

No Clear Picture
The Status of Privacy Law and Surveillance in Canada

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In Canada, the general consensus is that a common law tort for invasion of privacy has never existed, and that at best the concept can be characterized as a developing tort.¹

On the evidence side, surveillance evidence with respect to insurance cases has been held to be admissible as long as the disclosure rules prescribed by *Rules of Civil Procedure* are complied with, and the evidence is relevant and reliable.

This paper discusses some of the more recent developments in the law with respect to surveillance undertaken in personal injury cases in light of the *Personal Information Protection and Electronics Document Act* (PIPEDA), and what is required today by private investigators to conduct surveillance on behalf of insurers.

Surveillance and Privacy Law Before PIPEDA

Back in 1998, a civil action was brought against a private investigation company wherein the plaintiff sought damages for invasion of privacy, breach of the *Charter*, breach of the *Criminal Code* and *Newfoundland's Privacy Act*: see *Druken v. RG Fewer & Associates Inc.*, [1998] N.J. No. 312 (T.D.).

With respect to the application of the *Charter*, the court held the following:

I must be satisfied that the defendant's actions and production of a video surveillance tape reflect *Charter* values. Were the production of the videotape at issue before me, then it would be incumbent that I embark on a balancing of the privacy interest of the plaintiff against the right of the defence to fully defend its case in litigation and to have equal benefit of the law bearing in mind the overall goal of the trial process is to discover the truth.

The production of the particular videotape being the subject matter of this litigation, as a trial exhibit, is not before me. This is an action for damages based on the plaintiff's allegation of invasion of her privacy interest. As will be seen later, the *Private Investigation and Security Services Act* and *Privacy Act* address the issues of the plaintiff's and the defendant's rights in these circumstances...

The defendant's videotaping of the plaintiff was by virtue of a contract with two insurance companies. The plaintiff had made claim for compensation in

¹ Provinces such as BC, Saskatchewan, Quebec, and Newfoundland have passed their own legislation creating a statutory tort of invasion of privacy.

respect of personal injuries sustained by her. The companies engaged the defendants to conduct video surveillance presumably to test the truth of the defendant's position pertaining to the extent of her injuries. The courts have recognized surveillance as a legitimate tool in defence of personal injury claims: *Young v. Dawe* (1995), 127 Nfld. & P.E.I.R. 272 (Nfld. S.C.T.D.), *Outerbridge v. Whelan*, 1994 St. J. No. 3479....

Approaching this fact situation in this manner I conclude the plaintiff has failed to establish the actions of the defendants are inconsistent with *Charter* values...The issue as to whether or not the actions of the defendants amounted to any invasion of privacy is dealt with hereafter.

The court also rejected the notion of creating a tort of invasion of privacy for breaching privacy provisions contained in the *Criminal Code of Canada*. The court held:

The plaintiff also requests this court determine whether or not the *Criminal Code*, Part IV (Invasion of Privacy) and Part XV (Special Procedure and Powers) apply to regulate, control and authorize the use of video surveillance in Canada. It is the plaintiff's position that any videotaping contrary to these provisions constitutes an invasion of privacy. I have no problem concluding that the *Criminal Code* provisions apply to video surveillance and videotaping for purposes set forth therein by agents of the state. However, I cannot conclude, on the basis of the case law provided, that these provisions are intended to cover videotaping by a non-governmental agency under private contract.

Finally, the court rejected Ms. Druken's argument that the investigators had breached Newfoundland's *Privacy Act*, which has created the tort of invasion of privacy to fill a void in the common law. The court conducted a balance of interest analysis similar to that with respect to *Charter* values. The court held:

Any activities of the investigative agency and its agents must adhere to the spirit of *Charter* values. The *Charter* values referred to are those of the right of individuals to privacy as set forth in Sections 7 and 8 on the one hand, and the right of the insurance companies, through their agents, in this instance the private investigators, to obtain information to enable them to properly defend actions in which they are involved thereby engaging Section 15(1) of the *Charter*. Sections 3(1), 3(2), and 5(1)(b)(c) of the *Privacy Act* recognize and reflect the two foregoing *Charter* values.

What it basically comes down to is...the balancing of interest of [the] litigants and what is reasonable in the circumstances. It is clear that invasion of privacy in civil litigation is a recognized right in certain circumstances. Arguably, production of psychiatric records is far more invasive than visual recording of publicly exhibited behaviours as in the case of the plaintiff herein. Likewise,

medical assessments by defendant experts, particularly in the first instance, would seemingly to be more invasive than visual observations...

Insofar as video surveillance is concerned, and its relation to the *Privacy Act*, there is little distinction between a videotaping and a private investigator giving sworn testimony as to his own observations of an individual's actions where such actions are clearly in the public view.

As to the actions of the investigators, there is no question they believed they had the right to conduct such a surveillance and historically this right has not been questioned. Our Courts have recognized surveillance as a legitimate tool in defence of personal injury claims.

PIPEDA

Most of you know by now that the federal private sector privacy legislation, the *Personal Information Protection and Electronics Documents Act* (PIPEDA), which was passed by Parliament in 2000, came into force with respect to federally regulated industries effective January 1, 2001 and came into force with respect to provincially regulated industries effective January 1, 2004.²

Most of you also know that the general principle under PIPEDA is that if information about an individual is to be exchanged for commercial purposes or as part of a commercial transaction, then the consent of the individual is required.

There are a number of reasons why Parliament passed this legislation; a discussion of which is beyond the scope of this paper. Suffice to say, the fear amongst many defence counsel was that the unfortunate side effect of this legislation was that it would prohibit what has been the stock in trade of private investigators since the beginning of time – obtaining from various sources and reporting to their clients the personal information of the subject of an investigation on a without notice basis.

Application of PIPEDA to Litigation and Surveillance: *Ferenczy v. MCI Medical*

Ferenczy v. MCI Medical Clinics, [2004] O.J. No. 1775 was the first case in Ontario where the courts were required to determine if PIPEDA would have any impact on the admissibility of surveillance evidence for the defence.

In this case, the plaintiff alleged she suffered from certain physical limitations as a result of a physicians negligence. During the plaintiff's cross examination, the defence sought to impeach the plaintiff with surveillance evidence it had obtained in January 2004; that

² Note PIPEDA does not apply to provincially regulated business in provinces that have passed their own private sector privacy legislation which has been designated as substantially similar to PIPEDA. Alberta, British Columbia and Quebec have passed such legislation.

is, after the coming into effect of PIPEDA against provincially regulated industries such as private investigations, insurance and health care providers. It is noteworthy that the defence disclosed the existence of the video in their affidavit of documents, but maintained privilege over the document. The court held that as such, the video could only be used for impeachment purposes. The court further held that the facts contained in the video were relevant, as the plaintiff had denied in cross-examination the very facts contained on the video; ie: holding a hairbrush and a cup of coffee. The court held the video did not become relevant until she made those denials.

Plaintiff's counsel then took the position that the taking of the video by a private investigator and its subsequent disclosure to counsel for the defendant was in breach of the disclosure rules contained in PIPEDA, and that the video's disclosure to the court would be a further breach. More particularly, the plaintiff argued the video was taken in the course of a commercial activity (the private investigator was retained by the physician's association), and that PIPEDA prohibits the collection, use or disclosure of personal information without consent in such circumstances.

The court made a number of rulings to support its position that the surveillance evidence was admissible:

1. PIPEDA does not contain any provisions with respect to the admissibility of evidence. The remedies available under PIPEDA are to make a complaint to the federal privacy commissioner, and / or to commence an application in the federal courts.
2. The evidence at issue was relevant, reliable, and its probative value exceeded its prejudicial effect. As such, the evidence was *prima facie* admissible – the test is the same in both criminal and civil cases: *R. v. Morris*, [1983] 2 S.C.R. 190.
3. This was not a case involving state action, and accordingly the *Charter* has no applicability. That said, *Charter* values must be considered in determining if the admission of the evidence would make the trial unfair. As the plaintiff had the opportunity to respond and explain the surveillance evidence, and had the opportunity to bring reply evidence, the trial was not unfair.
4. While the term “commercial activity” is broadly defined in PIPEDA, it does not apply to situations where a person is seeking to obtain information to defend an action.
5. The use of an agent such as a private investigator to collect information on behalf of a litigant does not make the act of collecting information any more of a commercial activity than if the defendant had collected the information him or herself.
6. If the court was wrong with respect to (4) and (5), then there was an implied consent given to collect the information. Any person who commences an action implicitly consents to a defendant of that action to collect information about him or her that is relevant to the action. In this case, the plaintiff put her physical well being in issue in her pleadings. Accordingly, the plaintiff gave consent to the defendant to collect information with respect to her physical well-being that was publicly available.

7. If the court was wrong with respect to (6), then the collection and use of the information by the agent of the defendant does not require the consent of the plaintiff as it was collected in a situation where to request consent would compromise the accuracy of the information provided, and where the information collected and used related to a contravention of a law, that being the common law tort of negligence and fraud (s.7(1)(b) and s.7(2)(d)). The court further held that once the information was collected in such circumstances, it could then be disclosed by way of court order (s.7(3)(c)) or by rule of law (s.7(3)(i)).

PIPEDA and the Concept of Agency

Back in June 2003, George Radwanski, the past Privacy Commissioner of Canada, gave a speech to the Private Investigators Association of British Columbia. At this time, private investigators nationally were organizing to apply to Industry Canada for the investigative body designation. It was believed that the investigative body designation would allow them to disclose to their clients information they collected and used where there were grounds to believe information related to a breach of a contract or a contravention of a law. Mr. Radwanski was against the idea Industry Canada would ever award private investigators this designation. He thought that an industry such as private investigators would abuse such a designation, and use it as a means of sidestepping the intent of the legislation.

In this speech, Mr. Radwanski conceded that it would be rare that private investigators would obtain the consent of persons whose information they were collecting, using or disclosing. Mr. Radwanski, however, claimed he had a solution for the private investigators. He stated that since private investigators were agents of their clients, the disclosure of the evidence they collected to their clients was, for the purposes of PIPEDA, a “use.”

Mr. Radwanski compared the activities of private investigators to banks who outsourced the printing of cheques. Mr. Radwanski stated that banks collect information on their clients, and then “transfer” their client’s information to their contract printing company. This “transfer” is a “use” of the information, as opposed to a “disclosure.” Likewise the disclosure of information collected by private investigators to their clients was a “transfer,” or a “use.”

The problem with this logic, of course, is that in the bank scenario, the banks are receiving back on cheques the same information they sent out. The bank’s clients consent to this. Private investigators, meanwhile, may receive some information from their client to commence an investigation. But the idea is that the quantity of information they disclose back to their client significantly exceeds what they were given to start of with. Further, as indicated by Mr. Radwanski himself, individuals are not prone to give private investigators the same consent they would give to their bank to print them cheques.

Reference is made to Mr. Radwanski's speech for one reason. The court in *Ferency* made reference to the agency concept. However, in *Ferency*, the court first found that the action of a defendant retaining a private investigator to collect information as his or her agent was not a commercial activity as contemplated by PIPEDA. In other words, the court made no reference to this idea of "transfer" or agency as a standalone reason why the concept of "disclosure" was not relevant in the circumstances.

Further Developments With Respect to Private Investigators: Investigative Bodies

A further issue with respect to *Ferency* is worthy of mention. At the time of this surveillance, January 2004, private investigators had not yet been designated by Industry Canada as "investigative bodies." The investigative body designation was awarded to private investigators, as well as independent adjusters, in March 2004. I was very involved in this application process. At the time, the pronouncements of Mr. Radwanski were in doubt as a result of Industry Canada's Regulatory Impact Analysis Statement (RIAS) with respect to investigative bodies and the application of PIPEDA released in 2000. The position taken by Industry Canada in its RIAS was considered critical to the private investigation industry as the federal court in *Englander v. Telus Communications Inc.*, [2003] F.C.J. No. 975 had held that in cases of first instance, the court should find the intent of the legislation (PIPEDA) from the government's RIAS.

The RIAS with respect to PIPEDA and investigative bodies contains the following statements:

PIPEDA establishes rules to govern the collection, use and disclosure of personal information by organizations in the course of commercial activity. The legislation requires an organization which discloses personal information to obtain the individual's consent in most circumstances.

...

Increasingly, many fraud investigations are initially launched by private sector organizations by way of an independent, non-governmental investigative body.

...

Paragraph 7(3)(d) allows an organization to disclose personal information, without the consent of the individual, to the appropriate private sector investigative body in order to conduct the preliminary investigation. The disclosure is circumscribed as it must be a reasonable disclosure related to the breaches of agreements or contraventions of the law.

Paragraph 7(3)(h.2) allows an investigative body to disclose personal information back to the client organization on whose behalf it is conducting the investigation. Paragraph 7(3)(h.2) completes the exception provided in paragraph 7(1)(b) for collection without consent.

Collection alone would be of limited use...unless the information could be disclosed to the parties that need the information...Without paragraph (7)(3)(h.2), the information flow could only go in one direction – from the organization to the investigative body. The investigative body would be unable to disclose the results of its investigation back to the client organization without consent.

...

There are no alternatives to deal with the collection, use and disclosure of this information without consent.

What should be noted from the RIAS is that there is no mention of the agency concept as eluded to in *Ferency*. It is further noted that it does not appear that the court in *Ferency* had the benefit of reviewing the RIAS. Accordingly, if the court's application of the term "commercial activity" and implied consent are found one day to be in error, than it is unlikely the court's reference to non-consensual collection and use will prevail.

Conclusions

A very good review of the status of law on privacy can be found in the judgment of Clackson J. in *Amalgamated Transit Union Local No. 569 v. City of Edmonton*, [2004] A.J. No. 419 (Q.B.). This action pertained to a review of an arbitration wherein the admissibility of surveillance evidence was at issue. In this case, the learned judge provided a review of a number of decisions of the Supreme Court of Canada on privacy issues, showing how the court had moved from the concept of right to privacy that of a reasonable expectation of privacy.

The views of the court in the *City of Edmonton* should, in my view, be incorporated in the application and interpretation of PIPEDA. Currently the federal privacy commissioner's office is looking to right to privacy orientated labour arbitration awards for guidance on setting policy with respect to surveillance. While these decisions can not be ignored, for the time being, as it applies to surveillance in the insurance context, reference should be made to how the court in *Ferency* applied the concept of "commercial activity" with regards to PIPEDA, the argument of implied consent, and the investigative body status of private investigators as prescribed in PIPEDA's regulations.

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