

Admissibility as Evidence of Video Surveillance: The Court of Appeal rules on the matter

By Jean Saint-Onge



The video surveillance of daily activities has become an effective and sometimes conclusive means for verifying the good faith of an insured who has filed a claim for disability insurance. Such surveillance can also be used in damage claims where the plaintiff in an action for bodily injuries claims lost income as a result of alleged functional limitations which may appear doubtful.

This method often allows one to uncover fraudulent claims by discovering the performance of activities which are incompatible with the subjective complaints made during medical examinations carried out at the insurer's request.

Our courts are now less reluctant to admit such evidence in cases of disability insurance claims where the insured's credibility is in doubt.

In a recent labour relations matter decided on August 30, 1999¹, the Court of Appeal allowed into evidence video surveillance of the daily activities of an employee whose honesty was seriously questioned.

The employee once again consulted his attending physician who diagnosed a lumbar sprain and contusion, and indicated that his patient was to stop certain physical activities.

Sensing fraud, the employer decided to hire private investigators to conduct daily surveillance at regular intervals over a period of a few weeks. The initial results of the surveillance revealed that the employee was performing normal activities, although he continued to complain of significant functional limitations.

A second surveillance showed the employee on video carrying a medium-sized bucket and participating in certain activities with his son, without any evidence of pain or stiffness in his lower back, contrary to what he had stated to the employer's nurse and doctor who had found him fit to return to work.

The employer conducted a third surveillance during which the employee could be seen working on his lawn for half an hour while squatting and bending over at an angle of 90°, without any sign of discomfort or pain, although the next day he stated to the nurse that he still felt pain when bending over.

The facts

The employee fell at work and consulted a doctor who provided him with a sick leave certificate after having diagnosed, among other things, a contusion to the hip. A few days later, the employee met with the employer's nurse who did not notice any contusion or other condition, contrary to the attending physician's diagnosis. Similarly, the employer's doctor did not find any physical anomaly; he concluded that the injury had been consolidated and declared that the employee was fit to work, despite his subjective complaints.



LAVERY, DE BILLY
BARRISTERS AND SOLICITORS

¹ *Le syndicat des travailleurs(euses) de Bridgestone-Firestone de Joliette (CSN) v. M^r Gilles Trudeau et Bridgestone/Firestone Canada inc.*, C.A.M., 500-09-001456-953, August 30, 1999, Justices LeBel, Baudouin and Thibault.

Following the results of this surveillance, the employee was invited to meet with the director of human resources as well as management and union representatives; the employee was questioned and confronted about the situation. The employee saw his attending physician the next day who provided him with a certificate stating that he was fit to return to his regular employment. Nevertheless, he was suspended pending an investigation and eventually dismissed for having lied about his physical condition in order to extend his period of disability.

The arbitrator's decision and the judgment of the Superior Court

Seized with a grievance for dismissal, the arbitrator had to rule on the admissibility in evidence of the surveillance; he allowed the video tapes to be used as evidence, given that the employee had been filmed in public, rather than in private, places.

Under judicial review, the Superior Court concluded that a surveillance of the employee did not constitute an abusive exercise of rights since, by filing a work related accident claim, the employee had implicitly waived his right to privacy and allowed a reasonable investigation to be carried out.

The judgment of the Court of Appeal

The Court of Appeal confirmed that the video tapes were admissible in evidence.

Application of the *Charter of Human Rights and Freedoms* and the *Civil Code of Québec*

Given that this was a case of private dealings between an employee and an employer governed by a collective agreement, the *Canadian Charter of Rights and Freedoms* did not apply; instead, the Court relied upon the *Charter of Human Rights and Freedoms* and the provisions of the *Civil Code of Québec* regarding contracts of employment² and the right to privacy³ in order to determine whether the employer's actions constituted a lawful invasion of privacy.

Since the relationship between an insured and his insurer is also of a private and contractual nature, it is also subject to the same rules regarding the right to privacy.

Filming, surveillance and the right to privacy

The problem in the case at hand was not one of appropriating someone's image, but rather, of keeping someone under surveillance, which is expressly prohibited by paragraph 4 of article 36 C.C.Q. In this regard, it should be noted that the testimony of the investigator, even without relying on the video tapes, would probably have raised to the same issues.

The notion of respect of one's privacy is still a vague concept which is difficult to define. In fact, the Supreme Court refused to limit the concept of private life solely to private premises when it ruled that the publication in a magazine of a photograph taken in a public place constituted an invasion of privacy⁴. Thus, even though the plaintiff was working out in the open for all to see, he was still within the scope of his private life and was entitled to be free from surveillance. The fact that he was an employee who was subordinate to an employer did not justify the employer's right of surveillance over all of the employee's activities outside the workplace.

Since the right to privacy is protected by the Charter, a waiver of this right must be clear and precise⁵. Nothing in this case allowed the Court to conclude that there had been such a waiver. Therefore, at first sight, the surveillance had to be considered an invasion of privacy.

Surveillance may be justified on reasonable grounds

Not every instance of surveillance of an employee outside the workplace is illegal⁶.

Moreover, surveillance outside the workplace may be admitted "if it is justified on rational grounds and carried out by reasonable means, as required by section 9.1 of the *Quebec Charter*" [translation].⁷

² See, in particular, articles 2085 (an employee is under the direction or control of the employer), 2087 (employer's duty to protect the health and dignity of the employee) and 2088 (employee's duty to act faithfully and honestly).

³ Articles 35 to 41 C.C.Q.

⁴ *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591.

⁵ *La Métropolitaine v. Frenette*, [1992] 1 S.C.R. 647.

⁶ In this regard, the Court referred to decisions rendered by the Supreme Court with respect to unreasonable searches and seizures. For example, in the case of *R. v. Edwards*, [1996] 1 S.C.R. 128, the Supreme Court stated that the right to challenge the legality of a search or seizure depends on whether or not the accused had a reasonable expectation of privacy. The Court further stated that a reasonable expectation of privacy must be determined on the basis of all the circumstances.

⁷ Reasons of Justice LeBel at page 35.



Jean Saint-Onge has been a member of the Bar of Québec since 1981 and specializes in Life and Disability Insurance Law.

In light of the principles set forth by the Court of Appeal in the *Bridgestone-Firestone* case, a surveillance will, therefore, be justified if it satisfies the following criteria:

- there must be a link between the measure taken by the employer and what is necessary for the proper operation of the business;
- the decision to put an employee under surveillance must not be arbitrary;
- the employer must have serious grounds to question the employee's honesty before putting him under surveillance;
- the surveillance must appear necessary in order to verify the employee's behaviour;
- the surveillance must be carried out with as little intrusion as possible.⁸

The surveillance was justified and legal under the circumstances

According to the Court, the fact that an employee avails himself of worker's compensation justifies the employer's interest in verifying his loyalty and the proper performance of his obligations.

In the case at hand, the fundamental guarantees of protection of privacy had not been infringed. Indeed, several factors justified the surveillance, including the employee's suspicious behaviour, the contradictions between the nurse's findings and the attending physician's diagnosis, as well as the contradictions between the employee's behaviour and the report made by the employer's doctor.

The surveillance was done selectively and not continuously; it was restricted to certain periods and was carried out in places and circumstances which did not in any way infringe the employee's right to his dignity.

In the case at hand, the video tapes supplemented the written evidence and testimony to the effect that the employee simulated his condition in order to extend his period of indemnification. The arbitrator's decision to admit this evidence was reasonable and well founded.

Bringing the administration of justice into disrepute

In addition to the above-mentioned legislative provisions regarding the right to privacy, one must also consider article 2858 C.C.Q. which was introduced into the *Civil Code of Québec* during the 1994 reform which deals with the admissibility of certain evidence:

"2858. The court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are breached and that its use would tend to bring the administration of justice into disrepute.

The latter criterion is not taken into account in the case of violation of the right of professional privilege."

In order to exclude evidence pursuant to article 2858 C.C.Q., the person asking for the exclusion has the burden of proving that the admission of the evidence would bring the administration of justice into disrepute.⁹

In fact, Justice Baudouin emphasized that, in the case at hand, when a video tape allows one to prove a situation of outright fraud, the decision to exclude the video allowing the employer to prove such fraud would bring the administration of justice into disrepute.

Thus, it appears that Justice Baudouin's interpretation considerably tempers a civil law rule which was the counterpart to the criminal law rule regarding the exclusion of evidence found in subsection 24 (2) of the *Canadian Charter of Rights and Freedoms*. It seems that the civil law rule for exclusion of evidence will have to be applied with much greater caution than that applied in matters of criminal law.¹⁰

Conclusion

This Court of Appeal ruling confirms certain arbitration decisions rendered in labour relations matters as well as in disability insurance cases. In particular, in the case of *Claude Léger v. Télémedia inc.*¹¹, such evidence was found to be admissible,

⁸ Among other things, the measure must not infringe the employee's right to his dignity, as occurred in a case where the employee had been filmed while in his bedroom.

⁹ The judge emphasized that in determining whether evidence is such that it would bring the administration of justice into disrepute, one must rely solely on the civil law criteria, distinguishing them from the criteria established for criminal law purposes. (Reasons of Justice Baudouin at page 2).

¹⁰ The judge also emphasized that "there is no possible comparison between the specific requirements of criminal law as regards adjudicative fairness and those of civil law, given that the stakes and the philosophy are not the same". [TRANSLATION] (Reasons of Justice Baudouin at page 2 of the judgment).

¹¹ [1995] R.R.A. 179.

and, more recently, in the case of *Boulianne v. S.S.Q.*¹². In each of these cases, the surveillance had seriously weakened the insured's credibility and had resulted in the dismissal of the his action against the insurer.

Video surveillance carried out on reasonable grounds and by acceptable means constitutes a justifiable invasion of privacy. Although the judgment of the Court of Appeal deals with a labour matter, in our opinion the principles spelled out by the Court of Appeal can be applied to situations of disability insurance. Thus, surveillance of a claimant's daily activities will be justified in matters of disability insurance if the surveillance satisfies the following criteria:

1. the fact that the insured has claimed disability benefits constitutes an implicit authorization to verify the merits of the claim by lawful means;
2. the insurer's interests may justify verifying the genuineness of the claim and its merits, based, in particular, on "total disability" definition contained in the contract;

3. the insurer's decision to carry out surveillance must not be arbitrary, but based on sufficient grounds to doubt the insured's good faith or the genuineness of the subjective complaints reported during a medical examination;
4. the method of surveillance must be carried out with the least amount of intrusion possible and must not, under any circumstances, infringe the insured's right to dignity, failing which the evidence may be excluded pursuant to article 2858 C.C.Q.

Under these parameters, video surveillance could also be justified in damage insurance cases, in particular, when the accident victim alleges a functional disability resulting in lost income and the existence or extent thereof is doubtful.

Jean Saint-Onge

You can contact any of the following members of the Life and Disability Insurance Law group in relation with this bulletin.

At our Montréal office

Jean Bélanger
Daniel Alain Dagenais
François Duprat
Philippe Frère
Guy Lemay
Jacques Paul-Hus
Élise Poisson
Johanne L. Rémillard
Jean Saint-Onge
Evelyne Verrier

At our Québec City office

Michèle Bernier
Martin J. Edwards
Claude M. Jarry

¹² [1997] R.R.A. 368.

Montréal

Suite 4000
1 Place Ville Marie
Montréal, Québec
H3B 4M4

Telephone:
(514) 871-1522
Fax:
(514) 871-8977

Québec City

Suite 500
925 chemin Saint-Louis
Québec, Québec
G1S 1C1

Telephone:
(418) 688-5000
Fax:
(418) 688-3458

Laval

Suite 500
3080 boul. Le Carrefour
Laval, Québec
H7T 2R5

Telephone:
(450) 978-8100
Fax:
(450) 978-8111

Ottawa

20th Floor
45 O'Connor Street
Ottawa, Ontario
K1P 1A4

Telephone:
(613) 594-4936
Fax:
(613) 594-8783

Associated Firm

Blake, Cassels &
Graydon
Toronto
Calgary
Vancouver
London (England)

Web Site

www.laverydebilly.com

All rights of reproduction reserved. This bulletin provides our clients with general comments on recent legal developments. The texts are not legal opinions. Readers should not act solely on the information contained herein.

