

In the Matter of an Arbitration

Between:

Intercontinental Hotel

(The "Employer")

-and-

United Food and Commercial Workers International Union Local 333

(The "Union")

Re: Grievance of Maple Xu

Arbitrator: Brian Sheehan

Appearances:

For The Employer: Ms. Elizabeth Kosmidis

For The Union: Mr. Aaron Hart

Hearing conducted in Toronto on February 18, 2011

This Interim Award deals with the appropriate test for admitting video surveillance evidence in an arbitration proceeding.

Background

The grievor had been employed by the Employer as a Laundry Helper since April 30, 2007. On August 10, 2010 she was terminated for allegedly misrepresenting the nature of the injuries that she claimed had prevented her from working.

At the start of the hearing, the Employer advised that it intended to call as a witness, a private investigator that had been retained to monitor the off-duty activities of the grievor, and through this investigator surveillance and videotape evidence of the grievor in public places would be introduced. The parties requested a preliminary decision on the appropriate test for admitting video surveillance evidence in an arbitration proceeding. This award deals with the appropriate test generally applicable to the admissibility of such evidence but not the admissibility of the particular surveillance or video surveillance evidence sought to be introduced by the Employer.

Two divergent approaches to the admissibility of surveillance and video surveillance evidence have developed in arbitral jurisprudence. Some arbitrators follow the relevance test, holding that the sole criterion for admissibility is whether the evidence is relevant to the issues in dispute. If the evidence is relevant, there is no other precondition to admissibility. Other arbitrators apply a reasonableness test which requires the Employer to establish that it had a reasonable basis to put the employee under surveillance and that surveillance of the employee was conducted in a reasonable manner before admitting the evidence. The Union submitted that the

reasonableness test should be applied whereas the Employer urged me to adopt the relevance test.

The Position of the Union -The Reasonableness Test

In Ontario, there is no entrenched privacy legislation to support a claim that videotape surveillance evidence may violate an employee's privacy rights, as there is in other jurisdictions such as British Columbia and Manitoba. Nevertheless, a number of arbitrators have recognized that an employee has a right to some degree of privacy in the employment relationship. That right to privacy is not absolute and must be balanced against the legitimate interests of the employer. In particular, absent a collective agreement contractual provision limiting an employee's entitlement to privacy, an employer must demonstrate a compelling legitimate interest to justify an intrusion into the private and/or personal sphere of an employee's life. In Prestressed Systems Inc. (2005) 137 L.A.C. (4th) 193 (Lynk), Arbitrator Lynk noted:

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 (*Re Zehrs Markets Inc. and U.F.C.W.*, Loc. 175 & 633 (2003), 116 L.A.C. (4th) 216 (Etherington); *Re Dominion Stores Ltd. and U.S.W.A.* (1976), 11 L.A.C. (2d) 401 (Shime)); drug testing (

Re Trimac Transportation Services - Bulk Systems and T.C.U. (1999), 88 L.A.C. (4th) 237 (Burkett); *Re Canadian National Railway Co. and U.T.U.* (1989), 6 L.A.C. (4th) 381 (M. Picher)); accident investigations of an incident during off-duty hours (*Re Bell Canada and Communications Workers of Canada* (1984), 16 L.A.C. (3d) 397 (P. Picher)); and workplace searches (*Re Progistix-Solutions Inc. and C.E.P.*, Loc. 26 (2000), 89 L.A.C. (4th) 1 (M.R. Newman); *Re Canada Post Corp. and C.U.P.W. (Plant Security)* (1990), 10 L.A.C. (4th) 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* (3rd ed) (2004 loose-leaf), chap. 7:3010

The requirement that the employer demonstrate a legitimate interest to justify an intrusion into the personal and/or private sphere of an employee's life leads directly to the balancing of interests associated with the reasonableness test. In Prestressed Systems Inc., (*supra*) Arbitrator Lynk stated:

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.

The ongoing nature of the collective bargaining relationship between an employer and a union has also been identified in support of the reasonableness test. This perspective was articulated by Arbitrator Albertyn in Centenary Health Centre and Canadian Union of Operating Engineers (Ahluwalia) (1999) 77 L.A.C (4th) (Albertyn)

The mutual trust and respect between employees and their employer, and *bona fide* conduct between them, are fundamental to the success and efficacy of employment and collective bargaining relationships. Ongoing trust is essential not only to the relationship between employers and their employees, but also to the collective bargaining relationship between employers and trade unions. Surreptitious conduct on the part of one collective entity towards another, or in the administration of their collective agreement, has the effect of undermining the mutual trust and respect which are vital to an ongoing, successful collective bargaining relationship. Boards of arbitration should therefore not condone conduct which serves to undermine that trust and the good faith foundation of efficacious labour and employment relationships, unless there is good reason to do so.

A slightly different rationale in favor of the reasonableness test was offered by Arbitrator Picher in Canadian Pacific Ltd and B.M.W.E. (Chahal) (1996) 59 L.A.C. (4th) 111 (M. Picher), an award cited in a number of cases relied upon by the Union. Arbitrator Picher viewed requiring an employer to demonstrate reasonable justification for engaging in surveillance of an employee and justifying the admissibility of video surveillance evidence in terms of safeguarding the integrity of the arbitration process. Arbitrator Picher expressed the rationale for the reasonableness test as follows:

This approach, diligently applied, should protect reasonably against the possible abuse of the right of an employer to resort to surveillance of its employees, in a manner consistent with the obligation which boards of arbitration have to safeguard the integrity of their own procedures and the credibility of the arbitration process generally.

The exclusion of surveillance and videotape evidence is considered to be within an arbitrator's authority to exclude evidence that would otherwise be admissible pursuant to Section 48 (12) (f) of the Ontario Labour Relations Act. This statutory

discretion was relied upon in; Centenary Health Centre (supra), Prestressed Systems Inc. (supra), Toronto Transit Commission and Amalgamated Transit Union Local 113 (Collins) (1999) 80 L.A.C. (4th) 53 (Johnston) and Toronto Transit Commission and Amalgamated Transit Union Local 113 (1999) 95 L.A.C. (4th) 402 (Chapman).

The Union relied on the following additional authorities: Labatt Ontario Breweries and Brewery, General & Professional Workers Union, Local 304 (1994) 42 L.A.C. (4th) 151 (Brandt), Hershey Canada Inc. and CAW-Canada and its Local 462 (2008) 176 L.A.C. (4th) 170 (Levinson), Ross and Roseville Transport Ltd. [2003] C.L.A.D. No. 237 (Brunner), Toronto Transit Commission and Amalgamated Transit Union Local 113 (1997) 61 L.A.C. (4th) 218 (Saltman) and Municipality of Chatham Kent (Riverview Gardens) and CAW-Canada, Local 127 (2009) 186 L.A.C. (4th) 394 (Watters).

The Employer's Position-The Relevance Test

The relevance test suggests that the admissibility of video surveillance evidence should be determined solely by whether the evidence is relevant to an issue in dispute. The Employer asserted that the Divisional Court in Greater Niagara Transit Commission and Amalgamated Transit Union Local 1582 (1987) 43 DLR (4th) 71 determined that it would be prudent for an arbitrator to admit all relevant evidence. Taking that argument a step further, the Employer claimed it would breach the *audi alteram partem* rule of natural justice if a party were prevented from presenting evidence relevant to an issue in dispute. In support of this proposition, the Employer relied on the decision of the Supreme Court of Canada Université du Québec a Trois Rivières [1993] 1 S.C.R. 471.

Arbitrator Crljenica, in Hotel-Dieu Grace Hospital and Ontario Nurses' Association (unreported, May 21, 2010 Crljenica), suggested this decision stands for the proposition that an arbitrator should not use the statutory discretion granted by Section 48 (12) (f) of the OLRA to exclude relevant evidence:

Notwithstanding the differences in the wording of section 100.2 of the Quebec legislation and section 48(12) (f) of the Ontario legislation, it is my view that the same reasoning applies. Section 48(12) (f) and the last phrase of section 100.2 both give the arbitrator the authority to determine what evidence to admit. However, the Supreme Court of Canada has made it very clear that this authority cannot be exercised in such a manner that deprives a party of its right to present its case: the *audi alteram partem* rule.

The reasons of both the majority and L'Heureux-Dubé J make it clear that a labour arbitrator should not refuse to admit relevant evidence, especially when that evidence may be crucial to a party's case. L'Heureux-Dubé J.'s reference to the reckless rejection of relevant evidence leaves no doubt that if there is any uncertainty as to the relevance of evidence, it should be admitted.

Under the relevance test, there is nothing inherently improper about the nature of video surveillance evidence that would warrant its exclusion. This view was set out by the Ontario Court of Appeal in Landolfi et al v. Fargione (2006) 79.O.R. 767 (CA) where Cronk J. observed:

Moreover, and perhaps more importantly, there is no principled basis for video evidence to attract a different, and more stringent, test for admissibility at trial than that which applies to any other form of evidence. Admittedly, the impact of video evidence can be powerful. But this is true of many forms of demonstrative evidence or any evidence that establishes that a witness is being less than truthful. The test for the admission of the evidence remains the same.

This statement of Cronk J. was adopted with approval in Greater Toronto Airports Authority and PSAC Local 1004 (2010) 197 L.A.C. (4th) (Shime) and Thames Emergency Medical Services and CAW Local 302 (unreported, June 18, 2010, Rose).

In Ready Bake Foods Inc. and UFCW (2009) 184 L.A.C. 4th 193 Arbitrator Raymond advanced the proposition that relevant evidence should be admissible regardless of how it was obtained:

I do not see that the method by which evidence is obtained has any impact on its admissibility before me. It is either relevant evidence in which case I must admit it or it is not. How it was obtained is of no concern to me. For example, let us assume a situation where a person breaks into a manager's office and while in the office finds a document that is relevant to a question before an arbitrator. Clearly the action of the person breaking into the office could be pursued criminally and if that person was an employee (bargaining unit member or not) it might be pursued civilly. The illegality of the method by which the document was obtained, however, would not be a consideration in respect of its admissibility before an arbitrator. If evidence that is obtained in a clearly illegal way can be admitted, how is it that evidence that is obtained in a way that offends the sensibilities of many arbitrators but is not illegal is not admissible? The simple answer is that it is admissible....

I also am of the view that the right to privacy, however it may arise, is not germane to this issue. If the right exists, and I take no view at this time as to whether it does or does not, it can be pursued for its infringement. If an employee has such a right and this right has been infringed then, in the context of a collective agreement, it can be pursued as a grievance and a remedy for the infringement of the right can be fashioned by an arbitrator. Regardless, it would not impact the admissibility of the evidence....

The Employer relied on the following additional authorities: Kimberly-Clark Inc. and I.W.A.-Canada, Local 1-92-4 (October 11, 1996, unreported, Bendel), Corporation of the City of Kingston and Canadian Union of Public Employees, Local 109, (March 12,

2010, unreported, Starkman) and Hotel-Dieu Grace Hospital and .C.A.W.-Canada and its Local 2458 (November 2, 2004, unreported, Snow).

Decision

After reviewing the thorough submissions of counsel and the authorities, it is my opinion that the reasonableness test is the appropriate test for admitting video surveillance evidence in an arbitration proceeding.

That decision is reached notwithstanding the fact it is accepted that video surveillance evidence is often particularly compelling evidence. As noted by Arbitrator Slotnick in Johnson Matheny Ltd. and U.S.W.A Local 9046 (2004) 131 L.A.C. (4th) 249 (Slotnick):

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, therefore, recognized that there must be compelling reasons for an arbitrator to not admit such evidence solely on the basis of its relevance. It is also acknowledged that there is a degree of validity to certain of the criticisms of the reasonableness test raised by those arbitrators who favour the relevance test.

One such criticism is that other forms of evidence related to the investigation and monitoring of an employee's off-duty activities do not appear to be subject to the same restrictions on admissibility that apply to video surveillance evidence. As noted by Arbitrator Bendel in Kimberly Clark Inc., (supra):

There is a further problematical aspect to the argument that evidence of that kind should be subject to close scrutiny and possible exclusion. It is not at all clear to me, from these cases, whether the arbitrators endorsing this argument would follow the same exclusionary tendency in the case of other forms of covert surveillance or other products of such surveillance. What if a private investigator took still photographs, instead of videotapes? What if a private investigator simply made a written report to the employer of what he had seen and testified at the hearing on that basis? What if a manager had conducted the surveillance (electronic or non-electronic) instead of a hired investigator? What if a manager (or investigator or member of the public), without having been specifically assigned to keep the employee under surveillance, just happened to see the employee engaged in questionable activities, and captured his or her activities electronically (or gave a non-electronic report of them)? In short, the awards endorsing possible exclusion of surveillance evidence do not explain whether the offensiveness of such evidence lies in the electronic means used for gathering it, or in the use of outside specialists, or in the planned nature of the information-gathering. In the absence of a carefully defined rationale for scrutinizing such evidence, it is not immediately apparent why the product of some of these types of covert surveillance should be potentially inadmissible but not others. Yet, if they were all excluded, the interests of the parties would not be well served.

In my view, consistency requires that the reasonableness test be applied to any situation where an employer seeks to introduce evidence obtained from an ongoing covert surveillance of an employee's off-duty activities. It is difficult to justify allowing the *viva voce* observations of a private investigator in the surveillance of an employee to be admitted solely on the basis of relevance while applying, because that investigator decided to use a video recording as a tool for the surveillance, a reasonableness standard to video surveillance evidence of the same events.

The determination that the reasonableness test should generally apply to all situations where an employer places the off-duty activities of an employee under ongoing covert surveillance does not address the type of scenario raised by Arbitrator

Bendel where it is the employee's supervisor who is the one involved in investigating the employee's off duty conduct. For example, what if a supervisor decides to "play a hunch" and sit for a couple of hours outside the house of an employee who has called in sick for a third consecutive Friday? Would the reasonableness test apply to the supervisor's evidence in a disciplinary proceeding? The grievor, in the case at hand, was the subject of ongoing covert surveillance by a private investigator, so it is not necessary to "bright-line" all the circumstances where an employer's investigation or monitoring of an employee's off-duty activities would trigger the balancing of interests associated with the reasonableness test. There is, however, a significant and qualitative difference, in terms of an intrusion into the personal and private sphere of an employee's life, between a supervisor attending at the employee's house on an *ad hoc* basis and the employer hiring a private investigator to place the employee under ongoing covert surveillance.

The suggestion, in some of the authorities relied upon by the Union that a video recording attracts greater scrutiny because it is a permanent recording of an employee's activities is, in my view, suspect. Obviously, photographs taken by a private investigator also constitute a permanent recording of the employee's activities. Moreover, a video recording that is not connected to an ongoing covert surveillance would typically be admitted into evidence solely on the basis of its relevance to the issues in dispute. For example, the security cameras of a retail store, or of a public institution, that captured the activities of an employee that are relevant to the issues in dispute do not raise any privacy concerns *per se*; and there would be no requirement of the employer to satisfy certain preconditions for that evidence to be deemed admissible. Likewise, a video

recording made by a member of the public that happened to capture the off-duty activities of an employee would typically be admitted into evidence solely on the basis of its relevance.

In my opinion, it is not the tools used by the private investigator to engage in surveillance of the employee, but rather the decision of the employer to place an employee under ongoing covert surveillance, that justifies the application of the reasonableness test. Whether the surveillance evidence involves videotape, still photographs or simply the observations of a private investigator, the justification for the reasonableness test arises from the employer's decision to place the employee under ongoing covert surveillance. An employee's life outside the workplace, absent the establishment of a legitimate employer interest, is of no concern to the employer. When an employer intrudes into the private life of an employee by covertly monitoring the off-duty activities of the employee on an ongoing basis, the admission of evidence derived from the surveillance requires some level of justification. As Arbitrator Nairn noted in Re Centre for Addiction and Mental Health and O.P.S.E.U. (2004) 131 L.A.C. (4th) 97 (Nairn):

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.

The ongoing nature of a collective bargaining relationship also provides a compelling reason for requiring the Employer to establish that it has a reasonable basis to surreptitiously monitor the off-duty activities of an employee. As was noted in Centenary Health Centre (supra):

... we are satisfied that in the interests of healthy and harmonious long-term labour relations between collective bargaining parties, surveillance and surreptitious videotape evidence should be admitted only if it was reasonably necessary to obtain that evidence, and if it was obtained in a reasonable manner. A distinction between labour relations litigation at arbitration from litigation in the courts is the ongoing nature of the relationship between the litigants at arbitration, and what is usually the incidental relationship between litigants in the courts. The long-term or ongoing relationship between a union and an employer affects the manner in which boards of arbitration approach disputes between them. The comments of Arbitrator Picher, referred to above, concerning the obligation of boards of arbitration to safeguard the integrity of their own procedures and the credibility of the arbitration process are apposite

The viewpoint advanced by Arbitrator Raymond in Ready Bake Foods Inc. (supra) that an arbitrator should not be concerned with the manner in which evidence was obtained and should simply admit the evidence if it is relevant, warrants comment. Arbitrators have never adopted the viewpoint that all relevant evidence is necessarily always admissible. In certain circumstances arbitrators have regularly excluded relevant evidence where its admission could cause harm to the collective bargaining relationship. For example, evidence of discussions during the grievance procedure is generally potential highly relevant evidence is deemed inadmissible even though it may

be highly relevant. The labour relations policy of encouraging settlements of grievances has justified the exclusion of evidence of all such discussions regardless of how relevant this evidence might be to the issues in dispute. More generally, as noted by Arbitrator Johnston in Toronto Transit Commission (supra), the power of an arbitrator to exclude evidence that would elsewhere be admissible pursuant to Section 48 (12) (f) of the OLRA has been exercised in a variety of circumstances:

Situations in which otherwise relevant evidence has been excluded in arbitration proceedings because of its potentially negative impact on industrial relations or its potential to undermine harmonious labour relations include: grievance procedure discussions; polygraph tests; and discussions between a union representative and an employee (see in this regard *Re Greater Niagara General Hospital and O.P.S.E.U.*, Loc. 215 (1989), 5 L.A.C. (4th) 292 (Joyce)). We have the discretion to refuse to admit otherwise relevant evidence in circumstances in which the admission of the evidence would undermine or be destructive to the collective bargaining relationship between the parties.

Having not yet heard about the circumstances which led to the videotaping of the grievor in this case, it is too easy to say whether it would or would not be appropriate to exclude the video evidence on this basis. However, we have the discretion to refuse to admit evidence which in our view is contrary to sound industrial relations policy or would be harmful to the ongoing relationship of the parties. Depending on the circumstances, it is not inconceivable that video surveillance evidence could fall into this category.

The difficulty with accepting relevance as the sole criterion for admissibility of surveillance evidence is highlighted by the following hypothetical scenarios: What if the surveillance was carried out under an employer policy that all employees on sick leave would be placed under surveillance after one week of absence? Or, what if the employer decided to place any employee subject to a "last chance" agreement under

perpetual covert surveillance? These examples are extreme but they illustrate the problem with making decisions on admissibility solely on the basis of relevance. In either scenario, the arbitrator would have no option but to admit the surveillance evidence. As suggested by Arbitrator Picher in Canada Pacific Ltd. (*supra*), the adoption of the reasonableness test protects against the possible abuse of an employer's power to place its employees under ongoing covert surveillance.

As to the suggestion in Ready Bake Foods Inc. (*supra*) that any claim that an employee's privacy rights have been breached should potentially be pursued elsewhere; in a termination case, it is difficult to appreciate what effective remedy would be available elsewhere. This point was addressed by Arbitrator Chapman in Toronto Transit Commission (*supra*):

With respect, we fail to see to see the significance of the distinction noted by our colleagues. In virtually all of the privacy cases dealing with employer conduct like searches, fingerprinting, and compulsory medical examinations, the issue came to arbitration at a point when some prior restraint of this conduct was still available, or when the employee had refused to permit the alleged invasion of privacy. In these circumstances, arbitrators have been able to order the employer to cease and desist its conduct in violation of employee privacy rights, and/or to prevent the employer from penalizing an employee as a result of the employee having asserted such a right. These remedial responses seem appropriate in such circumstances, where the employer conduct complained of is visible and employees will be aware of it and able to complain before it has a negative impact upon them.

However, in the case of *surreptitious* surveillance, there is no opportunity for the employee or the union to challenge the employer conduct which is alleged to violate privacy rights until *after* it has come to light, which given the purpose of the surveillance is likely only to occur should the employer collect information which it seeks to rely upon in imposing discipline on the employee it has surveilled. It is readily apparent that the only effective remedy which could be provided by an arbitration board which later determined that the surveillance was unreasonable would be to prohibit the employer from relying upon the evidence of the surveillance by excluding it.

This would serve two important purposes: (1) to prevent the employer from benefitting from its improper conduct; and (2) to ensure that the employee whose right to privacy has been violated unreasonably was not penalized as a result. This is analogous to the approach taken by arbitrators in the other privacy cases who have engaged in prior restraint of employer conduct such as searches or have considered whether employees should be disciplined for refusing to permit an invasion of privacy which is later found to have been unreasonable.

I also take issue with the conclusion of Arbitrator Crjenica in Hotel-Dieu Grace Hospital (*supra*), that the decision of the Supreme Court of Canada in Université du Québec a Trois Rivières (*supra*), stands for the proposition that it would necessarily constitute a breach of natural justice for an arbitrator to exclude relevant surveillance evidence. While noting “the reckless rejection of relevant evidence” could undermine the confidence of the parties in the arbitral process, the Court made a point of emphasizing that an arbitrator may exclude relevant evidence and that the rejection of relevant evidence by an arbitrator would not automatically give rise to a breach of natural justice. Specifically, Lamer C.J., writing for the majority, stated;

The proposition that any refusal to admit relevant evidence is in the context of a grievance arbitration a breach of natural justice is one which could have serious consequences. It in effect means that the arbitrator does not have the power to decide in a final and exclusive way what evidence will be relevant to the issue presented to him. That may seem incompatible with the very wide measure of autonomy which the legislature intended to give grievance arbitrators in settling disputes within their jurisdiction and the attitude of restraint demonstrated by the courts toward the decisions of administrative bodies.

The adoption of the reasonableness test does not constitute the reckless rejection of relevant evidence. Rather it is a measured attempt by arbitrators, in the furtherance of harmonious labour relations, to strike an appropriate balance between

important competing interests of the parties; and allows for the admission of relevant surveillance evidence provided that the decision to initiate the surveillance was, in the circumstances, reasonable and the surveillance was conducted in a reasonable manner.

Given my determination that the reasonableness test is applicable, it is appropriate to provide the parties with some guidance as to the nature of the test. Specifically, I wish to advise that I do not accept the view that the Employer must establish that it has exhausted all other possible alternatives before deciding to place the employee under surveillance. On this point I find the reasoning of Arbitrator Johnston in Toronto Transit Commission (supra), particularly persuasive:

It is our view that it is not appropriate to include as a separate third aspect of any test a specific requirement that the employer must have exhausted all other alternatives before turning to video surveillance. Such a requirement puts too onerous a burden upon the employer and may not be appropriate in every case. It is important to look at the reasons why the employer chose to engage in surveillance and to determine in the specific circumstances of each case whether or not the decision was a reasonable one.

Questions regarding alternatives open to the employer in determining whether or not to take the serious step of videotaping an employee may form part of the analysis of the reasonableness of the employer's decision to video an employee. In determining whether or not it is reasonable to videotape an employee, an employer must look at the options available to it in every case. However, the third prong of the test, as articulated by some arbitrators, requires the employer to act on all possible alternatives before resorting to video surveillance. We do not agree that it is necessary for the employer to do so as it is possible that there could be situations in which the decision to video was a reasonable one even though no other alternatives were exhausted.

In conclusion, to justify the admission of evidence obtained from the ongoing covert surveillance of the grievor, the Employer must establish that there was a reasonable basis for it to engage in the covert surveillance of the grievor and that the surveillance was conducted in a reasonable manner.

Dated at Mississauga, Ontario this 18th day of April, 2011

Brian Sheehan