

Privacy Plea

Surveillance videotape ruled admissible in civil trial despite existence of PIPEDA **By Elliott Goldstein**

Does PIPEDA bar the use, in a civil trial, of surveillance videotape evidence recorded by a private investigator?

Not according to the recent case of *Ferenczy v. MCI Medical Clinics*¹, in which the Ontario Superior Court of Justice held that the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5 (PIPEDA), which came into effect on Jan. 1, 2004, does not render inadmissible surveillance videotapes in civil trials. The facts of the case are as follows:

Per: Dawson, J:

"On the morning of the second day of trial an issue arose during the plaintiff's cross-examination concerning the possible use of video surveillance evidence gathered by a private investigator in January 2004 after the coming into force of the *Personal Information Protection and Electronic Documents Act* S.C. 2000 c. 5.

"In the early stages of her cross-examination the plaintiff indicated she could not grip a hairbrush with her left hand. She then indicated that it was also very difficult for her to grip a cup with her left hand. She then stated that she would invariably grip a cup in her right as opposed to her left hand.

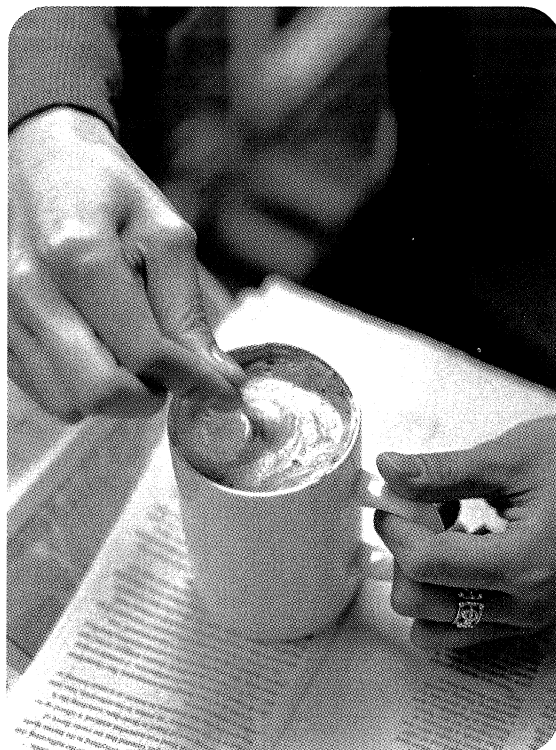
"On the morning of the second day of trial, counsel for the defendant applied in the absence of the jury for leave to use an eight-minute clip of video surveillance evidence in his cross-examination of the plaintiff. I was advised that the clip showed the complainant holding a Tim Hortons coffee cup continuously in her left hand, something she had unexpectedly said in her evidence she could not do. Counsel for the defendant advised me that the video was taken in January 2004 and that he had not contemplated using it until the plaintiff made the statements in evidence that I have just described.

"Accepting as I do, the submission that the video did not become relevant until the plaintiff testified in an unanticipated fashion at trial, ... I concluded the fair way to deal with the matter was to permit the plaintiff to be cross-examined on the video which would be shown to the jury, but to restrict the jury's use of the evidence to assessing the credibility of the plaintiff, and not for substantive purposes.

"The plaintiff contends that the video surveillance was private information collected in the course of commercial activity without the consent of the plaintiff, and that the Act prohibits the collection of such information or its use or distribution.

"At the outset I wish to point out 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 that results in an investigation and report under the Act. Thereafter, certain steps described in the legislation may be taken in the Federal Court. 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, that has no direct impact on the issue of the admissibility of evidence in this trial.

"I conclude that the admission of the evidence here in question will not render the trial unfair. The video will be shown to the plaintiff and the jury. The jury will hear any explanation offered by the plaintiff concerning the contents of the video



and will determine to what extent, if at all, the surveillance evidence assists them in assessing the complainant's credibility. The plaintiff has sued Dr. Weinstein and made a claim in her pleadings and in her evidence that her left hand has been disabled. The surveillance was undertaken in a public place and relates directly to the alleged disability. The introduction of such evidence has the potential to operate unfavourably to the plaintiff, but not to render the trial unfair."

The learned trial judge concluded that the surveillance videotape evidence was not "collected, recorded, used or disclosed in contravention of the PIPEDA." Its admission into evidence would not render the trial unfair and, therefore, it is admissible. ★

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¹. [2004] O.J. No. 1775 (Ont. Sup. Ct. J. file no. C22438/00, unreported decision of Dawson, J. issued April 14, 2004). All quotes are from this case unless otherwise indicated.

COVER STORY I

12 Capital Watchman

Ottawa's Bob Gauvreau combines decisive action and gut instincts to keep the city's facilities safe.

By Yvan Marston

SPECIAL SECTION I

16 Focus On... CCTV 2004

A special section focusing on expansion and upgrades at the RCMP's communications centre in Ottawa, and how Montréal's transit authority is using video surveillance to monitor remote parking lots and keep an eye on traffic

By Neal Linnihan and Bonnie Toews.

FEATURE I

26 Perfecting the Drill Team

Before it comes time to evacuate your premises in an emergency, it's best to know how to pull together a top-notch drill team.

By Michael R. Galin

28 Going Door to Door

It's easy to migrate from mechanical key control to electronic access control, if you know how.

By Chris Nieshall

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DEPARTMENTS I

4 Editor's Notebook

The Privacy Priority

6 Letters to the Editor

Strong opinions on hidden agendas; Security has nothing to hide

10 Industry Updates

IT security threats escalate at financial institutions; Canadian Blood Services selects IR security; Network security market nears \$1 billion in Q1

25 CCTV and the Law

Privacy Plea

By Elliott Goldstein

30 From the Trenches

Danger and Doorknobs

By Rui Martins

