



# Catching Misconduct

A look at the legalities surrounding the surveillance of unionized employees' bad behaviour

By Elliott Goldstein

**Q Do unionized employees have to be notified that their misconduct was covertly videotaped?**

**A** The answer depends upon whether the collective agreement between the unionized employee and his or her employer requires that the employee receive notice of his or her alleged misconduct. Usually such videotaped misconduct is relied on as the basis for the employee's dismissal.

In a recent Ontario Court of Appeal decision, *Canada Post Corporation v. Canadian Union of Postal Workers et al*<sup>1</sup> (the "Canada Post case") two related issues were before the court:

- When must an employee be notified that he or she has been under covert surveillance?
- When does an employee's alleged misconduct come to the attention of the employer?

The Canada Post case arose from an investigation into customer complaints of theft from the mail at the Gateway facility in Mississauga, Ontario. The only effective means of investigating these complaints was with the use of covert video surveillance.

Canada Post security personnel installed hidden cameras in February 1997. They remained in operation until June 7, 1997. During that four-month period, some Canada Post employees were "captured on videotape," apparently stealing from the mail and engaging in other criminal activity involving the mail. Even though those employees were identified from the videotape at various times, no steps were taken to fire them or even notify them of their alleged misconduct until after the video surveillance was terminated on June 7, 1997.

The obvious reason for this non-disclosure to individual employees was that disclosure prior to June 7, 1997, would have compromised the ongoing covert investigation. Canada Post security gave the results of its investigation to Peel Re-

gional Police on June 8, 1997. By June 12, 1997, charges were laid against numerous employees, who were subsequently suspended or fired. Those employees were advised in writing that their dismissals related to the circumstances giving rise to the charges laid against them.

Twenty-nine of the discharged employees grieved their dismissals. Pending the outcome of criminal proceedings, their grievances were held in abeyance:

## CANADA POST relied on 76 videotaped incidents of criminal misconduct involving the 29 employees

"Canada Post relied on 76 videotaped incidents of criminal misconduct involving the 29 employees. Sixteen of the employees were involved in more than one incident. The majority of the incidents (about two-thirds) occurred after May 1, 1997. Of the 29 employees charged, five pleaded guilty, one was convicted after a trial, five were acquitted, and charges against the others were dropped."

The collective agreement between Canada Post and its unionized employees required that Canada Post give notice in writing to any employee within 10 calendar days after the date of the employee's alleged misconduct or of its coming to the attention of Canada Post. Absent this proper notice, Canada Post could not rely on the alleged misconduct to justify the dismissal of the employee. In the Canada Post case, an employee was entitled to be notified that he or she

was under covert surveillance within 10 days of the employer learning of the misconduct.

In answer to the second question, the Ontario Court of Appeal held that it was not "patently unreasonable" for the labour arbitrator to find that the alleged misconduct came to the attention of Canada Post on the date its investigators were able to identify by name an employee whom they had previously identified from the videotape as having been engaged in misconduct.

Canada Post had argued that the 10-day notice period did not begin to run until the laying of the criminal charges. The labour arbitrator disagreed and rejected Canada Post's argument that "in the interest of maintaining secrecy of an ongoing covert investigation," Canada Post is not bound by the requirement to put the employee on notice within 10 days. The 10-day notice requirement was designed

to benefit the individual employees, not the employer, by requiring notice of intended disciplinary action within a fixed time.

Canada Post had argued that it did not have knowledge of the alleged misconduct until those responsible (for determining whether disciplinary action should be taken) had that knowledge. Further, it argued that it needed to consolidate and centralize its decision-making process.

However, at the arbitration, senior management did not suggest that it needed time to do so. In fact, the evidence indicated that Canada Post's "senior management was not informed of the nature and results of the investigation until shortly before or immediately after the laying of the criminal charges. This was a product of a conscious decision on the part of ... Canada Post's lead investigator, to keep senior management in the

dark so as to avoid triggering the ten-day rule."

There was no evidence led at the arbitration to suggest that the laying of criminal charges was a pre-requisite to Canada Post's decision to proceed with disciplinary action. For these reasons, the Ontario Court of Appeal concluded that the labour arbitrator's decision was not patently unreasonable and should stand. The court concluded that "[T]o the extent that Canada Post is unhappy with the outcome, its remedy lies in the bargaining process, not the judicial process."

The Canada Post case highlights the need for clear, concise exemption language in collective agreements in particular, and employment contracts in general. Canada Post and its unions could

## Canada Post's remedy lies not in the judicial process

have negotiated an exemption to the 10-day notice requirement in the interest of maintaining the secrecy of ongoing covert investigations. Such an exemption from the notification time limits is found in the Purolator (a wholly owned subsidiary of Canada Post) agreement, which reads: "in the case of criminal investigation (for example, theft, drugs, fraud), the time period does not commence until all conclusions have been drawn from the investigation."<sup>2</sup>

In conclusion, the Canada Post case stresses the importance of knowing and understanding the contents of those contracts and agreements that govern relationships between employers and employees. 🍁

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### Author's Notes

- 1 (2002), 56 Ontario Reports (3d) 457. All quotes are from this case unless otherwise indicated.
- 2 *Purolator Courier v. Canada Council of Teamsters, Local 938* re: lafrate, [1999] C.L.A.D. No. 215.

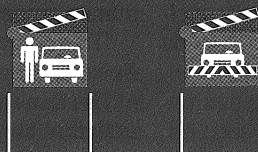
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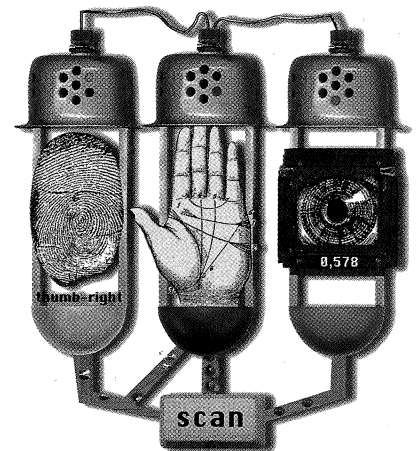
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