IN FACT AND IN LAW

Labour and Employment

November 2006

Recording in the work environment: do your telephone conversations belong to you?

By Jean Beauregard and Nicolas Joubert

*The right to privacy occupies a prominent place in Quebec law. Both the **Charter of human rights and freedoms**[1] and the **Civil Code of Québec**[2] recognize this right. Moreover, it is acknowledged that deliberate interception of a private communication may infringe this right. Does this mean that any form of electronic recording in a work environment is prohibited? Absolutely not. However, some limits exist in this regard, concerning both the employer's power to record an employee's statements, and the employee's right to record the statements of his employer or its representative. This newsletter succinctly presents the state of the law on this question.*

Recording of a conversation by a participant

It is generally accepted by the courts that a person may record his conversations with another person without that person's knowledge, provided that the recording does not constitute an invasion of the other person's private life. This rule applies in labour relations and other fields.

Consequently, not only may an employer generally record his conversations with an employee, but an employee may also record his conversations with his employer and fellow employees.

However, the conversation must be about business or pertain to employment matters. Indeed, in most cases, private conversations cannot be put into evidence, because there would then be an infringement of the right to privacy.

Moreover, although it is generally permitted to record one's own conversations, an employee who does so could be subject to disciplinary action if the relationship of trust essential in the employer-employee relationship is affected. It is precisely for this reason that the Court of Appeal upheld disciplinary action imposed on an employee who, on several occasions, had clandestinely recorded his conversations with his superiors and meetings in which he had participated[3].

An arbitration tribunal also concluded that an employer may be justified in disciplining an employee who records his conversation with a co-worker if it concerns the co-worker's private life[4].

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[1] *Charter of human rights and freedoms*, R.S.Q. Ch. C-12, see, in particular, Section 5 [hereinafter the "*Quebec Charter*"].

[2] *Civil Code of Québec*, S.Q., 1991, Ch. 64, see, in particular, articles 3, 35 and 36 [hereinafter the "*C.C.Q.*"].

[3] *Sept-Iles (Ville de) v. Thibodeau*, D.T.E. 97T-1361 (C.A.).

[4] *Centres de jeunesse Mauricie et Bois-Francs*, A.A.S. 96A-248 (T.A.).

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Interception by an employer of a conversation between an employee and a third party

According to a judgment of the Quebec Court of Appeal, the secret interception of an employee's communications, when they take place at work, does not necessarily constitute a violation of his privacy, nor is it inevitably synonymous with an unfair or unreasonable condition of employment[5]. On the contrary, the civil courts and arbitration boards frequently admit into evidence electronic recordings made without an employee's knowledge when there is a combination of circumstances that justifies the employer resorting to making them.

Indeed, an employee who claims that a recording infringes his privacy must prove that the discussion recorded was really a "private" conversation. Essentially, two factors are involved in the evaluation of the private nature of a communication: place and content.

Concerning "place", it must be understood from the outset that the performance of work in places controlled by an employer reduces an individual's legitimate expectation of privacy. Thus, regarding his right to protection of privacy, the employee must have lesser expectations in the workplace than at home.

As for "content", the courts have stated that a conversation is private when a participant can reasonably expect that it will be. (In the case of Srivastava v. Hindu Mission of Canada Inc., REJB 2001-23958, this interpretation has been imported from criminal law by the Court of Appeal and corresponds to the provisions of Sections 183 and 184 of the Criminal Code). On the other hand, they recognize that a conversation concerning employment matters generally does not constitute a private conversation.

In addition, as the Court of Appeal has recently pointed out, even when these expectations are substantial and real, the employer may, in some cases, interfere with an employee's privacy without thereby contravening Article 35 of the *C.C.Q.* or Section 5 of the *Quebec Charter*[6]. Generally speaking, such an intrusion will be permitted if it meets the following conditions:

1) the employer is, by means of the intrusion, seeking to achieve a legitimate and important objective;
2) the intrusion is rationally related to the objective sought;
3) there are no other reasonable means of achieving the objective; and
4) the intrusion is as limited as possible.

An employer who proves that the recordings have a practical utility, such as improving the quality of the services offered to customers, puts forward a convincing argument supporting the legality of a recording. Indeed, it is then difficult for the employee to claim that these are unfair or unreasonable conditions of employment contravening Section 46 of the *Quebec Charter* or Article 2087 of the *C.C.Q.*

The case law also shows that the courts are more inclined to allow the production of electronic recordings in evidence if the employer does not really have other means to verify the quality of its employees' work and if it has informed its employees that their conversations may be recorded[7].

Lastly, the legality of electronic recording will be recognized more easily if the other participant in the conversation has been informed that he may be under surveillance[8].

In short, if he observes the limits established by the legislation and the courts, an employer who presents serious grounds can justify the necessity of electronic recording of an employee's conversations even if it involves some interference in the private sphere.

[5] *Ste-Marie v. Placements JPM Marquis inc.*, [2005] R.J.D.T. 1068 (C.A.).

[6] *Ste-Marie v. Placements JPM Marquis inc.*, [2005] R.J.D.T. 1068 (C.A.).

[7] See, in particular, *C.L.S.C. Les Forges*, [1997] T.A. 667.

[8] See, in particular, *Services préhospitaliers Laurentides-Lanaudière* D.T.E. 2003T-779 (T.A.).

Inadmissibility of evidence that "brings the administration of justice into disrepute"

When the above conditions are respected, the courts usually allow an electronic recording to be admitted into evidence.

This being said, a party may object to presentation of this evidence by invoking Article 2858 of the *C.C.Q.*, which prescribes 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. For such an objection to be accepted by a court, both of these elements must be present.

The judgment in *Ville de Mascouche v. Houle*[9] clearly illustrates this situation. In that case, a citizen had decided to record the telephone conversations of his neighbour (Ms. Houle), who was the municipality's ombudsman, without her knowledge. The conversations had been intercepted while Ms. Houle was at home, away from the performance of her duties and outside of her working hours. Informed that Ms. Houle had made disloyal comments, the mayor of the municipality asked the neighbour to continue making the recordings. On the basis of the statements subsequently collected without her knowledge, Ms. Houle was dismissed. The Court of Appeal concluded that the violation of the right to privacy was flagrant, because the legitimate expectation of privacy at home is very high. Secondly, even though the recordings had made it possible to discover the truth, the Court decided that their use would be likely to bring the administration of justice into disrepute. The evidence was therefore rejected based on Article 2858 of the *C.C.Q.*

Evidence obtained by electronic recording in the work environment was also rejected on this basis in the recent judgment in *Bellefeuille*[10]. In that case, a patient attendant had been dismissed. She claimed that her employer had given her bad references, which had driven away potential employers. To prove this allegation, she wanted to present as evidence a telephone recording made by one of her friends, who had posed as a potential employer to discuss the dismissed employee with the former employer. The court concluded that there had been an illegal ploy committed in bad faith by the employee and that this evidence was likely to bring the administration of justice into disrepute. It was therefore rejected. This judgment is currently before the Court of Appeal. It will be interesting to see whether Quebec's highest court upholds the Court of Québec's position in the case.

Based on these judgments, it should be noted that, in a labour relations context, the courts do not tolerate serious infringements of the right to privacy or fabrication of evidence by subterfuge or dishonest methods.

Conclusion

After all is said and done, an employee may record his conversations with his employer in complete legality in some circumstances and use the recordings in court. However, the employer can object to this evidence when it undermines the relationship of trust inherent in any contract of employment.

As for an employer who resorts to this type of evidence against an employee, he must prove that he has reasonable grounds to believe that the person concerned is contravening his obligations under the contract of employment (whether individual or collective) and the known policies. If he can prove this, electronic surveillance commensurate with the objectives sought will be justified.

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[9] *Mascouche v. Houle*, [1999] R.J.Q. 1894 (C.A.).

[10] *Bellefeuille v. Morisset*, D.T.E. 2006T-172 (C.Q.) (Motion for permission to appeal granted).

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