

IN THE MATTER OF AN ARBITRATION  
UNDER THE  
ONTARIO LABOUR RELATIONS ACT, 1995

BETWEEN:

Labourers' International Union of North  
America, Local 625

AND:

Prestressed Systems Inc.

REGARDING:

An Admissibility Issue Concerning Video  
Surveillance Tapes in the Termination Grievance of Mr. Dion Roberts

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|----------------------------|------------------------|
| ARBITRATOR:                | Michael Lynk           |
| REPRESENTING THE UNION:    | Stephen Krashinsky     |
| REPRESENTING THE EMPLOYER: | Jean Leslie Marentette |
| PLACE OF HEARING:          | Windsor, Ontario       |
| DATE OF DECISION:          | 3 March 2005           |

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PRELIMINARY AWARD ON ADMISSIBILITY

I Introduction

This ruling deals with an admissibility issue that has been frequently litigated before labour arbitrators over the past decade and a half, but for which there has yet to be a settled approach. The contested issue revolves around the appropriate test to determine the admissibility of video surveillance evidence which purports to capture employee misconduct in a public space.

The admissibility issue on video surveillance arose before me at the beginning of the hearings into the termination grievance of Mr. Dion Roberts. His employer, Pre-Stressed Systems Inc. ("Pre-Stressed Systems", or the "Employer") dismissed Mr. Roberts on 20 January 2003, alleging that he had deliberately misrepresented the severity of a back injury which he had suffered at work in the autumn of 2002. The Employer decided to terminate Mr. Roberts after it commissioned and reviewed several video surveillance tapes which had covertly filmed Mr. Roberts during various off-work activities in public areas in the later half of December 2002. The Employer has sought to introduce these tapes into evidence at the arbitration hearing in support of its decision. Mr. Roberts' union, the Labourers' International Union of North America ("LIUNA" or the "Union") has objected. A number of hearing days followed, where evidence establishing the context of the Employer's decision to commission the video surveillance of Mr. Roberts was heard. The following is my interim award on the admissibility issue.

II Evidence

At this stage of the hearing, the parties agreed that evidence would be taken from two employer witnesses – Mr. Louis Cristofaro, who was Mr. Roberts' supervisor during the relevant times; and Ms. Patricia Bergsma, the

company's health and safety co-ordinator – for the purposes of determining the context of the Employer's decision to commission and conduct the video surveillance of Mr. Roberts.

Mr. Roberts had worked as a general labourer for the Employer at its Windsor plant since his hiring in June 1998. Pre-Stress Systems manufactures pre-cast hollow core and structural concrete products, such as columns, beams and balconies, for the construction of industrial and commercial buildings. As a general labourer, Mr. Roberts would normally rotate through a number of jobs at the Pre-Stress plant, all of which required some degree of physical exertion. The rotation system was meant to broaden the skill acquisition of the general labourers through cross-training, and to reduce the likelihood of repetitive strain injuries. Several of the general labourers' jobs were designated by the Employer as light-duty positions, which were made available to employees who required modified duty assignments while they recovered from injuries.

In early July 2002, Mr. Roberts injured his left elbow at work. Initially, he continued to perform his regular duties for several weeks. However, he subsequently went to a local chiropractor, Dr. Franz Futo, for assessment and treatment. The Employer asked Mr. Roberts to arrange for the chiropractor to complete a Functional Assessment Form ("FAF"), which is produced by the Workplace Safety and Insurance Board. The form consisted of a number of questions which detailed his specific physical limitations and their expected duration. The initial FAF, dated 15 August 2002, listed the limitations to his elbow, and estimated that these limitations would last for two weeks. With this FAF in hand, and while Mr. Roberts' elbow recovered, his supervisor assigned him to light-duty work, which largely consisted of assisting a crane operator with material loadings on a flat-bed trailer.

However, Mr. Roberts' elbow took much longer to recover than initially anticipated. He made at least five visits to Dr. Futo between August and the beginning of November, and first four FAFs completed by the chiropractor stated the same approximate limitations, with an anticipated recovery time of two further weeks in each case. The final FAF on his left elbow, dated 13 November 2002, determined that Mr. Roberts was now capable of employing his elbow without limitations. Throughout this time, Mr. Roberts was primarily assigned to the trailer loading job as a modified work assignment, and he did not miss any time from work, aside from visits to his chiropractor during working hours.

There was no evidence before me that, prior to this injury, Mr. Roberts had a worrisome attendance record in the eyes of the Employer, or that he had any kind of negative assessment.

While Mr. Roberts was recovering from his elbow injury, he suffered a work injury to his back when he lifted up a load of materials. The initial injury to Mr. Roberts' back occurred on 24 September, and he re-injured it at work on 18 October. Mr. Roberts subsequently visited his chiropractor on 1 November to address the back injury. On that date, Dr. Futo completed a FAF respecting Mr. Roberts' back injury, which listed a series of work limitations:

- Walking as tolerated
- Standing less than 15 minutes
- Sitting less than 30 minutes
- No lifting
- Stair climbing at own pace
- No ladder climbing
- Limitations to bending/twisting of lower back

On the 1 November FAF, Dr. Futo estimated that the anticipated duration of the limitations caused by the back injury would be two weeks.

Following this FAF, Mr. Roberts was re-assigned new light-duty work consistent with these limitations. The new light duties consisted primarily of cleaning chucks, performing guard duties at the delivery shack on the Employer's property, and for a short time, operating a materials saw. By the middle of December, Mr. Roberts' modified work assignment was limited to cleaning chucks. This assignment lasted until his chiropractor cleared him for a complete return to regular work assignments on 15 January 2003. Mr. Roberts did not miss any time from work because of his back injury during this period, aside from the ongoing visits to Dr. Futo.

After the 1 November FAF, Mr. Roberts visited the chiropractor on six more occasions for attention to his back injury, including his final clearance visit on 15 January 2003. After his visits to Dr. Futo on 15 and 29 November, the limitations initially listed on the 1 November FAF were maintained with only minor alterations. On each occa-

sion, the estimated duration of the limitations was stated as either 10 days or 1.5 to 2 weeks. The limitations listed on the 29 November FAF contained the following:

- Walking, standing, & sitting as tolerated
- Lifting waist to shoulder less than 10 kg.
- No lifting floor to waist
- Stair climbing as tolerated
- No ladder climbing
- Limitations to bending/twisting of lower back

Mr. Cristofaro testified that, by the first week of December, he was having doubts about the severity of Mr. Roberts' back injury and about the veracity of his limitations. In particular, he stated that Mr. Roberts's injury appeared to be taking a long time to heal, especially since the FAFs from Dr. Futo had estimated that the expected duration of the limitations would be within the two weeks following each FAF. Mr. Cristofaro said in his evidence that he was concerned because he wanted Mr. Roberts to assume more demanding tasks in light of ongoing production demands. Yet, whenever he would ask Mr. Roberts if he could work at a specific task other than his assigned modified duties, Mr. Roberts would usually refuse because of his limitations. Additionally, in Mr. Cristofaro's mind, another item of concern arose when Mr. Roberts told him that he had slipped on some ice at the plant on 2 December, and exasperated his back injury. This meant that Mr. Roberts could not do some of the light-duty tasks which he had been performing. According to Mr. Cristofaro, none of Mr. Roberts' work injuries – the elbow injury, and the three back injuries in September, October and early December – were witnessed by any other employee.

In cross-examination, Mr. Cristofaro acknowledged that he had asked Mr. Roberts on several occasions in late November if he could do some physical work which involved some minor bending. He stated that Mr. Roberts would try to perform other duties when asked, with, however, only limited success.

On Monday, 9 December, Mr. Cristofaro was told by one of the employees under his supervision, Mr. Brian Issac, that Mr. Roberts had been speaking to several of his work mates that morning about having played hockey the night before. According to Mr. Cristofaro, Mr. Issac also told him that Mr. Roberts was now playing hockey several times a week. With this information, Mr. Cristofaro immediately went to see Ms. Bergsma, and asked her if something could be done to verify Mr. Roberts' true physical condition. He testified that, during his discussions with Ms. Bergsma, he raised the idea of video-taping Mr. Roberts during his off-work activities.

On that same day, Mr. Roberts made another visit to Dr. Futo, who completed a new FAF that Mr. Roberts subsequently provided to Ms. Bergsma the following morning. The 9 December FAF repeated most of the same limitations that were stated on the 29 November FAF. It also estimated that these limitations would last for another 1½ to 2 weeks. The limitations were stated as:

- Standing, & sitting as tolerated
- Lifting waist to shoulder less than 10 kg.
- No lifting floor to waist
- Stair climbing as tolerated
- No ladder climbing
- Limitations to bending/twisting of lower back

As the Employer's health and safety co-ordinator, Ms. Bergsma had engaged a Windsor health and safety management company known as Safety Comp to act as outside consultants. The company would advise Pre-Stress Systems about its health and safety operations, its workers' compensation claims, and the management of its work hardening programs for its injured employees. Ms. Bergsma said that she would regularly send Mr. Roberts' elbow and back injury FAFs to Safety Comp for advice. She testified that she sent the 9 December FAF to Safety Comp, and also sought its advice regarding surveillance. As well, she spoke to her supervisor, Mr. Don Little, to seek his approval for authorizing video surveillance of Mr. Roberts' off-duty activities. Ms. Bergsma received the requisite permission on 10 or 11 December, and then directed Safety Comp to retain a private investigation service to conduct the surveillance.

In her direct-examination evidence, Ms. Bergsma gave two reasons for initiating the video surveillance of Mr. Roberts. First, she was concerned that his back injury was taking such a long time to heal, particularly in light of the short duration estimates that Dr. Futo had mentioned on each of his FAFs. And second, Mr. Roberts' regular

engagement in hockey games suggested to her that he might be misrepresenting the severity of his back injury. When asked by the Employer's counsel whether she had considered other alternatives to conducting covert surveillance on Mr. Roberts, Ms. Bergsma stated that she relied on the advice she received from Safety Comp on the management of such an issue, and no one at the company suggested any other alternatives.

In cross-examination, Ms. Bergsma stated that, when her doubts about the severity of Mr. Roberts' back injury grew, she did not specifically consider writing to Dr. Futo for clarifications. Nor did she consider requesting Mr. Roberts to see a medical doctor, or directing him to see a vocational rehabilitation specialist. None of these options crossed her mind because Safety Comp did not suggest any of them to her. Ms. Bergsma also said that she did not raise the issue of Mr. Roberts' hockey activities when she spoke to him about his limitations after his 9 December FAF.

Mr. Roberts was subsequently placed under covert video surveillance. The tapes were shot on various dates between 16 and 27 December 2002. I viewed the tapes with the consent of both parties, and without prejudice to the Union's position that they should not be admitted. The tapes showed Mr. Roberts at different times walking in a residential neighbourhood and bending over to pick up an object lying on the grass, lifting an object (described as a barbecue) off the back of a truck at a residential home, and playing two games of no-contact ice hockey at an indoor rink. The pace and the exhibited skills of the two hockey games appeared to be at a relatively low level.

Mr. Roberts did not work during the Employer's holiday shutdown, which ran between 20 December 2002 and 6 January 2003. On 20 December, Mr. Roberts again visited his chiropractor. The FAF that Dr. Futo issued that day stated that Mr. Roberts could return to work with no restrictions. He visited Dr. Futo again on 6 January, and the resulting FAF listed a number of restrictions as a result of the back injury. Mr. Roberts remained on light duty assignment, cleaning chucks, until he was cleared by his chiropractor on 15 January to return to unrestricted full duties. Mr. Roberts was subsequently dismissed by letter on 20 January 2003, on the primary grounds that he had misrepresented his capabilities.

### III Argument

#### (i) *Union*

Union counsel argued that the video surveillance tapes which the Employer sought to enter as evidence should not be admitted. It maintained that the Employer had a duty in law to take other less invasive and more intermediate steps to secure the information that it was seeking about Mr. Roberts' true medical condition before infringing upon his privacy in such a manner. Counsel stated that the Employer admitted that it did not seek clarifications from Dr. Futo about why Mr. Roberts' back injury was taking so long to heal. It did not request him to visit a medical doctor. It did not direct him to vocational rehabilitation. It did not raise its concerns with Mr. Roberts himself, nor did it question him about his hockey activities. These were all viable steps available to the Employer which would have met its interests and yet preserved Mr. Roberts' privacy. In its actions, the Employer did not need any acceptable standard of reasonableness.

Turning to the caselaw, Union counsel pointed out that, among arbitrators in Ontario and Canada, there are essentially two schools of thought respecting the appropriate test for the admission of video surveillance evidence on employees captured in a surreptitious fashion in a public space. The relevance school would admit documents, testimony or video surveillance as evidence in an arbitration proceeding if it satisfied a test of relevance to the circumstances at issue. Counsel stated that this test is set too low, and unduly favours the employer's production and security interests over the employee's privacy interests. As well, it has not found favour among the majority of Canadian arbitrators. The more appropriate test, he maintained, is the reasonableness test, which sets the balance more equitably between production and security interests on the one hand and privacy on the other.

Counsel urged me to adopt the reasonableness test, which, in this case, would surely exclude the Employer's video surveillance tapes. The Employer did not have sufficiently reasonable grounds to order the monitoring of Mr. Roberts, nor did it adequately explore other alternatives before commissioning the surveillance. In the alternative, if I adopted the relevance test, then the video surveillance tapes would be irrelevant because Mr. Roberts was fit to work without restrictions when the surveillance was undertaken.

Union counsel relied upon the following caselaw: *Securicor Cash Services and Teamsters, Local 419* (Re) (2004), 125 L.A.C. (4<sup>th</sup>) 129 (Whitaker); *Ross v. Rosedale Transport Ltd.*, [2003] C.L.A.D. No. 237 (Brunner); *Toronto Transit Commission and A.T.U., Local 113 (Belsito) (Re)* (1999), 95 L.A.C. (4<sup>th</sup>) 402 (Chapman); *Toronto Transit Commission and A.T.U., Local 113 (Collins) (Re)* (1999), 80 L.A.C. (4<sup>th</sup>) 53 (Johnston); *Toronto Transit Commission and A.T.U., Local 113 (Adams) (Re)* (1997), 61 L.A.C. (4<sup>th</sup>) 218 (Saltman); *Canadian Pacific Ltd. and B.M.W.E. (Chahal) (Re)* (1996), 59 L.A.C. (4<sup>th</sup>) 111 (M. Picher); *Labatt Ontario Breweries (Toronto Brewery) and Brewery, General and Professional Workers Union, Local 304 (Re)* (1994), 42 L.A.C. (4<sup>th</sup>) 151 (Brandt); *Toronto Star Newspapers Ltd. and Southern Ontario Newspaper Guild, Local 87 (Re)* (1992), 30 L.A.C. (4<sup>th</sup>) 306 (Springate); *Steels Industrial Products and Teamsters Union, Local 213 (Re)* (1991), 24 L.A.C. (4<sup>th</sup>) 259 (Blasina); and *Doman Forest Products Ltd. and I.W.A., Local 1-357 (Re)* (1990), 13 L.A.C. (4<sup>th</sup>) 275 (Vickers).

#### (ii) Employer

The Employer submitted that the core of Mr. Roberts' misconduct – the misrepresentation of the state of his recovery from an industrial injury in order to benefit through light-duty assignments – is a serious industrial relations offence. The consequences are many: diminished productive value for the Employer; higher workers' compensation costs; erosion of the morale of other employees; removing light-duty assignments from other employees with disabilities; and, most seriously, breaching the fundamental element of employment trust.

Employer counsel argued for the adoption of the relevancy test as the appropriate industrial relations standard to measure the admissibility of video surveillance evidence in these circumstances. She maintained that it is the more persuasive and the more coherent approach towards evidence reception in labour arbitration. Applying this test, the video surveillance tapes would meet the standard of relevance because the context in which the Employer based its decision – Mr. Roberts' extremely slow recovery; and the apparent incompatibility between his physical restrictions and his reported off-work hockey activities, which turned out to be true – were justifiably connected to the Employer's employment interests.

The reasonableness test advocated by the Union did not have a solid legal foundation, at least not in Ontario, argued Employer counsel. The *Doman Forest Products* decision was based on British Columbia privacy laws, which have no statutory equivalent in Ontario. Compelling caselaw suggests that it is doubtful that employees have a right to privacy in Ontario. Even if they do, they do not enjoy an unlimited right, particularly in a public space.

In the alternative, even if I prefer the reasonableness test, a persuasive argument exists for admitting the video surveillance tapes in this case. The Employer encountered all kinds of red flags regarding Mr. Roberts' recovery: the pattern of minor injuries; the FAFs which listed short recovery periods that never worked out; no witnesses to any of his injuries; and the hockey activities which seemed to go against his stated limitations. As for the Union's argument on reasonable alternatives, Employer counsel maintained that none existed. The issue here was a soft-tissue injury, which is usually a fruitless exercise to refer to a physician because the medical diagnosis is largely dependent upon the subjective offering of the patient.

The Employer submitted the following caselaw: *A.T.U., Local 569 v. Edmonton (City)* (2004), 124 L.A.C. (4<sup>th</sup>) 225 (Alta. Q.B.); *Goodrich Turbomachinery Products and U.S.W.A., Local 4970 (Danesh) (Re)* (2002), 103 L.A.C. (4<sup>th</sup>) 382 (Marcotte); *Transit Windsor and A.T.U., Local 616 (Orsi) (Re)* (2001), 99 L.A.C. (4<sup>th</sup>) 295 (Brandt); *Canadian Timken Ltd. and U.S.W.A., Local 4906 (Hutchin) (Re)* (2001), 98 L.A.C. (4<sup>th</sup>) 129 (Welling); *Toronto Transit Commission and A.T.U., Local 113 (Russell) (Re)* (1999), 88 L.A.C. (4<sup>th</sup>) 109 (Shime); *Toronto Transit Commission and A.T.U., Local 113 (Fallon) (Re)* (1999), 79 L.A.C. (4<sup>th</sup>) 85 (Solomatenko); and *Kimberley-Clark Inc. and I.W.A. – Canada, Local 1-92-4 (Re)* (1996), 66 L.A.C. (4<sup>th</sup>) 266 (Bendel).

#### IV The Law

In deciding this issue, I have the advantage of considering not only the cogent and well-presented arguments offered by both counsel, but also the extensive body of arbitral caselaw which has emerged during the past 15 years. This caselaw offers a rich exploration of the competing legal and industrial relations policy issues at play when one attempts to locate the appropriate balance between the employer's interest in production, cost control and a trusted workforce, and the employee's interest in privacy, personal autonomy and the "right to be let alone". While Canadian labour arbitrators have yet to reach a settled position, let alone unanimity, on the appro-

appropriate principles to apply when assessing the admissibility of video surveillance evidence covertly taken of an employee in a public place, a distinct trend is emerging. I intend to explain why I am persuaded by the policy and legal arguments of this trend, and then apply these principles to the Union's preliminary objection going to the admissibility of the video tapes.

(i) *Unionized employees in Ontario have a general right to privacy*

The initial question to answer is whether, in the absence of a statutory or collective agreement right, a unionized employee in Ontario has a general legal entitlement to privacy respecting the employment relationship. For the reasons that follow, I am persuaded that the answer is yes.

The general right of an employee to some degree of privacy has been recognized by labour arbitrators with sufficient regularity and volume in recent years to be now considered as forming part of the 'common law' of the unionized Ontario workplace. This entitlement is not absolute, for it always must be weighed against the employer's legitimate interests. But, in a range of workplace circumstances, arbitrators have said that the creation of the employment relationship does not remove an employee's general ability to assert certain deeply personal interests that go to privacy, individual autonomy and human dignity. Accordingly, arbitrators have regularly identified a private personal interest of the employee as an important entitlement to protect when considering challenges by unions and employees to employer policies, directions or actions respecting dress and grooming codes (*Zehrs Market Inc. and United Food & Commercial Workers' Union, Locals 175 & 633 (Re)* (2003), 116 L.A.C. (4<sup>th</sup>) 216 (Etherington); *Dominion Stores Ltd. and United Steel Workers of America (Re)* (1976), 11 L.A.C. (2d) 401 (Shime)); drug testing (*Trimac Transportation Services – Bulk Systems and Transportation Communications Union (Re)* (1999), 88 L.A.C. (4<sup>th</sup>) 237 (Burkett); *Canadian National Railway Co. and United Transportation Union (Re)* (1989), 6 L.A.C. (4<sup>th</sup>) 381 (M. Picher)); accident investigations of an incident during off-duty hours (*Bell Canada and Communications Workers of Canada (Re)* (1984), 16 L.A.C. (3d) 397 (P. Picher)); and workplace searches (*Progistix-Solutions Inc. and Communications, Energy and Paperworkers Union, Local 26 (Re)* (2000), 89 L.A.C. (4<sup>th</sup>) 1 (M. Picher); *Canada Post Corp. and Canadian Union of Postal Workers (Plant Security) (Re)* (1990), 10 L.A.C. (4<sup>th</sup>) 361 (Swan)). As well, arbitrators have long held that employees have a general entitlement to lead their lives as they see fit outside of the workplace and during off-duty hours, absent some persuasive nexus to the employer's legitimate workplace interests: Brown & Beatty, *Canadian Labour Arbitration* (3<sup>rd</sup> ed) (2004 looseleaf), chap. 7:3010.

Employers are able to intrude upon these interests in two accepted ways. One way would be through a contractual agreement between a union and an employer that expressly limits an employee's entitlements to personal privacy. Thus, the general right to privacy can be contractually derogated by the parties, even beyond what might be considered to be reasonable or appropriate in an industrial relations context, but always subject to any human rights obligations arising from statute. A second way would be where, even in the absence of a specific collective agreement derogation, the employer can demonstrate persuasive business and industrial relations reasons to justify an intrusion. All this is to say that the law of the unionized workplace recognizes that employers in Ontario are entitled to protect their legitimate interests in justifiable circumstances. It shapes the scope of the privacy right, but it does not negate it.

The employee entitlement to privacy that has been recognized in the caselaw has usually been implied by Ontario arbitrators, as it has not often been expressed as a particular contractual right. While arbitrators have not always given this entitlement a name, it seems obvious that it is a privacy concern that they are upholding, and it appears to arise from the personal private interests that every employee can be said to possess. Indeed, in the burgeoning caselaw dealing specifically with the admissibility of video surveillance tapes, a number of Ontario labour arbitrators have expressly found that employees have a protected right to privacy in the employment relationship, even in a public space and irrespective of the existence of an express contractual or statutory right to privacy: *Re Centre for Addiction and Mental Health and O.P.S.E.U.* (Re) (2004), 131 L.A.C. (4<sup>th</sup>) 97 (Nairn); *Toronto (City) and C.U.P.E., Local 79 (Re)* (2004), 128 L.A.C. (4<sup>th</sup>) 217 (Kirkwood); *Re Securicor Cash Services* (Whitaker), *supra*; *Re Centenary Health Centre and C.U.O.E. (Ahluwalia) (Re)* (1999), 77 L.A.C. (4<sup>th</sup>) 436 (Albertyn); *Re Toronto Transit Commission* (Shime), *supra*; *Re Toronto Transit Commission* (Chapman), *supra*; *Re Toronto Transit Commission* (Johnston), *supra*; *Re Toronto Transit Commission* (Saltman), *supra*; *Re Labatt Ontario Breweries* (Brandt), *supra*; and *Re Toronto Star Newspapers Ltd.* (Springate), *supra*. To the extent that employers cannot intrude, or survey, or concern themselves with the private or personal areas of their employees' lives, unless a proper industrial relations justification is present, or a contractual or statutory basis can be

found for the intrusion, then it can be said that employees have a reasonable expectation of privacy vis-à-vis their employer.

As Arbitrator Nairn has stated in *Re Centre for Addition and Mental Health, supra*, at p. 113:

An employer is neither the state nor is it an ordinary individual observer. It has a particular relationship with its employees. Although a grievance is a dispute between private parties, that private relationship is governed by public policy through the *Labour Relations Act* and by the parties' own contract, the collective agreement. A cornerstone of virtually all collective agreements...is the requirement that an employer show just cause before imposing a penalty of discipline, including discharge. Within that framework and, absent some legitimate employer interest in off-duty conduct, an employee's "private life" is none of the employer's concern.

Thus within the collective agreement context, and if it need be framed in the context of a privacy interest, in my view it may fairly be said that an employee has a reasonable expectation of privacy from their employer when engaged in activities outside of work that do not otherwise negatively impact on the employer's legitimate business interests. The fact that surveillance is not otherwise unlawful is not a sufficient inquiry.

Several well-respected arbitrators in Ontario have criticized this trend, and have stated that there is no general right or entitlement by an employee to privacy. Arbitrator Welling has written that, absent an express statutory or common law right, employees do not have a right to privacy in Ontario. No source for this right has been identified by any of the arbitrators, he maintains, and the standard pronouncement in the arbitration awards that such a right exists is nothing more than an assertion based upon either a legal fiction or a misunderstanding: *Re Canadian Timken Ltd., supra*. Arbitrator Bendel has similarly held that no privacy right exists in Ontario, and the early line of Ontario arbitration cases that had located such a right lacked either a firm legal basis for saying so, or improperly fettered the broad right and duty of arbitrators to receive evidence as directed by the *Labour Relations Act: Re Kimberley-Clark Inc., supra*. And Arbitrator Solomatenko, in *Re Toronto Transit Commission, supra*, has likewise said that there is no general right to privacy in the employment relationship, unless the employee can first identify a reasonable expectation of privacy in the circumstances.

I respectfully disagree with this approach. I do not accept the position that the right to privacy has been identified or asserted without a proper legal foundation. This argument forgets the fact that a 'common law' of the unionized workplace has existed for almost as long as labour arbitrators and the courts have been reading collective agreements. While statutes and collective agreements form the foundation for the law of the unionized workplace in Ontario today, as well as providing the source for arbitral authority, any statement on the scope of labour arbitration law would be deficit and incomplete without also including the interpretative function that arbitration awards play in building upon and adding to the law on workplace relations. When an arbitral rule or principle has emerged through industrial relations practice and become broadly accepted in a series of arbitration awards, then, even though the governing statute, the broader common law and the collective agreement may be silent on the matter, this principle at some point crystallizes and becomes part of the law of the unionized workplace. The duty of management to act fairly and reasonably, the estoppel doctrine, the *KVP* principle on company rules and the doctrine of the culminating incident, to name but only a few, have all become part of the legal regime of the workplace through the arbitral 'common law'.

For the purposes of our present case, an employee's entitlement to privacy has been identified and endorsed, both explicitly and implicitly, by such a volume of arbitration decisions and in such a variety of employment circumstances involving personal interests that it can be safely said to now exist as a general right in the unionized Ontario workplace.

(ii) *The 'Reasonableness' test is the preferred approach*

Even among the Ontario arbitrators who accept that unionized employees have a general right to privacy in their employment relationship, there is a debate over the appropriate test to apply when assessing the admissibility of video surveillance tapes taken of an employee in a public area during non-working hours.

Employer counsel had identified a cogent body of arbitral caselaw that has endorsed the 'relevancy' test. This approach generally states that, if an employer can satisfy that the video surveillance evidence which it is seeking to admit is arguably relevant to its broader decision to terminate the grievor, then an arbitrator ought to admit

the tapes into evidence, and decide later on the weight to be given to them. Relevancy is the usual rule for the determination of evidence admission in labour arbitration, and there is nothing so unique or distinctive about video surveillance tapes that should create an exception to this rule. In the words of Arbitrator Slotnick, in *Johnson Matthey Ltd. and U.S.W.A., Local 9046 (Murray) (Re)* (2004), 131 L.A.C. (4<sup>th</sup>) 249, at p. 251:

In a case such as this, it is obvious that surveillance evidence is relevant. Not only is it relevant, but it usually possesses the virtues of accuracy and reliability. It may be an exaggeration to say that the camera never lies, but the camera certainly reflects reality more reliably than witnesses, who often have a faulty memory or a vested interest in distorting, misrepresenting, omitting or adding facts. It is my view that an arbitrator must have a strong and compelling reason to exclude evidence that is potentially so helpful in separating fact from fiction.

Union counsel relied upon the 'reasonableness test', which imposes a stricter standard for admissibility. This test would require the employer to establish: (i) that it was reasonable in the circumstances for the employer to have engaged in video surveillance of the grievor, and (ii) that the surveillance itself was conducted in a reasonable fashion. Built into the test is a requirement that the employer had genuinely considered whether some less intrusive steps to protecting its interests and avoiding the intrusion into the employee's privacy interests were reasonably possible before it conducted the video surveillance. As articulated by Arbitrator Michel Picher in *Re Canadian Pacific Ltd.*, *supra*, at p. 123:

The employer's interest does not extend to justifying speculative spying on an employee whom the employer has no reason to suspect will be dishonest. As a general rule, it does not justify resort to random videotape surveillance in the form of an electronic web, cast like a net, to see what it might catch. Surveillance is an extraordinary step which can only be resorted to where there is, beforehand, reasonable and probable cause to justify it. What constitutes such cause is a matter to be determined on the facts of each case. As well, the method and extent of such surveillance must be appropriate to the employer's interest, and not excessive or unduly intrusive.

Given the importance that the arbitral law has placed on the privacy interest of employees, and also given its recognition that the employer may be justified in intruding into an employee's privacy or personal interests on occasions when its own legitimate business interests are at stake, the proper test would be one that provides an appropriate balance between these two competing interests. For the following three reasons, I am satisfied that it is the 'reasonableness' test which more suitably sets the proper balance.

First, in an industrial relations context, the reasonableness test better reflects the importance of privacy as an employee entitlement. I agree with Arbitrator Slotnick and the proponents of the 'relevancy' test that relevancy and reliability are the usual arbitral criteria for assessing the admissibility of evidence. However, I also agree with Arbitrator Michel Picher and the arbitral school which has developed the 'reasonableness' test that the particular protection accorded to employee privacy in arbitral law means that would-be evidence gathered in a public area during off-duty hours should satisfy more than a relevancy standard if the protection is going to be meaningful. Privacy, once intruded upon, is not easily remedied: *Re Securicor Cash Services*, *supra*. One of the best guards against the inappropriate gathering or use of surveillance evidence in the employment context is through the application of a test which properly regulates its admissibility into evidence. As Arbitrator Chapman has observed, the exclusion of evidence that has not met a 'reasonableness' test would serve two related purposes: (i) preventing an employer from benefiting from the unwarranted acquisition of surveillance evidence; and (ii) ensuring that the employee whose right to privacy had been violated unreasonably was not penalized as a consequence: *Re Toronto Transit Commission (Belsito)*, *supra*.

Secondly, the nature of the ongoing relationship between employers and unions suggests the requirement for a test regarding the intrusion of privacy that encourages and re-enforces the importance and particular character of this relationship. A broadly cast ability by management to conduct covert surveillance on employees outside of the workplace, with the opportunity to enter the results of the surveillance on an evidentiary standard based on relevancy, poses the danger of more easily corroding the mutual trust and cooperation that underlies the partnership between employers and unions. These elements of trust and cooperation are two of the primary pillars that ensure the viability and productivity of the ongoing nature of the collective bargaining relationship: *Re Centre for Addiction and Mental Health*, *supra*; *Re Toronto (City)*, *supra*; *Re Centenary Health Centre*, *supra*; *Re Toronto Transit Commission (Collins)*, *supra*; *Re Canadian Pacific Ltd.*, *supra*.

And third, I have considered the argument that evidence entered through video surveillance tapes is, at the very least, as credible as eye witness accounts on an incident or activity, and it can often be more reliable. Arbitrators routinely allow personal observation testimony to be admitted into evidence, so, as the argument goes, why should video tapes not also be entered into evidence on the same terms? The argument is appealing, but it is not ultimately persuasive. The difference between the two types of evidence lies in the potential for harm that could occur to the privacy right through the permanent recording of an employee's activities in circumstances where there was no expectation that an employer's unblinking eye would be present. In public, employees will have the reasonable expectation that others will see them, but not that their employer will monitor and record them.

I have considered whether the reasonableness test is properly able to protect the employer's legitimate interests, which would include concerns going to productivity, controlling costs, and ensuring employee trust and fidelity. I conclude that it does. Although this test sets the standard higher than the ordinary relevancy and reliability requirement respecting the admission into evidence of surveillance tapes, it is neither onerous nor unfair. In most conceivable cases, an employer will be permitted to enter such evidence, as per the reasonableness test, where it can establish that: (i) it had a concern, reasonably and honestly based, that one of its employees was engaged in conduct or behaviour which, if verified, would be in breach of an important employment obligation; (ii) it took reasonable and genuine steps to first consider whether the verification of the conduct or behaviour could be accomplished through means short of relying upon covert video and/or electronic surveillance taken in public or outside of the workplace, and it can reasonably explain why these more intermediate steps were determined to be inappropriate; (iii) the means utilized to conduct the covert surveillance were reasonable and measured in the circumstances; and (iv) the purpose of the surveillance was to investigate the reasonable concern about the purported employee conduct or misbehaviour, and there were no inappropriate purposes involved. This test requires an employer to expend some thought before initiating the surveillance, and it would not normally allow the employer to engage such a method if the employment concern was minor or inconsequential. But, on the other hand, once the privacy concerns have been sufficiently addressed, the nexus to the employer's interest has been proven, and the videotapes have been established as relevant and reliable, then such surveillance information would normally be available as evidence under the test: *Re Securicor Cash Services, supra*; *Re Toronto Transit Commission (Belsito), supra*; *Re Canadian Pacific Ltd., supra*.

With all of this in mind, I have found that the employer must establish a reasonable basis, based on all of the circumstances, for the admission of video surveillance tapes into evidence. The following factors will be considered as part of the test:

1. A 'reasonableness' test will examine: (i) whether the employer had a reasonable basis to engage in the covert surveillance; *and* (ii) whether the surveillance was conducted in a reasonable manner.
2. Part of the inquiry will consider whether the employer had other reasonable alternatives to employ before engaging in the covert surveillance. The employer will not have to demonstrate that *all* other possibilities were exhausted before turning to the surveillance, but, as a factor in considering the reasonableness of the surveillance, it would have to explain why some readily available and less intrusive methods could not have accomplished the same goal.
3. Reasonableness will be measured on an objective standard.
4. What is reasonable will depend on the context. This would normally include considering such factors as: the basis of the employer's suspicion of the employee; the nature of the potential harm to the employer's enterprise; the degree of impairment to the trust factor; the alternatives available to obtain the required information; and the degree of intrusion caused by the particular surveillance method.

The authority for permitting a labour arbitrator in Ontario to exclude evidence that would be otherwise admissible in a court of law is found in s.48(12)(f) of the *Labour Relations Act, 1995*. I would find that, in the circumstances of this case, videotape surveillance evidence that is otherwise relevant and reliable, may be properly excluded if the basis for commissioning the evidence was unreasonable or if it was obtained in an unreasonable manner.

The Employer has argued that, in the event that I prefer the reasonableness test, the surveillance tapes still ought to be admitted into evidence. Mr. Roberts' conduct during November and December 2003, taken in its totality, was sufficient suspicious to raise legitimate and reasonable concerns about the true state of his health, and to thereby justify the commissioning of the surveillance.

The Union maintains that, on this test, the Employer did not have nearly enough grounds to initiate covert surveillance on Mr. Roberts, and, in particular, it did not consider any of the less intrusive possibilities available to answer its concerns before commissioning the videotape monitoring. The Union has not seriously contested the issue that the surveillance was conducted in a reasonable fashion.

Some of the caselaw which has adopted the reasonableness test has allowed the videotape surveillance to be entered into evidence. In *Re Canadian Pacific Ltd.*, *supra*, Arbitrator Michel Picher found that the employer had established a reasonable basis for the off-duty surveillance because the grievor, who was claiming an injury, had previously falsified information respecting a workers' compensation claim, a separate medical report had concluded that he had been faking an injury, he had been observed walking in a manner inconsistent with his claimed injury, and he had an unusual pattern of on-the-job injuries which far exceeded the employee average. The Arbitrator found that other more intermediate alternatives, such as confronting the employee, would likely have been ineffectual in the circumstances. In *Re Toronto Transit Commission (Belsito)*, *supra*, Arbitrator Chapman found justification for the employer's surveillance in the fact that the grievor, while on sick leave, was not able to be contacted by the employer over a six week period, despite numerous attempts to reach him. Arbitrator Chapman concluded that any other alternative steps, including confronting the employee, would have been unfeasible and unproductive. Finally, in *Re Securicor Cash Services*, *supra*, Arbitrator Whitaker allowed in the surveillance evidence after being persuaded that, in the immediate aftermath of a large cash theft, the grievor missed two consecutive shifts and subsequent visual evidence of the grievor's residence indicated suspicious behaviour.

In other circumstances, arbitrators have applied the reasonableness test to exclude the surveillance evidence. In *Re Toronto Transit Commission (Adams)*, *supra*, the grievor had no prior history of fraud, no previous long-term-disability claims, and had not been uncooperative in providing medical information or attending medical examinations. Although the employer had suspicions of the grievor because of a perceived discrepancy in the available medical information, and it did take some intermediate steps to answer some of its questions, Arbitrator Saltman found that other obvious intermediate steps to obtain further information had not been taken. Similarly, in *Rose v. Rosedale Transport Ltd.*, *supra*, Arbitrator Brunner ruled that the employer should have first asked the grievor, who was suspected of malingering, to attend an independent medical examination before authorizing surreptitious surveillance on him. And, in *Re Labatt Ontario Breweries*, *supra*, the employer suspected that the grievor was misrepresenting the extent of his injuries from a car accident. Arbitrator Brandt declined to allow surreptitiously obtained videotapes to be entered into evidence, because the employer's suspicions were based on the grievor's previous attendance record, which it had not previously treated as a culpable concern. He also found that the employer had other viable and less intrusive means to solicit the information it was seeking about the grievor and his activities. (I am aware that Arbitrator Brandt subsequently adopted the relevance test in a later award – *Re Windsor Transit*, *supra* – but I am more persuaded by the reasoning in his earlier decision.)

Turning to the grievance before me, I accept that the Employer had developed some legitimate concerns by the first part of December 2003 about the seemingly slow progress of Mr. Roberts' recovery from his back injury. Mr. Cristofaro and Ms. Bergsma were puzzled by the repeated predictions in the successive FAFs received from Dr. Futo that Mr. Roberts would be fully recovered from the injury within the two week time span of each FAF, and yet his recovery seemed to be repeatedly stalled. They were both upset by the news that Mr. Roberts was playing hockey while still on modified duties at work. Mr. Cristofaro was also underwhelmed by Mr. Roberts' apparent dilatory efforts to increase the scope of his modified duty limitations.

Taken together, these legitimate concerns would have caused most reasonable employers to wonder why Mr. Roberts' recovery was not proceeding faster, and to ask themselves whether his work limitations were being accurately represented to, or were being properly diagnosed and treated by, his chiropractor. A reasonable employer would have had enough information to raise its suspicions. A desire to investigate further to determine as to whether some employee chicanery was present or, alternatively, whether a misguided recovery process was

being applied, would have been justified. However, having said this, the basis for a legitimate suspicion to justify some further investigation into an employee's conduct is not necessarily the same thing as establishing reasonable grounds to conduct covert surveillance that would intrude upon his or her privacy in an off-duty setting.

In balancing the various and competing factors, I have noted that no evidence was presented to me to indicate that Mr. Roberts had any unsatisfactory employment history up to the point in time that the Employer began to develop suspicions about his back injury, such as a prior excessive use of sick leave, doubtful requests to obtain light work assignments, a general pattern of disdain towards working productively, or acting dishonestly or deceitfully. Nothing was entered into evidence to indicate that he had been uncooperative in responding to any requests by the Employer to see Dr. Futo on a regular basis, or to keep the Employer apprised in a timely fashion about the results of the chiropractic examinations. I also note that Mr. Roberts did not miss work throughout the entire period of time from his initial elbow injury in July 2002 up until his termination in January 2003, aside from attending his appointments with Dr. Futo. Furthermore, I note that the Employer did not turn its mind to any of the other possible options that were available to it, such as seeking a direct explanation from Dr. Futo about the off-duty limitations for Mr. Roberts, or requesting him to go for an independent medical examination to assess the extent of his injury and his limitations.

Taking all of this together, I have come to the conclusion that the Employer has not established the reasonableness of its decision to commission the covert videotape surveillance of Mr. Roberts in December 2003. I have arrived at this finding for four inter-related reasons, none of which of themselves solely decisive. First, there was nothing in Mr. Roberts' employment history that would suggest an untrustworthy employee, one who had already displayed a pattern of deceit or indolence sufficient enough to cause red flags to fly. Second, the Employer decided to commission the surveillance immediately after hearing the news about Mr. Roberts' hockey activities. It did not consider other, more intermediate, alternatives that were viable, that were as, if not more, likely to produce substantive answers to its concerns, and that were more respectful of employee privacy in a public sphere away from work duties. Based on the evidence before me, I do not think that these options would have been ineffectual. Third, Mr. Roberts had been cooperative with the Employer throughout the period in question with respect to providing updates from Dr. Futo on a regular and timely basis. And fourth, in comparison to the body of cases which has adopted the reasonableness test, the facts in this case are thinner and much less compelling for the admission of the video surveillance tapes than in *Re Canadian Pacific*, *Re Toronto Transit Commission (Belsito)* and *Re Securicor Cash Services*, where they were entered into evidence, and they are less compelling than even the rulings in *Re Toronto Transit Commission (Adams)* and *Re Windsor Transit*, where the surveillance tapes were kept out.

I have compared the facts in this present case to the broadly similar case in *Re Johnson Matthey Ltd.*, *supra*. That case involved an employee who had played hockey on two documented occasions while on a partially paid sick leave for a leg injury. Prior to his dismissal, the grievor in *Re Johnson Matthey* had attracted three disciplinary warning letters for attendance related offences. Arbitrator Slotnick allowed the video surveillance tapes of the hockey activity to be admitted into evidence, because he found the grievor's past record had raised suspicions in the employer's mind about the veracity of his current injury (a twisted knee which purportedly occurred during the shovelling of snow at the grievor's home). While I likely take a different view than Arbitrator Slotnick on the content of the 'reasonableness' standard, I would also state that, even assuming that the 'reasonableness' test in *Re Johnson Matthey* and in our present case is the same, and has been applied in the same fashion, the central facts are distinguishable from one another. In particular, the prior troubling attendance record and pattern of deceit on the part of the grievor that was decisive in Arbitrator Slotnick's ruling as establishing reasonable grounds for the surveillance is absent in the present case.

I do not take lightly the fact that Mr. Roberts was playing hockey while he was still recovering from his back injury. Intuitively, any reasonable employer would have had some concerns, or at least questions, in the circumstances. However, after some reflection, I am persuaded that the stated physical limitations on Mr. Roberts by the second week in December were moderate enough that other reasonable explanations for his hockey activities other than nefarious ones were possible, and should have led the Employer to consider other less intrusive steps to seek answers to its questions before deciding to initiate the surveillance. Had the relevant FAF stated that Mr. Roberts' injury and limitations were more incapacitating, such that the participation in an activity like hockey would have been incongruous, then the probability of fraud or deceit would have almost certainly justified the commissioning of surveillance.

As well, I would not expect that, in every case, an employer would have to establish a troublesome prior employment record as a necessary pre-condition to satisfying the 'reasonableness' test to conduct covert surveillance. One can envisage a range of persuasive situations – such as an employee with a clear prior record who has been reasonably linked to an apparent pattern of fraud or theft – that would justify the employer's operational interests trumping the employee's general entitlement to privacy.

However, the totality of the evidence in front of me, and which was in front of the employer during the decision-making period – such as the lack of a prior worrisome employment record, the pattern of consistent co-operation respecting the delivery of health reports, the feasible alternatives available to obtain answers to the concerns, the now modest range of stated limitations, and the degree of intrusion into the grievor's privacy in the public sphere away from work duties – persuades me to conclude that the Employer did not have sufficiently reasonable grounds to commission the surveillance.

#### VI Conclusion

I have concluded, for the reasons expressed, that the Union's preliminary objection to the admissibility of the video surveillance tapes which the Employer proposes to rely upon in support of its decision to terminate Mr. Roberts should be upheld. It is my finding that the Employer did not establish that it was reasonable, in all of the circumstances, to undertake the surveillance.

Accordingly, I will shortly contact the parties to set further dates for the continuation of these hearings on the merits of the case.

**Dated This 3<sup>rd</sup> Day of March 2005 in the City of London, Ontario**

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Michael Lynk