IN FACT AND IN LAW

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Video Surveillance: Yes… but under what conditions?

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In a judgment rendered August 30, 1999[1], the Court of Appeal ruled in favour of an employer who decided to secretly film an employee, because the employer had doubts as to the employee's honesty. The court ruled that the video tape was admissible as evidence, because the employer had reasonable grounds to carry out video surveillance of its employee. However, this judgment does not provide an unrestricted right to employers to have an employee followed or watched, without regard to the circumstances. The decision was rendered within a very specific context in which the employee's behaviour clearly indicated a lack of loyalty towards the employer and in which the company had identified an overall rate of absenteeism on which it had to act.

It should be pointed out that the Court of Appeal did not rule on whether or not the employee's dismissal was justified; furthermore, an employer will not necessarily have grounds to dismiss an employee who is being followed in all cases in which the surveillance establishes an activity which is incompatible with a sick leave.

The Facts

After having fallen at work, the employee felt some pain for which he consulted a doctor. The doctor, having noted that the employee had a limp and contusions to the hip, provided him with a sick leave certificate. Two days later, the employee met with a nurse appointed by the employer to deal with employment injury matters. During that meeting, the nurse did not notice any contusion, contrary to the attending physician's report, and she referred the employee to the employer's doctor. The nurse noticed discrepancies in the employee's behaviour; the employee stated he was in a great deal of pain, but was unable to indicate specifically where he felt pain. The employer's doctor, who did not find any physical anomaly, concluded that the injury had healed and had been consolidated, and he declared that the employee was fit to return to work.

The next day, the employee consulted his attending physician whose diagnosis contradicted that of the employer's doctor; the attending physician diagnosed a lumbar sprain and contusion, and indicated that his patient was to stop certain physical activities, given that he had an obvious spasm and was unable to bend more than 60% at the waist.

LAVERY, DE BILLY

BARRISTERS AND SOLICITORS

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

The employer then decided to have the employee watched by a firm of private investigators who followed the employee on three occasions, each separated by several weeks. The video tape made during the first round of surveillance showed the employee performing everyday activities.

During several subsequent meetings with the employer's nurse, the employee initially stated that he was in too much pain to accept any work whatsoever, but later indicated his willingness to attempt a temporary assignment in which his tasks would be lighter. The nurse was once again suspicious of the employee's statements, given, among other things, the contradictory statements made by the employee's physiotherapist who did not notice any limp on the part of the employee and who also indicated that the employee's subjective pain had decreased in general by 50%.

A second round of surveillance showed the employee on video carrying a medium-sized pail and running with his son, without any evidence of pain or stiffness in his lower back. Nonetheless, the employee was still limping and complained again the next time he went to see the employer's nurse. At her suggestion, the employee was once again invited to meet with the employer's doctor, but he first consulted his attending physician who concluded that the employee was still suffering from a contusion and lumbar sprain. As for the employer's doctor, he did not find any anomaly with respect to the employee's movements and he deemed the employee fit to return to work.

Faced with this contradictory information, the employer decided to conduct a third round of surveillance which proved to be conclusive. As a result of this investigation, the employee was captured on video pulling weeds on his property for half an hour while bending over at an angle of 90° or squatting, without any sign of discomfort or pain. Nonetheless, the next day he stated to the nurse that he still felt pain when bending over. Following this conversation, the employee was invited to meet with the director of human resources while in the presence of three members of the employer's management and certain union representatives. The employee reiterated his version, according to which he was still in pain, although he admitted that he had pulled weeds on his property and that he no longer felt pain in his back. The day following this meeting, the employee saw his attending physician who provided him with a medical certificate stating that he was fit to return to his regular employment.

At that point, the employer informed the employee that he had been suspended for purposes of an inquiry. A few days later the employer decided to dismiss the employee for having lied on several occasions in order to extend his absence from work.

The Rulings Made by the Arbitrator and the Superior Court

A grievance was filed with respect to the dismissal and was submitted to arbitration. The arbitrator had to rule, among other things, on the admissibility as evidence of the video tapes obtained by the employer. The arbitrator allowed the videos to be used as evidence, because the plaintiff could be seen in public, rather than private places.

The Superior Court, called to rule upon a motion for evocation of the arbitrator's ruling, confirmed the arbitrator's position and concluded that the arbitrator had not erred by admitting the video tapes as evidence. The surveillance did not constitute an abusive exercise of rights because, by filing a claim pursuant to an industrial accident, the employee had implicitly waived his right to privacy for purposes of a reasonable investigation.

The judgment was appealed on two issues of law: firstly, the union alleged that the arbitrator had usurped the specific jurisdiction of the authorities established pursuant to the *Act respecting industrial accidents and occupational diseases* to evaluate an

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employee's state of health and his ability to return to work; secondly, the issue focused on the arbitrator's decision to admit the video tapes as evidence.

The Judgment of the Court of Appeal

The Court of Appeal, in a judgment written by Justice LeBel, confirmed the arbitrator's decision, ruling that the arbitrator had not erred in his conclusions regarding the employee's state of health and, further, that he had not erred in admitting the video tapes as evidence. Justice Baudouin, who was in agreement with Justice LeBel's opinion, nevertheless added comments of his own which will be discussed below.

Usurpation of the Functions of the Specialized Tribunals

According to the employee, by ruling on the quality of the medical certificate issued by the attending physician and, thereby, on the employee's ability to return to work, the arbitrator usurped the exclusive decision-making powers conferred upon the authorities designated pursuant to the *Act respecting industrial accidents and occupational diseases*.

The Court of Appeal made a distinction between the act of an arbitrator usurping the exclusive jurisdiction of the specialized tribunals[2] by ruling directly upon the state of health of an employee in order to determine his entitlement to benefits, and the act of an arbitrator verifying whether the employee had been loyal and honest towards his employer in order to determine whether or not a disciplinary measure was justified.

In the case at hand, it was the employee who submitted the dispute to arbitration. In order to consider the grievance relating to a dismissal resulting from fraud, the arbitrator had to examine the employee's state of health and the probative value of the medical certificates on which the employee had relied.

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

Even if the surveillance was linked to an employment injury and, thus, to a government plan protecting against industrial accidents, the Court first pointed out that the *Canadian Charter of Rights and Freedoms* did not apply, because this was a case of private dealings between an employee and an employer whose relationship was governed by a collective agreement. These were not searches or seizures carried out by the State which would have been subject to the *Canadian Charter of Rights and Freedoms*. Rather, in order to decide whether or not contractual dealings between an employer and an employee are lawful, one must consider the *Charter of Human Rights and Freedoms*[3] (the "Québec Charter"), as well as the provisions of the *Civil Code of Québec* regarding contracts of employment[4] and the right to privacy[5].

Section 5 of the Québec Charter stipulates that every person has a right to respect for his private life and section 46 stipulates that every person has a right to fair and reasonable conditions of employment. Articles 35 and 36 of the *Civil Code of Québec* provide for a right to privacy by prohibiting any violation of such right, unless the person in question has consented.

Filming v. 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 observation, something which is prohibited *a priori* by paragraph 4 of article 36 of the *Civil Code of Québec*. The testimony of the investigator, even without relying on the video tapes, would probably have given rise to the same problems.

The notion of respect of one's privacy is still an imprecise concept which is difficult to define. In fact, the Supreme Court refused to limit the concept of private life to private premises when it ruled that the publication of a photograph taken in a public place constituted an invasion of privacy[6]. Thus, in the case at hand, 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 not to be observed. The fact that he was

[2] Agencies such as the C.S.S.T., the Bureau d'évaluation médicale (medical evaluation board), the Bureau de révision paritaire (joint review board) and the C.A.L.P.
[3] *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.
[4] 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).
[5] Articles 35 to 41 C.C.Q.
[6] *Aubry* v. *Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591.

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 Québec Charter, a waiver of this right must be clear and precise[7]. Nothing in this case allowed the Court to conclude that there had been such a waiver. Therefore, at the outset, the surveillance had to be considered an invasion of privacy.

Surveillance May Be Justified on Reasonable Grounds

However, not every instance of surveillance of an employee outside the workplace is illegal[8]. It will be permitted *"if it is justified on rational grounds and carried out by reasonable means, as required by section 9.1 of the Quebec Charter"*.[9]

Surveillance will be justified if it satisfies the following criteria:

- there must be a link between the measure taken by the employer and requirements for the proper operation of the business;
- the decision to have an employee followed must not be arbitrary;
- the employer must have serious grounds for doubting the employee's honesty or loyalty before having him followed. One cannot create reasons after the fact;
- the surveillance must appear to be necessary in order to verify the employee's behaviour; and
- the surveillance must be carried out in the least intrusive manner possible.[10]

The Surveillance Was Justified and Legal Under the Circumstances

According to the Court, the fact that an employee avails himself of a plan providing benefits in the event of employment injuries justifies the employer's interest in verifying his loyalty and the proper performance of his obligations.

Moreover, the fundamental guarantees of protection of privacy had not been infringed. Several factors justified the surveillance, including the employee's suspicious behaviour in relation to the events noted and the reports made by the attending physician.

In addition, considering that an employee in the same company had recently been dismissed for a similar type of fraud which had also been proved by surveillance, one could conclude that the employer's decision to keep the employee under surveillance was reasonable, as were the means used to do so.

According to Justice LeBel, *"therefore, the decision to carry out surveillance was reasonable. The means used to do so were reasonable. This was not a case of continued surveillance, but of three specific occasions, restricted to certain times; the surveillance was carried out in places where the employee was within the public's direct view and it was done under conditions which did not in any way infringe his right to his dignity"*.[11]

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

The Current State of the Law

A reading of the reasons set forth by the Court of Appeal indicates that an employer who wants to carry out any type of surveillance will have to justify such surveillance on rational and serious grounds and carry it out by reasonable means if the employer wishes to have the information so gathered admitted as evidence.

[7] *La Métropolitaine* v. *Frenette*, [1992] 1 S.C.R. 647.
[8] 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.
[9] Justice LeBel at page 35 of the judgment.
[10] 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.
[11] Justice LeBel at page 38 of the judgment.

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The judgment does not give an employer the right to monitor an employee's behaviour by means of random observation or on grounds which do not have anything to do with the employer's material interests. The Court did not claim to be providing a solution applicable to all situations and emphasized that it was ruling on a specific dispute which presented a particularly blatant situation, leaving no doubts.

However, one can conclude that an employer does, in fact, have a right to have an employee observed outside the workplace if the circumstances justify it. Depriving an employer of such means of establishing evidence would often result in appalling situations which would bring the administration of justice into disrepute. In rendering its decision, the Court of Appeal approved a point of view which had long been favoured by employers, and it confirmed *Lavery, de Billy*'s position regarding the lawful nature of an employer's surveillance of its employees.[12]

The president of the CSN, Marc Laviolette, recently[13] asked for the establishment of a judicial process similar to that governing police forces in criminal matters, in order to set limits and provide a framework for the practice of video surveillance.

Clearly, Mr. Laviolette had not read Justice Baudouin's comments dealing with article 2858 of the *Civil Code of Québec*. This provision, which was introduced into the *Civil Code of Québec* during the 1994 reform, allows for the rejection of any evidence obtained under circumstances where fundamental rights and freedoms are breached and where its use would tend to bring the administration of justice into disrepute.

Justice Baudouin emphasized that, in the case at hand, when a video tape allows one to prove a situation of outright fraud, it would be the decision to exclude the video providing the employer with the means to prove its employee's fraud which would bring the administration of justice into disrepute.

Thus, it appears that Justice Baudouin's interpretation considerably tempers a rule of civil law which was the counterpart to the rule used in criminal law as regards the exclusion of evidence and which is set forth in subsection 24 (2) of the *Canadian Charter of Rights and Freedoms*.

In accordance with this opinion, 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.[14] Indeed, one must distinguish between the contractual relationship which exists between an employee and his employer and the relationship which exists between citizens and the State, for which the police constitutes the "strong arm of the law".

Practical Guidelines for Employers

In closing, we would like to suggest some useful guidelines which will provide support for the lawfulness of a proposed surveillance of an employee by an employer:

(1) ensure that you are acting on the basis of medical information and other information which is relevant and reasonably up to date at the time the surveillance procedure is carried out[15];

(2) appoint a person who will be in charge of making all decisions regarding surveillance in order to establish internal consistency;

[12] See, among others, Bernard Jacob, *Pouvoirs d'enquête de l'employeur par filature et moyens électroniques, Développements récents en droit du travail (1996)*, Service de la formation permanente, Barreau du Québec, Les Éditions Yvon Blais at page 111.

[13] See Claude-V. Marsolais' article entitled "La CSN demande un encadrement de la vidéofilature" published in *La Presse* on Thursday, September 2, 1999, at page A4.

[14] The judge 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". (At page 2 of the judgment).

[15] It is interesting to note that, in the case at hand, the employer was "tailing" the employee in a certain manner by subjecting him to meetings with the employer's nurse twice a week.

(3) establish a file in which you record all objective elements which raise serious doubts regarding the loyalty or honesty of the employee at the time the surveillance is set in motion:

- suspicious circumstances;
- compromising or contradictory statements;
- contradictory medical opinions;
- discrepancies between various facts and medical opinions;
- etc.

(4) ensure that you are able to identify how the company's material interests are at stake (for example, honesty, loyalty, absenteeism)[16]. Conversely, resist the temptation to jump on someone who is lying or acting fraudulently, if such behaviour does not have serious consequences (for example, coming in late a few mornings);

(5) target the surveillance so that it is limited as to time and place and so that it is not prolonged unduly once it has provided you with conclusive and probative results;

(6) ensure that you are able to show that you, as the employer, as well as your mandataries did not merely choose the easiest solution for you, but, rather, that you and your mandataries took the time to choose places and times which would result in the least intrusion into the employee's private life and intimate moments (for example: the main passage in a shopping centre during the day, rather than the stoop of a private residence on a summer's eve).

We should point out, once again, that each case depends upon the specific facts, and that the particular circumstances of each case will determine whether or not surveillance was lawful.

Chances are that the courts, including the Court of Appeal, will have the opportunity to examine other cases of this type and to provide more details regarding the rules set forth in this judgment, in particular, by pointing out situations in which employers have, unfortunately, abused their rights.

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[16] In the case at hand, the Court of Appeal noted that another dismissal had occurred under the same circumstances shortly prior to the dismissal in question, and this showed that a problem did, in fact, exist within the company.

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