



## LABOUR LAW

### Surveillance cameras in work environment & privacy

Over the past few years, there was a noticeable increase in installation of video surveillance equipments by employers, within their business establishments. Whether these surveillance cameras are hidden or not, they essentially strive toward the same objective: the protection of the employer's business not only against possible intruders, but also against its own employees. Considering the privacy protection set forth in the Canadian Charter of Rights and Freedoms, one may reasonably question the legality of such installations. Is an employee's right to privacy protected in his work place? In the affirmative, in what extent does this privacy protection apply in the work environment, since the employer also has the right to protect its business?

In several occasions, Canadian and Quebec courts of justice have decided that the right to privacy protection is not restricted to citizens' residence and may be extended to other situations, such as the work place. That being said, the employee's privacy protection in the work environment is not an absolutely inalienable right. In fact, one must also take into consideration the employer's right to protect his business.

In view of the above-mentioned rights, which are in direct opposition, arises the following question: where is the line drawn between the employee's right to his privacy protection and the employer's right to its own business protection?

One can hardly answer this question at the moment because of the current lack of judicial decisions rendered on that matter. Nevertheless, in light of fundamental rules which govern general provisions pertaining to privacy protection and labour relations, two (2) main principles may be drawn and should be taken into consideration by an employer before installing surveillance cameras within its business establishment: the principle of **necessity** and the obligation, for the employer, to evaluate the **extent of its intrusion in its employees' privacy**.

#### 1. The Necessity Principle

Any employer who wishes to depart from the protection rules (privacy) set forth in the Canadian Charter of Rights and Freedoms must motivate its decision in reference with the argument of *necessity*.

There are, to date, not many jurisprudential examples on which to rely for the implementation of the *necessity* principle regarding video surveillance in the work environment. However, in light of a few judicial decisions rendered by the Supreme Court of Canada regarding privacy protection and the argument of *necessity*, some basic principles that an employer should observe before installing surveillance cameras can be brought to your attention.

For example, without being much mistaken, one can affirm that an employer would be entitled to install video surveillance equipments within its business establishment when the cameras thus installed are positioned near the business' different entrances. This installation would enable the employer to protect its establishment against unexpected intrusions or, as the case may be, to retrace relevant information that would have been recorded. Also, an employer may wish to protect itself from its employees, or from the public's comings and goings around the business' safebox. For this employer, installing surveillance cameras near the business' safebox is of major, if not essential necessity to guard itself against possible thefts.

#### 2. The Extent of Intrusion into Privacy

Although it is possible for an employer to install surveillance cameras within its business establishment in order to augment its security when necessary, it must not be concluded that cameras could be installed anywhere and in any circumstances. In fact, not only does the installation of surveillance cameras have to meet with a necessary need, but in installing these cameras, the employer must minimize its intrusion into its employees' privacy. For example, the employer would not be justified to install cameras directly pointing at its employees when they are at their work station in order to record on a continuous basis, if the employer's objective is one of simple, "just in case" prevention.

There are some obvious circumstances where it is strictly forbidden for an employer to install surveillance cameras: washrooms, shower rooms, building windows, fitting rooms, etc. In brief, if an employer wishes to install video surveillance equipments within its business establishment, it must use its common sense and insure that there are no other, less intrusive means available to protect its business. An employer must be aware that, **as a rule**, surveillance cameras should not be used to investigate the quality and performance of employees' work. However, if the employer has serious reasons to believe that an employee had committed a criminal offence or is about to commit one, he would in all probability be entitled to install surveillance cameras pointed directly on this employee in a temporary fashion. In fact, this provisional measure would meet with the employer's need to protect its business.

### **The subcontractor whose services have been retained by the employer**

The subcontractor whose services have been retained by the employer for remote surveillance (and possibly also the subcontractor who installed the video surveillance equipments) should also question itself on the employer's intrusion in its employees' privacy. In fact, the requirements of the Canadian Charter of Rights and Freedoms not only apply to the employer, but also to any person who views and operates the surveillance cameras or manages surveillance records.

### **Conclusion**

Before investing a major portion of its time and financial resources in the installation of video surveillance equipments within its business establishment, an employer should wisely plan its installation. In fact, the law is in continuous evolution and there currently are very few jurisprudential examples to rely on for the application of the above-mentioned criteria. Nevertheless, it is our opinion that these criteria will continue to be applied by Canadian and Quebec courts of justice since they fall under common sense.

Therefore, the employer that wishes to install surveillance cameras within its commercial establishment must, firstly, question itself on the necessity to proceed to with such an installation in order to protect its business. Secondly, the employer must also delimit what its needs are and their extent in order to assure that the intrusion into its employees' privacy is reduced to its simplest expression. Besides, in order to prevent potential litigations, the employer may, in certain circumstances, inform its employees of the exact locations where the cameras will be installed and for what purpose. Employees thus informed would have the choice to leave the cameras' visual field should they want to protect their privacy.

The world of video surveillance is rapidly developing and its technology becomes more and more accessible to any budget. In fact, this technology is evolving faster than the jurisprudence is changing. Therefore, any employer, as well as its subcontractors, must remain mindful before installing video surveillance equipments within the business establishment since the application of the above-mentioned criteria could take a different course in the future. We presently are at the onset of the general application of the principles governing privacy protection in the work environment and, following the example set forth in other fields where technology is fast evolving, we may expect that the law will evolve in reaction to the acts of reckless employers.

The citizens' fundamental right to privacy protection within work relations is a very large concept and its application concurrent with the employer's rights (to protect its business, to investigate its employees' work, etc.) brings up other questions. What happens about the employee's right to privacy protection outside his work place? Does the employer have the right, for serious reasons, to investigate an employee, take videos or pictures, without the employee's knowledge when the latter pretends to be sick or injured further to an event apparently occurred within the scope of his work? If so, is the employer allowed to use these collected proofs for a possible litigation?

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