OF EVIDENCE
Many legal proceedings involve figuring out the facts of the case. Did the defendant kill the victim? Did the employee fired for theft steal the money? Both sides get to present evidence supporting their side of the story. The Rules of Evidence limit the kinds of evidence that can be “admitted,” i.e., presented to the judge, jury or arbitrator. One of the fundamental rules: Evidence is inadmissible if it was obtained illegally. Many an employer has incurred the frustration of not being able to use tapes of employees to prove misconduct because their surveillance methods were illegal.

Example: An elevator contractor’s construction manager suspected that two employees were smoking pot on the job. He followed them to their truck in a public parking lot and secretly videotaped them getting high. The employees were fired and the union filed a grievance. The Ontario Labour Relations Board ruled that the surveillance was unreasonable and the tape was inadmissible in the hearing [Int’l Union of Elevator Constructors, Local 50 v. ThyssenKrupp Elevator (Canada) Ltd.].

2. EMPLOYEES’ PRIVACY RIGHTS
Improper surveillance can also result in liability to the employee—even if the employee actually does commit misconduct. The primary risk of liability stems from the new personal privacy laws that have taken effect across Canada. The federal Personal Information Protection & Electronic Documents Act (PIPEDA) and provincial privacy laws ban the collection, use and disclosure of individuals’ “personal information” without consent. And if you’re subject to AB, BC, Fed or QC laws, these protections apply to employee information. The privacy laws also explicitly say personal information collected in violation of the law can’t be admitted into evidence.

Making a surveillance tape is a form of collecting personal information. And surreptitious taping is, by definition, collection without the employee’s consent. But Section 5(3) of PIPEDA lets organizations collect, use or disclose personal information without consent for “purposes that a reasonable person would consider
appropriate” in the circumstances. Section 7(1)(b) spells out that collection without consent is “reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province.” Provincial privacy laws include similar provisions.

When is it “reasonable” for an employer to conduct surreptitious surveillance of an employee? The leading court case on this question is a ruling by a federal court in which railway employees filed a grievance against their employer for installing surveillance cameras throughout the railyard without their knowledge or consent. The court asked 4 questions to determine if this was “reasonable”:

- Was it demonstrably necessary to meet a specific need?
- Was it likely to be effective in meeting that need?
- Was the loss of privacy to the people being filmed proportional to the benefit gained?
- Was there a way to achieve the same end that would have been less invasive of privacy? [Eastmond v. Canadian Pacific Railway].

Because this is the test that courts and arbitrators would most likely use to evaluate the legality of your own surreptitious surveillance efforts, let’s go through each of these questions one by one:

1. **Was the Surveillance Demonstrably Necessary to Meet a Specific Need?**

Surreptitious surveillance is highly intrusive of privacy rights and it’s only considered demonstrably necessary in limited situations. The general desire to police the workplace isn’t enough. The employer must have some specific indication that wrongdoing is taking place. The suspected wrongdoing must be serious and the suspicion credible. A mere hunch isn’t adequate justification.

**Example:** Let’s go back to the *ThyssenKrupp* case where the company secretly videotaped two employees that a construction manager suspected of smoking pot. The construction manager said he had a “feeling” that the employees were up to something because they were acting “oddly.” The arbitrator ruled that this wasn’t a “particularly compelling” reason to tape the employees. A mere feeling isn’t enough to justify
secret surveillance, the Board said. Moreover, the employees’ supposedly odd behaviour—wearing their hard hats backwards and failing to wear safety belts and glasses—wasn’t all that odd [Int’l Union of Elevator Constructors, Local 50 v. ThyssenKrupp Elevator (Canada) Ltd.].

2. Was the Surveillance Likely to Meet the Need Effectively?

Courts also consider whether the particular methods used were likely to be effective. For example, suspicion of pot smoking on a loading dock might justify planting a hidden camera in the loading dock but not installing them all over the facility, including the employees’ lounge.

3. Was Employee’s Loss of Privacy Proportional to Employer’s Benefit?

The courts essentially weigh the employees’ right to privacy against the employer’s need to know the information. Surreptitious surveillance is generally considered more intrusive than open surveillance. So it requires more compelling justification. For example, secret surveillance is generally easier to justify when it targets serious forms of misconduct like violence, theft and workplace safety.

4. Was There a Less Intrusive Alternative?

Secret video surveillance is justifiable only as a last resort when there are no less intrusive alternatives available.

**Example:** An employee claimed that he needed job accommodations because of a work-related injury. The company suspected that he was faking and hired a private investigator to conduct secret surveillance. The tapes confirmed that the employee was faking. So the company fired him. The employee filed a privacy complaint but the Privacy Commissioner ruled that the surreptitious surveillance didn’t violate PIPEDA. For two years, the company had asked the employee for information about his medical condition. But the
employee refused to cooperate. It was only after these less intrusive methods had failed that the company resorted to secret surveillance to get the information it needed [PIPEDA Case Summary #269].

3. THE COLLECTIVE AGREEMENT

You need to be sensitive to the privacy considerations of secret surveillance even if you’re not from a jurisdiction in which personal privacy laws apply to employee information—AB, BC, Fed and QC. One reason for this is that employees might still have privacy rights under common law, that is, law made by judges in court cases as opposed to legislators in statutes and regulations. For example, at least one labour arbitrator has ruled that an employee has “some right to privacy in Ontario” [La-Z-Boy Canada Limited v. Communications Workers of America, Local 80400 IUE].

More significantly, employees may have privacy rights vis-à-vis their employer under their employment contract. This is particularly true when the contract is a collective agreement negotiated by a labour union. Some collective agreements give employees an explicit right to privacy. But even if the contract doesn’t mention privacy, courts and arbitrators may read it in as an implied part of the agreement.

A number of employees have filed grievances against their employers over the conducting of surreptitious surveillance in the workplace. As a result, a body of case law has emerged marking out the boundaries of secret workplace surveillance. Not surprisingly, those boundaries are pretty much the ones established by the federal court in the Eastmond case that we talked about above. However, in the context of labour disputes, the Eastmond factors are applied in a slightly different way:

1. Was There a Compelling Reason for the Surveillance?

This is similar to the first prong of the Eastmond test. Labour arbitrators want to be sure that the employer had a compelling reason for the surveillance. As in the privacy context, the general desire to police the workforce or a hunch that misconduct is taking place aren’t enough.
**Example:** The ThyssenKrupp case in which the construction manager’s “feeling” that employees were acting “oddly” wasn’t enough to justify secret surveillance was actually a labour grievance case.

2. **Were There Less Intrusive Ways to Get the Information?**

Arbitrators and labour boards want evidence that surveillance was the last resort.

**Example:** An employer hired an investigator to secretly tape an employee who claimed he was injured. Sure enough, the video showed the employee moving furniture. So the employer fired him for fraud. The arbitrator ruled that surveillance wasn’t reasonable because the employer had other ways to verify the extent of the employee’s injury *[Ross v. Rosedale Transport Ltd.]*.

3. **Was the Invasion of Privacy as Limited as Possible?**

The scope of surveillance should be kept to the minimum necessary to accomplish the purpose. The employer should make efforts to ensure that employees not under suspicion and parts of the workplace unaffected by the suspected misconduct aren’t swept up in the surveillance.

**Example:** An arbitrator ruled that it was “reasonable” for a company to secretly videotape three employees it suspected of smoking pot. The surveillance was “to the point and brief in duration,” the arbitrator explained; it focused only on the suspected misconduct; and taping was done in just one area—outside the back doors of the plant *[La-Z-Boy Canada Limited v. Communications Workers of America, Local 80400 IUE]*.

**Conclusion**

Using cameras to spy on your employees is not automatically illegal. But it’s justifiable only in the narrowest of situations. Your reasons must be compelling, your alternatives non-existent and your taping methods as minimally intrusive as possible. The failure to clear each and every one of these hurdles will make your tape
usable in your own legal case against the employee, and in a twist of cruel irony, render it Exhibit A in the employee’s lawsuit against you.

**TOOL**

Video surveillance is easier to justify when it’s conducted openly. One of the best ways to establish your right to conduct open surveillance is to publish a clear and specific policy explaining the groundrules and distributing the policy to each of the employees in your organization. Here’s a Model Video Surveillance Policy you can adapt for that purpose.

**VIDEO SURVEILLANCE POLICY**

**PURPOSE:** After careful consideration, [insert company’s name] (the “Company”) has determined that the use of surveillance cameras is necessary to ensure the safety of employees and company equipment. Such use will improve safety and security by deterring acts of theft, violence and other criminal activity, and increasing the likelihood that perpetrators of these acts will be identified. The Company has created this surveillance policy in furtherance of these purposes and to assist in complying with federal and provincial privacy laws governing the collection of personal information.

**CAMERA LOCATIONS AND TIME OF OPERATIONS:** The Company has installed surveillance cameras in the following locations:

[Insert list of locations].

Each of these locations was chosen because of its increased potential for incidents of theft, violence and other criminal activity. They are also areas where employee expectations of privacy are minimal. At each location, cameras will record images only between the hours of 5 p.m. and 8 a.m. All areas subject to surveillance will be identified by signs that are clearly posted at the entrance to that area.
USE AND RETENTION OF FOOTAGE:

1. Surveillance cameras shall be used for the sole purpose of deterring theft, violence and other criminal activity. At no time shall the cameras be used to monitor employee productivity or performance.

2. In the event of a reported or observed incident, the recorded footage may be used to assist in the investigation of the incident and may be turned over to law enforcement personnel, if appropriate.

3. At no time will persons other than those designated by the Chief of Security have access to the footage made in the course of surveillance. Personal information contained on the footage shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law.

4. Footage from the surveillance cameras will be kept for a maximum of two (2) weeks unless required for the purposes outlined in this policy. If footage has been used to investigate an incident, that footage will be retained for one year after a final decision is reached concerning the incident.

5. Old footage that isn’t reused or recycled for surveillance will be shredded, burned, magnetically erased or otherwise made permanently unreadable.

SANCTIONS: Individuals who fail to follow this policy or who use surveillance camera footage inappropriately will be subject to disciplinary sanctions, up to and including termination.

FOR FURTHER INFORMATION about this policy or Company’s video surveillance program, employees may contact: [insert name, title, and phone number].