Workplace Surveillance and Privacy Law: Jurisdictional and Practical Considerations

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1. Introduction

With the introduction of the *Personal Information Protection and Electronic Documents Act*[1] ("PIPEDA" or "the Act"), the Federal government aimed to establish a national system of rules that would govern the collection, use and disclosure of personal information by private sector organizations.[2] PIPEDA was enacted largely to address the public's concern that the manner in which private sector organizations collect, use and disclose customer information can pose a threat to customer privacy. In addition to placing limits on the collection of customer information, PIPEDA has also impacted the right of some employers to collect, use and disclose information about its own employees. This paper will examine, from a practical perspective, the manner in which PIPEDA impacts employer/employee relations, with a focus on workplace surveillance.

2. Application of PIPEDA to Employers in Ontario

According to Section 4(1), the Act applies to, "every organization in respect of personal information that the organization collects, uses or discloses in the course of commercial activities."[3] Section 2 defines the scope of these terms:

> **"Organization"** includes an association, a partnership, a person and a trade union.
> **"Personal Information"** means information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization.

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[1] S.C. 2000, c. 5 [PIPEDA].
[2] The *Privacy Act* R.S. 1985, c. P-21 places limits the collection of personal information by public sector organizations and businesses.
[3] *Supra* note 1 at s. 4 (1).

> "**Commercial Activity**" means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.[4]

These definitions seem to give the Act very broad application. Not surprisingly, when PIPEDA was first enacted, there were a number of concerns as to the constitutional legitimacy of the legislation. While the Federal government's trade and commerce power in section 91(2) of the *Constitution Act 1867*[5] gives it some jurisdiction over business affairs, the activities of local businesses have traditionally fallen under the provincial heads of power. As part of an attempt to minimize these concerns, the Act was designed to contain a mechanism through which provinces could be exempted from the application of PIPEDA. If the federal government determines that provincially enacted private sector personal information protection legislation is substantially similar to PIPEDA, then it can exempt the application of PIPEDA to the commercial activities of that province's provincially regulated private sector.[6]

In order to give the provinces time to enact their own legislation, *PIPEDA* was introduced in stages. Initially, as of January 1, 2001, *PIPEDA* applied only to federal works, undertakings or businesses.[7] *PIPEDA* limited how these federally regulated industries could collect use and disclose personal information, including that of its own employees. Provincially regulated organizations were not affected by PIPEDA until January 1, 2004. At that time, PIPEDA came into force for the provincially regulated

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[4] *Ibid.* at s. 1.
[5] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II No. 5.
[6] PIPEDA s. 26(2)(b).
[7] See PIPEDA s. 2.1 (a-j). These federally regulated sectors include telecommunications, broadcasting, aviation, banking, nuclear energy, inter-provincial or international transportation, as well as activities related to maritime navigation or shipping. The act also affected all local businesses in Yukon, Nunavut and the Northwest Territories as in these provinces, all private sector activity falls under federal jurisdiction

private sector, except in cases where a province had enacted its own, substantially similar, legislation.[8]

Given that Ontario has not enacted its own personal information legislation, one might assume that PIPEDA now applies to all aspects of personal information including that which a private company can collect, use and disclose with regard to its own employees. There is, however, another constitutional complication to consider. The regulation of employer/employee relations has always been delegated to the provinces. As a result, the federally enacted PIPEDA cannot purport to control the manner in which non-federally regulated organizations collect, use and disclose information about their own employees. The wording of PIPEDA omits any mention of provincially regulated employees, and expressly includes federal works, undertakings or businesses. As s. 4 states, PIPEDA:

> **4.** (1) ...applies to every organization in respect of personal information that
> (*a*) the organization collects, uses or discloses in the course of commercial activities; or
> **(*b*) is about an employee of the organization and that the organization collects, uses or discloses in connection with the operation of a federal work, undertaking or business.**[9]

Comments from the Privacy Commissioner of Canada ("PCC") have clarified the intended application of the legislation. In an Online address dated April 1, 2004, Jennifer Stoddart, the current PCC explained:

> *PIPEDA* does not extend to personal information about employees unless the organization involved is a federal work, undertaking or business. Employers in federal works, undertakings or businesses must ensure that they collect, use, and disclose employees' personal information only for purposes that a reasonable person would consider appropriate in the circumstances. However, personal information about employees of provincially-regulated organizations is not covered by *PIPEDA*, although it may be covered by provincial legislation such as that of Quebec.[10]

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[8] Alberta, British Columbia and Quebec have all enacted legislation that has received this "substantially similar" designation from the federal government. No such legislation has been enacted in Ontario.

[9] PIPEDA s. 4. Emphasis added.

[10] On-line address by Jennifer Stoddart, Privacy Commissioner of Canada. April 1, 2004. See http://www.privcom.gc.ca/speech/2004/vs/vs_sp-d_040331_e.asp.

In 2002 Ontario's provincial government released a draft privacy bill for consultation but the bill was never introduced. There are no known plans at present for a new bill. Ontario's *Health Information Protection Act*, S.O. 2004, c.3, received royal assent on May 20, 2004. It relates only to personal health information and is expected to be granted substantially similar status in the coming months. At present, employers in provincially regulated businesses in Ontario are not restricted by any privacy information legislation with regard to the collection, use and disclosure of employee information.[11]

It is also noteworthy that all of the provinces that have enacted their own privacy legislation have filled the gap left open by PIPEDA. Quebec[12], Alberta[13] and British Columbia[14] have all placed limits on an employer's ability to collect, use and disclose information about its employees.[15] Whether Ontario will eventually follow this trend by enacting its own legislation remains to be seen.

3. Complaints under PIPEDA: The Processes and Powers of the PCC

Generally, complaints about breaches of PIPEDA are made by way of a complaint filed with the PCC. As will be discussed below, issues relating to contraventions of PIPEDA

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[11] Though workers not covered by PIPEDA may not have the same right to privacy as those who are covered, it is clear that these employees are not without any right to privacy. Even before PIPEDA was enacted, there was extensive discussion in arbitral cases about a common law right to privacy. In the recent decision of *Labourers' International Union of North America, Local 625 v. Prestressed Systems Inc.* [2002] O.L.A.A. no. 125. Arbitrator Lynk made an extensive review of recent cases and concluded that such a common law right to privacy does indeed exist for unionized employees.

[12] *An Act Respecting the Protection of Personal Information in the Private Sector* R.S.Q., c. P-39.1.

[13] *Personal Information Protection Act*, SA 2003 c. P-6.5 at ss. 15 (2) and 18 (2)

[14] *Personal Information Protection Act* [SBC 2003] Chapter 63 at s. 13.

[15] In Alberta and B.C. the entire private sector is subject to restrictions similar to those laid out in PIPEDA. Both Acts then go on to carve out an exception for employers, who are allowed to collect employee information without consent if the collection is reasonable and is for the purposes of establishing, managing or terminating the employment relationship. The Quebec Act does not have a specific exception for employers but is in some ways less onerous then the other acts.

can also be raised in arbitral proceedings and in court. This section will deal with complaints to the Office of the PCC.

A – Initiating a Complaint to the PCC

Any employee in an organization covered by PIPEDA who thinks that their employer is not respecting the Act can file a written complaint with the PCC under s. 11 (1) of the Act. Alternatively, under s. 11(2) the Privacy Commissioner can also initiate a complaint. The Act provides for complaints to be filed by individuals, not corporations. As of September 2005, employees or former employees initiated only approximately 20% of complaints filed with the PCC. The remainder of the complaints were filed by customers and other external parties.[16]

B– Investigation by the PCC

The PCC must give written notice of any complaints to the organization against which the complaint was made.[17] Under s. 12 of PIPEDA the PCC is accorded broad powers to investigate a complaint. These powers include the right to summon witnesses and compel oral testimony from individuals involved in the matter as well as the right to enter premises in conjunction with the investigation. The PCC also has the power to compel the production of documentary evidence. [18] Section 28 of PIPEDA makes obstructing the efforts of the PCC a criminal offence punishable by a fine.

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[16] Numbers are approximated because there was more then one complainant in some instances. See http://www.privcom.gc.ca/cf-dc/2005/index2-5_e.asp for summaries of the findings in these cases.
[17] PIPEDA s. 11 (4).
[18] PIPEDA s. 12. The PCC is not bound by strict rules of evidence; s. 12 (1) (c) states that the Office of the PCC can accept evidence as it sees fit "whether or not it is or would be admissible in a court of law."

An investigator from the Office of the PCC will be assigned to look into the complaint. The organization complained against will be asked to provide the name of a representative who will deal with the matter on its behalf. The investigator will proceed to look into the allegations by way of interviewing parties on both sides of the dispute and examining any relevant evidence. One of the roles of the investigator is to seek a remedy to the situation by way of mediation or reconciliation. Once the investigator has looked into the matter, recommendations are passed on to the PCC or the Assistant PCC to make a finding.[19] There are no provisions in PIPEDA for an oral hearing to be held on the matter.

The PCC is bound by the confidentiality provisions of PIPEDA which state that no information arising from an investigation will be disclosed to non-parties, unless such disclosure is necessary in order to further the investigation. Section 20 (2) creates an exception to this rule, which allows the PCC to disclose "the personal information management practices of an organization if the Commissioner considers that it is in the public interest to do so."

C- Decisions of the PCC

Within one year of the filing of the complaint, the PCC must issue a report, reffered to commonly as a "letter of finding."[20] This report is sent to both parties and contains any findings of fact, as well analyses and recommendations concerning the complaint. The possible outcomes are:

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[19] For more on the investigative process see: http://www.privcom.gc.ca/fs-fi/02_05_d_20_e.asp.
[20] PIPEDA s. 13 (3).

Not Well-Founded: Indicating that there is no evidence to show a breach under PIPEDA
Well-Founded: The organization has breached PIPEDA
Resolved: In cases where a breach was present but has been remedied by the organization before any finding was made.
Discontinued: Investigation terminated.

Since January 1, 2004, the Office of the PCC has designated a new finding of "Early Resolution," which indicates that the matter was resolved before any allegation could be made.

If the PCC finds that the complaint was well-founded, a recommendation will be made suggesting how the breach of PIPEDA can be remedied. The PCC cannot make binding orders or award damages.

D – Beyond the PCC: The Jurisdiction of the Federal Court

A complainant who is not satisfied with the findings of the PCC, or who wants to compel the organization complained against to act on the PCC's recommendations has recourse to the courts. Section 14 (1) of PIPEDA allows a complainant to apply to the Trial Division of the Federal Court for "a hearing in respect of any matter in respect of which the complaint was made, or that is referred to in the Commissioner's report." No leave of the court is required to make such an application. Section 15 gives the PCC a limited right to apply to the Federal Court to have its findings enforced.[21]

[21] The PCC can only bring an application in cases it has not initiated on its own. Consent of the complainant or leave of the court is required.

To date, only a handful of cases have been brought to the Federal Court for review under these provisions and the exact nature of the proceeding is still somewhat unclear.[22] In some cases, applications to the Federal Court under s. 14 (1) of PIPEDA are referred to as applications for Judicial Review.[23] In *Telus*, this position was rejected: "The present hearing is...not an appeal of the Commissioner's report, nor is it an application for judicial review in an administrative legal sense."[24] In the appeal of *Telus*, the court agreed with this finding of the trial division and explained that "the hearing under subsection 14(1) of the Act is a proceeding *de novo* akin to an action and the report of the Commissioner, if put in evidence, may be challenged or contradicted like any other document adduced in evidence."[25] In *Eastmond,* the court supported the decision in *Telus* and stated that:

> A proceeding under section 14 of PIPEDA is not a review of the Privacy Commissioner's report or his recommendation. It is a fresh application to this Court by a person who had made a complaint to the Privacy Commissioner under PIPEDA and who, in order to obtain a remedy under section 16, bears the burden of demonstrating CP violated its PIPEDA obligations.[26]

What is clear is that matters before the Federal Court are dealt with *de novo*.[27] The Federal Court can choose to enforce the decision of the PCC, make new findings and/or award damages. Applications made under s. 14 or 15 are determined by way of summary hearing unless the court decides otherwise.[28] Though some of these cases have

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[22] See *Englander v. Telus Communications Inc.* [2003] F.C.J. no. 975 (F.C.T.D.) [*Telus*]; *Englander v. Telus Communications Inc.* [2004] F.C.J. No. 1935 (F.C.A.) [*Telus Appeal*]; *L'Ecuyer v. Aéroports de Montréal* [2003] F.C.J. No. 752. [*L'Ecuyer*]; *Eastmond v. Canadian Pacific Railway* [2004] F.C.J. No. 1043 [*Eastmond*]; *Morgan v. Alta Flights (Charters) Inc.* [2005] F.C.J. No. 523 [*Morgan]; IBEW Local 213 and 258 v. BCT Telus Communications Inc.* [2002] B.C.J. No 918; *Maheu v. IMS Health Canada* [2003] F.C.J. No. 902 [*Maheu*].

[23] See *Maheu* and *Morgan, Ibid.*

[24] *Telus, supra* note 22 at par. 29.

[25] *Telus Appeal, supra* note 22 at par. 48

[26] *Eastmond, supra* note 22 at par. 118

[27] See: *Supra* note 22 *Eastmond* at paras. 118, 121-123; *Telus* at paras. 29-30 and *Morgan* at paras. 16-17

[28] PIPEDA ss. 16 & 17.

overturned findings of the Commissioner, none to date have led to the awarding of damages.

With regard to the standard of review, Justice Lemieux stated in *Eastmond* that, "as a statutorily created administrator with specialized experience the PCC is entitled to some deference with respect to decisions clearly within his jurisdiction."[29] This deference led the judge to adopt the PCC's test for what constitutes a reasonable use of workplace surveillance but did not extend to findings of fact.[30] In *Morgan,* the court discussed the standard of review to be accorded to the PCC. Noel, J. cited *Eastmond* and explained that although some deference has been given to the PCC, "the question of whether or not a breach has occurred is a question of interpretation under the Act, and so should be reviewed on a standard of correctness."[31]

An employer against whom a complaint is made is not granted any right to apply to the Federal Court under PIPEDA. Such a party can nevertheless seek a Judicial Review of the findings of the PCC under s. 18.1 of the *Federal Courts Act.*[32]

4. Arbitrators' Jurisdiction to Deal with PIPEDA Issues

One question that arises for organizations that are covered by PIPEDA is how the jurisdiction of the PCC will intersect with that of arbitrators under the *Canada Labour Code.*[33]

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[29] *Eastmond, supra* note 22 at par. 121.
[30] *Ibid.* at par. 123. Justice Lemieux noted that the Federal Court had more extensive and different fact finding capabilities then the Privacy Commissioner.
[31] *Morgan, supra* note 22 at par. 17.
[32] In *Telus Appeal* at par. 50, the court envisaged the possibility that an organization complained against might make such an application. The Federal Court granted an application for Judicial Review by the

Under s. 13.2 (a) of PIPEDA, the PCC can decline to act on a complaint if the internal mechanisms of arbitration have not been exhausted. In the event that the PCC does not decline jurisdiction, an employer can seek to challenge this assumption of jurisdiction by relying on case law from the Federal Court.

In *Eastmond,* Justice Francois Lemieux of the Federal Court examined how the jurisdiction of the PCC will be impacted by arbitrators in the collective bargaining context.[34] Taking his reasoning from a similar case respecting the Human Rights Commission,[35] Justice Lemieux explained that in cases where the "essential nature of the dispute" does not arise from the collective agreement, the PCC shares concurrent jurisdiction with arbitrators.[36] If the matter is one directly connected to the collective agreement, then only arbitrators have jurisdiction. The judge stated that, "Parliament's intention was not to exclude unionized workers from PIPEDA's scope."[37]

After examining the details of the collective agreement in the case, Justice Lemieux found that it did not cover the question of workplace privacy. As a result, the essence of the dispute was not covered by the agreement and the PCC had jurisdiction. The judge also noted that even if there had been a legitimate jurisdictional issue in the case, the respondent would have had to raise it at the earliest opportunity. It was too late to raise the question of jurisdiction once the PCC's findings were already made.[38]

Eastmond was distinguished from *L'Ecuyer*[39], where Federal Court Justice Pinard held that the neither the court nor the PCC had jurisdiction to hear the case, because it concerned a dispute that was covered by the collective agreement. As a result, the arbitrator under the *Canada Labour Code* was granted exclusive jurisdiction to determine the issue.

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company complained against in *3Web Corporation v. Llano Gorman*, (March 1, 2005), Toronto T-1603-04 (F.C.T.D.), but the case was discontinued before it could proceed.

[33] R.S.C. 1985, c.2 L-2.

[34] *Supra* note 22.

[35] *Ford Motor Company of Canada v. Ontario (Human Rights Commission)*, [2001] O.J. No. 4937 (ONCA).

[36] *Eastmond, supra* note 22 at par. 102.

[37] *Ibid.* at par. 99.

[38] *Ibid.* at par. 117.

[39] *Supra* note 22.

5. Workplace Surveillance and the PCC: Tests, Standards and Trends

While an in depth examination of the findings of the PCC with regard to workplace surveillance is outside the scope of this paper, attention can be drawn to the basic tests and standards that will be utilized in the commissioner's findings.

Under Principle 4.3 of Schedule 1 of PIPEDA, the knowledge and consent of the individual under surveillance is required before personal information can be collected. There are specific exceptions to this principle. For example under s. 7 (1) (b) of PIPEDA, consent can be dispensed with if it would compromise an investigation into a suspected contravention of a Canadian law.

Even if the informed consent of the individual is obtained, there is further standard that must be met. Section 5 (3) of PIPEDA states that:

> 5 (3) An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

A number of recent decisions by the Privacy Commissioner have utilized a four-part test in order to determine whether workplace surveillance can be considered reasonable. The test asks:

1) Is the measure demonstrably necessary to meet a specific need?
2) Is it likely to be effective in meeting that need?
3) Is the loss of privacy proportional to the benefit gained?
4) Is there a less privacy-invasive way of achieving the same end?[40]

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[40] The test has been used in a number of workplace surveillance cases. See: Case Summary #114 (January, 23 2003).

While sweeping statements are not possible, there has been a tendency for the PCC to find that most cases of camera surveillance in the workplace are unreasonable and do not meet the requirements of the test.[41]

As mentioned above, this four-part test was adopted by the Federal Court in the *Eastmond* case. The case was brought to the Federal Court by the complainant, an employer of Canadian Pacific Railway, who claimed that video cameras installed at several places in a train yard constituted an infringement of his privacy rights. The PCC applied the four-step test, found that the complaint was well-founded, and recommended the removal of the cameras from the train yard. When the surveillance cameras were not removed, the complainant made an application to the Federal Court to obtain an order requiring their removal. The Federal Court utilized the PCC's test, but disagreed with his findings. The court held that the use of the cameras was reasonable in the circumstances.

The discrepancy between the findings of the PCC and those of the Federal Court are not cause for concern, nor are they especially surprising. The Privacy Commissioner is not a judge, but an ombudsperson, whose role is not merely to adjudicate on complaints, but to act as an advocate for the protection of privacy. The role of an ombudsperson was discussed by the Supreme Court of Canada in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*.[42] The court explained that ombudspersons have a unique role in the Canadian judiciary system, which is to use their expertise "to resolve

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[41] See: PIPEDA Case Summary # 114 (January 23, 2003),PIPEDA Case Summary #265 (February 19, 2004), PIPEDA Case Summary #279 (Septeber 27, 2004), PIPEDA Case Summary #290 (January 27, 2005).

[42] [2002] 2 S.C.R. 773.

tension in an informal manner" in order to "address the limitations of legal proceedings."[43] Given the small number of cases that have required the intervention of the Federal Court, it would seem that the office of the PCC is fulfilling its role. If the cases decided by the PCC to date have shown a tendency to consider camera surveillance in the workplace to be unreasonable, the limits of the PCC's power together with the role of the Federal Court will act to check the impact of this tendency.

6. The Impact of PIPEDA on the Admissibility of Evidence in Court and Arbitral Labour and Employment Law Proceedings

While complaints respecting contraventions of PIPEDA can be brought directly to the PCC, it remains somewhat unclear whether evidence collected in a manner that would offend PIPEDA will be admissible in court and arbitral proceedings.

Two recent employment arbitration cases suggest that if evidence against an employee is collected in a manner that would be considered "unreasonable" under PIPEDA, it will not be admissible in disciplinary or unjust dismissal proceedings of workplaces covered by the Act.[44] In both cases, it was found that that employees covered by PIPEDA have a statutory right to privacy. Having found that this right to privacy existed, the arbitrators went on to consider whether surreptitious video surveillance evidence was a "reasonable" infringement of this right.

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[43] *Ibid.* at par 38.

[44] *Teamsters, Local 419 v. Securicor Cash Services (Mehta Grievance)*, [2004] O.L.A.A. No. 99 (Whitaker) and *Ross v. Rosedale Transport Ltd.*, [2003] C.L.A.D. No. 237 (Canada) (Brunner).

The courts have been far less willing to allow PIPEDA to impact upon questions of admissibility. In *Ferenczy v. MCI Medical Clinics et al.*,[45] a medical malpractice suit, the plaintiff objected to the admissibility of videotape evidence by a private investigator on the grounds that the collection and proposed use of the video contravened her rights under PIPEDA. Dawson, J. of the Ontario Superior Court of Justice used the traditional test for the admissibility of evidence, admitting it because it was relevant and its probative value outweighed its prejudicial effect.[46] The court found that:

> The Act does not contain a provision which prohibits the admissibility into evidence of personal information collected or recorded in contravention of the Act. Rather, the Act provides that an individual or the Privacy Commissioner may bring a complaint which results in an investigation and report under the Act...Consequently, if the collection of surveillance evidence in this case is said to be a violation of the Act a complaint may be filed pursuant to the Act to commence that process. However, this has no direct impact on the issue of the admissibility of evidence in this trial.[47]

The court also found that the video did not in fact contravene PIPEDA. To begin with, Justice Dawson held that a private investigator, though involved in collecting personal information for commercial purposes, was acting as an agent for the defendant, who would have been free to collect the information himself in order to defend the action.[48] Additionally, the judge found that anyone initiating a lawsuit could be deemed to give implied consent to any attempts to defend or investigate the allegations of the claim.[49]

Justice Dawson also held that the evidence should be allowed because of the exception at s. 7 (1) b of PIPEDA. This exception allows for the collection of personal information without an individual's consent "when it is reasonable to expect that the collection with

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[45] 70 O.R. (3d) 277 [*Ferenczy*].
[46] *Ibid.* at par. 16.
[47] *Ibid.* at par. 15. See also *Rosic v. Mayer* [2005] O.J. No. 3539 (Ont. Sup. Ct. Sm. Cl. Div.).
[48] *Ibid.* at par. 30.

the knowledge or consent of the individual would compromise the availability or the accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province." In allowing this exception to apply to the case, Justice Dawson found that the "laws of Canada" could include the common law.[50]

Some of the concerns about the impact of PIPEDA on the admissibility of surveillance evidence have been addressed by an amendment to PIPEDA. The Act now contains a specific exemption for private investigators:

> (3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is
> (h.2) made by an investigative body and the disclosure is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province.

A recent case summary by the Assistant Privacy Commissioner utilized the notion of implied consent as conceived of by Justice Dawson.[51] The complaint was brought by a woman who was involved in a lawsuit related to a car accident. The woman sought damages, claiming that because of the accident, she was unable to work or perform domestic duties. The defendant's insurance company hired a private investigator and sought to introduce video surveillance evidence at trial. The woman complained against the insurance company, claiming that their activities were in breach of PIPEDA. The Assistant PCC dismissed the complaint, but did not rely on the recent amendment of PIPEDA. Instead, she found that a person who initiates a lawsuit must be seen to give implied consent to the other party to investigate the matter to be defended. The Assistant

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[49] *Ibid.* at par. 31.
[50] *Ibid.* at par. 33.
[51] Case Summary #311 (August 9, 2005).

PCC stated that there are certainly limits to this implied consent, and that it could only be used for personal information directly related to the investigation of the case.

7. Conclusion

It is evident that PIPEDA is impacting the ability of employers to collect use and disclose information about their own employees. Though private businesses in Ontario are not subject to any provincial privacy legislation at this time, it seems unlikely that this gap in the law will remain open indefinitely. The right to privacy is an evolving concept in Canada, and it is gaining increasing legitimacy and having an increasing impact on acceptable practices in workplace surveillance. With that in mind, employers and those who advise them would do well to keep an eye on the status of the law as it changes and develops.