

Surveillance: Hot or Not?

Prepared By
Monika M.L. Zauhar

COX & PALMER

coxandpalmerlaw.com

Surveillance: Hot or Not?

Monika M.L. Zauhar*
Cox & Palmer

*Cox & Palmer is a member firm of the
Risk Management Counsel of Canada*

INTRODUCTION

Have you ever suspected that the plaintiff is exaggerating their disability or been suspicious the claimant might be malingering? Have you considered placing them under surveillance? If so, you may want to keep in mind the *Personal Information Protection and Electronic Documents Act*¹ (*PIPEDA*), which has applied to private sector organizations engaged in commercial activities since January 1, 2004. The Act was brought into effect in three separate stages: the first, in January of 2001, legislating collection, use and disclosure of personal information by federally regulated private organizations only; the second stage took effect on January 1, 2002, which expanded the Act to include medical information; and thirdly, on January 1, 2004, the application of the Act was expanded to include any commercial activity within a Province [not having similar provincial legislation], and included a provincially regulated organization.

In broad terms, *PIPEDA* regulates the collection, use and distribution of personal information in the course of commercial activity. It defines what is considered personal information, as well as what is to be considered a 'record', which includes a videotape. The basic premise of *PIPEDA* is that 'knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate'.

Further to the enactment of the *PIPEDA*, in May of 2009, the *Office of the Privacy Commissioner of Canada* (OPC) released *Guidance on Covert Video Surveillance in the*

¹ *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.

*Private Sector (OPC Guidance)*². The *OPC Guidance* purports to ‘outline the privacy obligations and responsibilities of private sector organizations contemplating and engaging in ‘covert’ video surveillance’³. The guidelines describe video surveillance to be ‘covert’ when the individual is not made aware of being watched.

Insurance companies, including first party Insurers, should be aware of the impact, if any *PIPEDA* and the *Guidance on Covert Video Surveillance in the Private Sector* might have on the conduct of litigation, in particular, any restrictions such legislation and guidelines might impose on the ability of Insurers to undertake ‘covert’ video surveillance.

Various questions must be further examined to determine whether the Act, which attempts to restrict the collection, use and distribution of personal information within the context of litigation, applies to surveillance. Is the scope of ‘commercial activity’, as defined by the Act sufficiently broad to include activities related to litigation such as surveillance? Within a litigious context, would it actually be ‘appropriate’ to first obtain consent of the claimant before undertaking surveillance? Will surveillance, found to have been conducted ‘covertly’ for the purpose of defending an action, be admissible as evidence in Court?

This article attempts to address these questions and to provide some direction to Insurers in undertaking surveillance activity within a litigious context. It is neither intended to be an exhaustive review of *PIPEDA*, nor intended to debate its application to the litigation process. Readers are advised to seek appropriate legal advice in addressing specific issues related to the law of privacy.

² *Guidance on Covert Video Surveillance in the Private Sector – May 2009, Office of the Privacy Commissioner* <https://www.priv.gc.ca>. This document is for guidance only and the OPC considers each complaint on a case-by-case basis.

³ See the *OPC Guidance*.

DEFINITION OF COMMERCIAL ACTIVITY

'Commercial Activity' is defined at Section 2 of *PIPEDA* to mean '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.

Insurance defence practitioners have contested whether, in the process of legislative drafting, the definition of 'commercial activity' was even intended to extend to the litigation process. It has been argued that, drafters and legislators did not contemplate either the act of surveillance itself, or the actual litigation in defining the ambit of a 'commercial activity'. Plaintiff counsel, on the other hand, have argued that, the retention of an investigator reflects a commercial transaction, for the request of a commercial type of activity undertaken by one commercial entity [investigative company] at the request of another commercial entity [the insurance company].

This issue was specifically addressed in the case of *Ferenczy v. MCI Medical Clinics and Dr. Gary Weinstein*⁴. In that case, the plaintiff sued the defendant for medical malpractice. At trial, the plaintiff testified that her injuries rendered her unable to grip a cup with her left hand. The defendant had surveillance videotape of the plaintiff depicting her at a local *Tim Horton's* holding a coffee cup in her left hand for an extended period of time. The defendant sought to introduce the videotape to impeach the plaintiff's credibility. The plaintiff opposed the admissibility of the videotape on the basis that it was collected in breach of *PIPEDA*, as the plaintiff's consent was not obtained.

In discussing the applicability of the Act, the Court held that, the surveillance did not fall within the definition of 'commercial activity'. At paragraphs 27 to 30, Justice Dawson, J. stated:

⁴ *Ferenczy v. MCI Medical Clinics, et al.* 2004 CanLII 12555 (ON S.C.).

[27] The legislation in question is complex and so broadly worded that a reasonable argument could be made to extend its reach so far as to transform both civil and criminal litigation into something very different than it is today. The arguments advanced on behalf of the plaintiff here prove that point. On the basis of the plaintiff's argument, Dr. Weinstein might be permitted to take his own video camera and record surveillance evidence in his own defence, but a licensed private investigator could not do so on his behalf if he was being paid to do so.

[28] This argument would extend to an accused in a criminal case. While there are exceptions in the Act that allow law enforcement agencies to investigate and collect information about a suspect or an accused, an accused would arguably be prevented from utilizing a private investigator, or other paid agent to collect or conduct surveillance that could be vital to his or her defence.

[29] In the criminal context an accused could perhaps turn to the *Charter of rights* and advance arguments that might succeed in preventing the act from operating in the manner described. However, a defendant against whom serious allegations have been made in a civil suit may not be able to do so.

[30] One way to avoid this result and I conclude it is the correct interpretation of the Act, is to apply the principles of agency. On this analysis it is the defendant in the civil case who is the person collecting the information for his personal use to defend against the allegations brought by the plaintiff. Those whom he employs, or who are employed on his behalf, are merely agent. On this analysis, s. 4(2)(b) of the Act governs. That section reads as follows:

4(2) This part does not apply to

.....

(b) any individual in respect of personal information that the individual collects, uses or discloses for personal or domestic purposes and does not collect, use or disclose for any other purpose; ...

Accordingly, the Court in *Ferenczy* concluded that, the defendant medical practitioner, or his Insurer, in defending the allegations of malpractice within the context of the lawsuit, was not collecting or recording personal information, including video surveillance, in the course of a 'commercial activity'.

In further support of his analysis, Justice Dawson relied on Section 3 of the Act, stating that, such an analysis fell well in line with the intended overall purpose of *PIPEDA*. Section 3 reads:

Purpose

3. The purpose of this part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

Based on *Ferenczy*, it may therefore be argued that, through an agent such as a private investigator, a litigant may be permitted to collect information, including surveillance, to defend him or herself against a lawsuit brought by a plaintiff. Such collection of information, undertaken for a personal purpose within the context of the civil litigation brought against this defendant by a plaintiff would therefore arguably fall outside of the ambit of ‘commercial activity’, as defined by the Act.

ISSUE OF CONSENT

Generally, *PIPEDA* requires consent of the individual prior to the collection, use and disclosure of personal information, including record of video surveillance. The *Office of the Privacy Commissioner of Canada* views ‘covert’ surveillance as an ‘extremely privacy-invasive’ form of technology that may only be used in the most limited of cases, and as a tool of last resort, as stated in its guidelines⁵.

It is nonetheless recognized under *PIPEDA* that there are circumstances where consent is not required⁶. Paragraph 7(1)(b) allows for the collection⁷ of personal information, including ‘covert’ video surveillance, without the consent or knowledge of the person, where the following conditions are satisfied:

⁵ See the *OPC Guidance*.

⁶ *PIPEDA*, s. 7.

⁷ In *Ferenczy*, it was also held that ‘once the collection of the information has been found to fall within s. 7(1)(b), then pursuant to s.7(2)(d) it can be used’. Surely, s. 7(3)(c) and para. (i) are broad enough to cover the disclosure of the information at trial, in accordance with the Rules of Court; see para. 33.

1. it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information; and,
2. 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.

The first requirement of paragraph 7(1)(b) is fairly easy to satisfy⁸. The second requirement is slightly less clear.

Are there circumstances when an individual should have a reasonable expectation that there may be collection of his/her personal information without their consent? This issue was addressed within a labour context in the case of *Ross v. Rosedale*⁹, [a decision under the *Ontario Labour Code*, L.R.C. 1985, c.L-2]. In *Ross*, an employer suspected misrepresentation of an employee's injuries and ordered video surveillance while the employee was moving some furniture. At the hearing, the employee objected to the admissibility of the videotape on the grounds that it constituted collection of personal information without his consent in breach of Section 7(1) of *PIPEDA*, which was said to apply, as *Rosedale* was involved in trucking operations extending beyond the borders of the Province of Ontario.

In determining whether video surveillance was 'reasonable for any purpose related to the investigation of a breach' of the employment agreement, the Adjudicator turned to the pre-*PIPEDA* arbitral jurisprudence¹⁰ on this issue, and considered the relevant test which existed at the time. Accordingly, the Tribunal examined the following considerations:

- ▶ was it reasonable, in all of the circumstances, to request surveillance;

⁸ If consent is obtained prior to surveillance being done, it is highly unlikely that the surveillance will reveal anything of any substance.

⁹ *Ross v Rosedale*, [2003] C.L.A.D. No. 237.

¹⁰ *Re Transit Windsor and Amalgamated Transit Union, Local 616* (2001), 99 L.A.C. 4th 295 (Brandt) and *Re Canadian Pacific Ltd. and Brotherhood of Maintenance of Way Employees 91996*, 59 L.A.C. (4th) 111 (M.G. Picher).

- ▶ was the surveillance conducted in a reasonable manner; and,
- ▶ were other alternatives open to the company to obtain the evidence it sought.

In considering the balance between the individual and the employer's interests, the Adjudicator decided that the employer's interest did not extend to justifying speculative spying on an employee whom the employer had no reason to suspect would be dishonest. Surveillance was found to be an 'extraordinary' step, which could only be resorted to where there was, before hand, reasonable and probable cause to justify it. What was reasonable and justifiable was to be determined on the facts of each case.

The Arbitrator concluded the surveillance video was inadmissible, on the grounds of unreasonableness; the employer had not acted reasonably in having conducted video surveillance in the circumstances of this case. The Adjudicator was of the view that, the employer could have utilized a less privacy intrusive method of investigation, such as requesting an independent medical evaluation, which had never been requested.

It may be said that *Ferencyz* contradicts with *Ross v. Rosedale*. *Ferencyz* stands for the principle that, a defendant has a right to collect personal information *in defence of a lawsuit*, more particularly through the use of surveillance, as long as the collection of information is for the purpose of defending a lawsuit¹¹. The information collected must, nonetheless, be related to the defence of the lawsuit.

It is noteworthy that, the *Ferencyz* decision was based on the surveillance having been conducted in a public place. Justice Dawson clearly aimed at striking a balance between the privacy interests of the plaintiff, in contrast to the right of the defendant to obtain necessary information to defend himself against the allegations made by the plaintiff. The Court

¹¹ See *Ferencyz v. MCI Medical Clinics* and *Carter v Connors*, 2009 NBQB 317 (CanLII) at paragraph 41, in the context of Facebook information, and PIPEDA Case Summary #311, *A Woman's Activities Recorded and Videotaped by a Private Investigator Hired by an Insurance Company* 2005 CanLII 21590 (P.C.C.).

recognized that, a claimant cannot put at issue his or her physical limitations, allege a causal relationship of such limitations to the actions of the defendant, and yet deny the defendant the opportunity to challenge such allegations. The Court appears to have drawn a distinction between situations where an individual might reasonably expect privacy free of any intrusion, versus a public place, where generally the activities and performance of the plaintiff are open to the view of the general public.

Accordingly, *Ferenczy* supports the position that, once an individual has initiated formal legal action against the defendant, such individual is considered to have given implied consent to the defendant to have collected, recorded and used his or her personal information through video surveillance *in a public place*.

It may therefore be said that, once the claimant has made a claim, he or she impliedly consents to investigation, including video surveillance in a public place. The rationale being that, claimants should have a 'reasonable expectation' of surveillance in a public place.

ADMISSIBILITY TEST OF THE VIDEO SURVEILLANCE

It must be recognized, as stated by the Ontario Superior Court in *Ferenczy*, that *PIPEDA* should not be interpreted as to interfere with the Court's search for the truth, that is, the *Act* does not prohibit the admissibility into evidence of personal information collected or recorded in contravention of the *Act*. *PIPEDA* merely provides individuals and the *Privacy Commissioner* with a right to bring a complaint resulting in an investigation, and as decided by the *Supreme Court of Canada* in the seminal case of *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*¹² the *Privacy Commissioner* holds an administrative role, whose positioned cannot be equated to that of a Superior Court Judge.

¹² *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] S.C.J. No. 45; 2008 Carswell 2244.

In *Ferenczy*, the Court applied the general test for determining the admissibility of evidence, which rests on the relevance of the evidence being sought to be admitted. The Court admitted into evidence the video surveillance. The Court further stated, in the alternative, if it were incorrect, the exception of s. 7(1)(b) of the *Act* would apply.

Similarly, in *Cam v. Hood*¹³ the plaintiff commenced a tort claim for soft tissue injuries arising from three motor vehicle accidents. The defence obtained video surveillance of the plaintiff playing volleyball, which it sought to introduce into evidence at trial. The plaintiff objected to its admissibility. In applying the test of admissibility [detailed above], and admitting the surveillance into evidence, the Court noted that, if the plaintiff's reasonable expectation of privacy had been infringed, she had a remedy under the *Privacy Act*¹⁴. However, that legislation did not provide for the exclusion of the evidence at trial.

A potential violation of *PIPEDA* does not, therefore, necessarily affect the admissibility of evidence at a trial. Accordingly, simply by having undertaken the activity of 'covert' surveillance which may be in contravention of the *Act*, is not sufficient to render the evidence inadmissible. The strict definition of 'covert' surveillance under the *PIPEDA* or under the *OPC Guidance* is inadequate in itself to prevent the surveillance from being used at trial.

SPECIFIC PIPEDA RESTRICTIONS ON 'COVERT' SURVEILLANCE

The scope of 'personal information' *PIPEDA* intends to protect includes the capturing of surveillance on video in its definition of 'collection of personal information'. Accordingly, obtaining surveillance coverage of an individual would appear at first blush to be prevented by the *Act* strictly in its definition of 'personal information'.

¹³ *Cam v. Hood*, 2006 B.C.S.C. 842 (CanLII)

¹⁴ *Privacy Act*, R.S.B.C. 1996, c. 373.

In addition, as referred to above, in May of 2009, the OPC published *Guidance on Covert Video Surveillance in the Private Sector*. The OPC Guidance lists some requirements with which organizations using 'covert' video surveillance, are 'required' to comply. This publication attempts to address issues which have arisen under PIPEDA in relation to the use of 'covert' surveillance. The most applicable Guidance 'principles' are summarized below, followed by comments by the author:

- Any collection of personal information by way of surveillance video, in the course of a commercial activity undertaken by an organization or by an employer subject to PIPEDA, regardless of the location, must be conducted in accordance with the guidelines established by OPC.

*As mentioned earlier herein, it is questionable whether 'covert' surveillance undertaken by a defendant, for the purpose of defending him or herself against a claim made by the individual about whom the surveillance has been conducted falls within the ambit of 'commercial activity', as defined by the Act. The case of **Ferency**, supports this argument.*

*Further, the Court in **Ferency** held that, a litigant should have a reasonable expectation to have their personal information collected by a defendant, for the purpose of defending the allegations which are the subject of a lawsuit, as long as the information collected is relevant to the lawsuit. The concept of implied consent of the claimant was reaffirmed by the Judge in **Ferency**.*

- The purpose for collecting the personal information must be considered appropriate in the circumstances, which means there must be a demonstrable, evidentiary need for the collection; mere suspicion is stated as being insufficient to justify the use of 'covert' surveillance.
- The benefit the organization will gain from 'covert' surveillance must outweigh the loss of privacy resulting from the 'covert' surveillance.

As discussed, the issue of relevance and purpose of collecting personal information has been held by the Courts as justifiable only if conducted for the purpose of defending allegations brought against a defendant by the individual whose personal information is collected, and is permissible only if relevant to the matters at issue in the lawsuit. Accordingly, this particular directive does not, in the opinion of the author, provide any greater onus than that imposed by the Courts.

As for the statement that, 'mere suspicion' is insufficient, such caution would undoubtedly apply to a much greater extent to a first party Insurer.

A greater onus rests on first party Insurers. As jurisprudence has shown in the development of insurance law, the insurance contract between an Insured and an Insurer is one of absolute good faith; the Insurer and the Insured owe a duty of utmost good faith to each other. 'The reason for this is that the Insured alone knows the facts of material importance to the Insurer in accepting, assessing, or continuing a risk or assessing and valuing a claim. Since it is difficult or impossible for the Insurer to determine these facts, the obligation requires the Insured to make full and accurate disclosure to the Insurer. The Insurer, in dealing with a claim, while not a fiduciary, holds a position of power over an Insured... This obligation to act in good faith owed to the Insured is separate from the specific obligations of the Insured and the Insurer under the policy...'¹⁵.

Accordingly, it is advisable that first party Insurers be very cautious when considering surveillance. Surveillance continues to be a proper investigative technique for Insurers to prove an unmeritorious claim¹⁶ by their Insured, under reasonable circumstances. The

¹⁵ See *MacGillivray and Parkington on Insurance Law*, 7th ed. (London: Sweet and Maxwell, 1981) at paras. 301, 303, 308, 524, 614; Brown and Menezes, *Insurance Law in Canada*, 2nd ed., (Toronto: Carswell, 1991) at paras. 1:2:9, 11:5,2; *Whiten v. Pilot Insurance Co.* (1999), 42 O.R. (3d) 641 (Ont. C.A.) at p. 650 per Laskin, J.A.; as found in *Poersch v Aetna* 2000 CanLII 22613 (ON S.C.).

¹⁶ See *Adams v. Confederation Life Insurance Co.* [1994] A.J. No. 308 at paragraph 68.

Insurer's obligation of utmost good faith does not prevent it from 'covert' surveillance to ensure that an Insured is also respecting his or her obligations of utmost good faith under the policy¹⁷. However, surveillance should be undertaken in such situations when warranted and justified, based on the medical and documentary evidence. Should a first party Insurer launch its own investigation without proper reasons and justification for doing so, simply in an attempt to 'catch and reveal its Insured's alleged bad intentions' it may become problematic. Without proper factual basis to undertake surveillance, the Insurer may not only open itself up to the finding of a valid complaint by the OPC, but also be held by a Court to be in breach of its duty of good faith and in breach of the insurance contract with its Insured. Surveillance must be warranted and based on existing evidence providing sufficient grounds for challenging the Insured's claim under an insurance contract.

- The personal information being collected by the organization must be clearly related to a legitimate business purpose and objective. Accordingly, the use of 'covert' surveillance must be directly related and in support of the stated objectives of the organization.

It is suggested that, regardless of such a directive, established tests of relevancy and admissibility of evidence have clearly required a direct causal connection to material issues of a litigation. Accordingly, 'the evidence must in all cases support the existence or non-existence of facts material to the determination of the issues either more or less probable than it would without the evidence.'¹⁸

In any event, it is further suggested that, the argument related to the non-commercial nature of the activity of 'covert' surveillance in defence of a lawsuit in itself, covers this particular section of the OPC Guidance.

¹⁷ See **Poersch v. Aetna** 2000 CanLII 22613 ON S.C., at para. 81; 152 A.R. 121; [1994] I.L.R. paras. 1-3096 at 2985.

¹⁸ See **Lis v Lombard Insurance Company** 2006 CanLII 21595 (ON S.C.).

- Although *PIPEDA* generally requires the consent of an individual to collect and use personal information, the *OPC Guidance* recognizes that there may exist implied consent on the part of the individual, such as a claimant having initiated legal action. Therefore, such implied consent allows the defendant to collect personal information on the claimant in order to defend him or herself, and any information collected on unrelated matters or parties must be limited and permitted only if such information collected on third parties is relevant to the purpose of collecting information about the claimant.... any personal information captured on individuals not linked to the purpose of the investigation should be deleted or depersonalized as soon as is practicable. This information relates not only to images, but to any information such as street names or numbers, or license plates which would assist in identifying third parties.

The OPC has had to update directives and clarify the application of various provisions of PIPEDA in light of the judicial rulings issued since the full implementation of PIPEDA. This particular directive is clearly in recognition of the fact that, Courts have recognized circumstances of litigation where defendants must be entitled to defend themselves against a claimant's allegations, and must be permitted to collect personal information on the claimant for the adequate defence of the claim.

It may nonetheless be argued that, the deletion or pixilation of the images of a third party as soon as practicable, as required by the OPC Guidance, casts aside the best evidence rule since Courts require original, unaltered videotapes for use at trial. If the video surveillance evidence is altered by investigators prior to its production into evidence, a Court may rule the evidence unreliable and reject it. Thus, in order to strike a proper balance, one could argue that a more appropriate interpretation of 'as soon as practicable' in the litigation context suggests the destruction of the third party evidence post-trial, following the expiration of all appeal periods.

- Less intrusive methods of collecting the personal information should first be considered, as the *OPC* considers 'covert' surveillance as a serious invasion of the individual's right to privacy, which the Act aims at protecting.

It must be recognized that, the requirement to undertake all alternative and less intrusive measures prior to undertaking 'covert' video surveillance on an individual, interferes with the Insurers' rights and duty to defend, a long standing legal principle, arising from both the common law and statutory authorities.

JURISDICTION

Recently in New Brunswick, *State Farm Insurance* has challenged the jurisdiction of the OPC, in the case of ***State Farm v. Privacy Commissioner of Canada***¹⁹. An Insurer was allegedly having surveillance conducted on a plaintiff as part of its defence of an Insured in a personal injury action. The plaintiff made a complaint to the *Privacy Commissioner* under PIPEDA. The Insurer sought, *inter alia*, a declaratory order that the *Privacy Commissioner* had no authority to investigate a complaint of an individual against it. The *Privacy Commissioner* on the other hand, sought an order that, the Insurer's application should be dismissed or stayed on the grounds that the Federal Court, and not the New Brunswick Court of Queen's Bench, was the appropriate forum to hear and determine the application.

The matter is proceeding in Federal Court, Trial Division. The Insurer is seeking a ruling as to whether the OPC has jurisdiction over the video surveillance the Insurer conducted on the plaintiff. *State Farm Insurance* claims that, the OPC had no justification to deal with its video surveillance, as the only relationship between the plaintiff and the defendant stems from the accident, which is not a 'commercial activity' under Section 4 of PIPEDA. As of the date of this article, *State Farm Insurance's* challenge has yet to be heard. This case will provide some interesting development on the authority of the OPC to regulate the activities of insurance companies in defence of judicial claims.

¹⁹ ***State Farm v. Privacy Commissioner of Canada*** (2009), 341 N.B.R. (2d) 1 (C.A.).

CONCLUSION

PIPEDA, as well as the *OPC Guidance* and suggestions on ‘covert’ video surveillance have yet to be fully considered by the Courts. The *OPC Guidance* may be described as vague, open to interpretation and without any legal authority to require strict compliance. Therefore, until the Courts rule on its applicable provisions, it remains open to interpretation.

Some guidance on interpretation was provided in *Englander v. Telus Communications Inc.*²⁰ In that case, the appellant filed a complaint against *Telus* under the *Act*, asking the Privacy Commissioner to determine whether the consent to disclosure allegedly secured by the communications company from new customers met the statutory standard and whether a monthly fee could be charged by the telecommunications company for non-published service. The Commissioner had held that, *Telus* has authority to charge the fee for not publishing a subscriber’s personal information. Although the sections of the *Act* discussed by the Court are not applicable to this discussion, comments made by Décar, J.A. are clearly relevant.

The judge stated that, as *Schedule 1* of *PIPEDA* reflects non-legal drafting, ‘its interpretation does not lend itself to typical rigorous construction; common sense, flexibility and pragmatism will best guide the Courts.’ As per Décar, J.A., in interpreting *PIPEDA*, the Court ‘must strike a balance between’ the protection of individual privacy and the commercial need for access to personal information.

In recognition of the judicial requirements to level the playing field and to ensure a fair hearing before the Courts of all relevant facts in determination of a claim, in 2005 the *OPC* issued a decision, which clearly supports an Insurer’s right to defend through the use of ‘covert’ surveillance.²¹

²⁰ *Englander v. Telus Communications Inc.* 2004 FCA 387 (CanLII).

²¹ *PIPEDA Case Summary #311*, 2005 CanLII 31590.

The *OPC* investigated a complaint from a woman who was involved in a motor vehicle accident in 2000, and who subsequently filed a lawsuit against the other driver. The other driver's insurance company had surveillance conducted on the woman following her testimony given at the Examination for Discovery. Some information contained in the medical records produced revealed discrepancies and inconsistencies with respect to the injuries she claimed to have suffered. Upon learning of the surveillance, the plaintiff filed a complaint with the *OPC* alleging that, the insurance company and private investigator had collected her personal information without her knowledge or consent, in contravention of *PIPEDA*.

The *Assistant Privacy Commissioner* found that, when the plaintiff initiated her lawsuit, and when her testimony and medical records revealed discrepancies and there were inconsistent with the injuries claimed, she was deemed to have given her implied consent to the collection of her personal information. It was noted, however, that the collection of an individual's personal information in such a circumstance should only be to the extent relevant to the merits of the case and the conduct of the defence.

Again, it is trite to say that, such test of relevancy is founded on well established rules of evidence and therefore, such requirement, as recognized by the *OPC* in its ruling does not render the requirements of surveillance activity any more onerous on the part of a defendant than that which a Court would admit into evidence at trial.

In the meantime, as we await further judicial interpretation of *PIPEDA* and its impact on the insurance sector, the following tips may be considered to minimize successful complaints brought under *PIPEDA* in relation to 'covert' surveillance. This is not to say the following tips are a sure fire means of preventing complaints from Insureds and/or plaintiffs with regard to surveillance during or in anticipation of the litigation process; however, such guidelines may provide some ground against allegations of privacy violations.

**TIPS ON OBTAINING VIDEO SURVEILLANCE WITHIN THE CONTEXT
OF AN INSURANCE DEFENCE CLAIM**

The following considerations should be assessed before undertaking ‘covert’ surveillance on the part of an Insurer in defence of a claim:

- ▶ EXAMINE THE NATURE OF THE ALLEGATIONS AND REQUIRED SURVEILLANCE EVIDENCE TO PROVIDE AN ADEQUATE DEFENCE TO THE CLAIM.
- ▶ DETERMINE THE BEST METHOD OF OBTAINING THE REQUIRED RELEVANT SURVEILLANCE EVIDENCE – CLAIMANT’S DAILY ACTIVITIES, WORK HABITS, SOCIAL ACTIVITIES – TO IDENTIFY THE TYPE OF ACTIVITY WHICH WOULD ALLOW FOR PUBLIC ACCESS.
- ▶ ENGAGE AN INVESTIGATION FIRM OR A PRIVATE INVESTIGATOR WITH A GOOD REPUTATION.
- ▶ ENSURE THAT THE INVESTIGATION FIRM OR PRIVATE INVESTIGATOR HAS A PROPER PRIVACY POLICY AND OBTAIN A COPY OF SAID POLICY FOR YOUR RECORDS.
- ▶ VERIFY WHETHER THE INVESTIGATION FIRM OR PRIVATE INVESTIGATOR IS A MEMBER OF YOUR PROVINCIAL ASSOCIATION OF PRIVATE INVESTIGATORS (IF ONE EXISTS), AND WHETHER THEY REQUIRE THEIR MEMBERS TO ABIDE BY A SPECIFIC POLICY. IF SUCH A POLICY IS IN PLACE, OBTAIN A COPY OF IT FOR YOUR RECORDS.
- ▶ ENSURE ADEQUATE AND PROPER DIRECTIONS ARE GIVEN TO THE INVESTIGATOR; I.E., THAT THE INVESTIGATOR NOT APPROACH THE SUBJECT UNDER SURVEILLANCE, ENGAGE THE SUBJECT IN CONVERSATION, OR ESTABLISH ANY RELATIONSHIP WITH THE SUBJECT²².
- ▶ ENSURE THAT THE SURVEILLANCE BE CONDUCTED IN A PUBLIC AREA, WHERE THE ACTIONS OF THE INDIVIDUAL ARE IN VIEW OF THE PUBLIC, AND IN LOCATIONS WHERE IT COULD CLEARLY BE HELD THAT, THERE WAS NO EXPECTATION OF PRIVACY ON THE PART OF THE SUBJECT²³.
- ▶ ENSURE THE INFORMATION GATHERED IS RELEVANT TO THE MERITS OF THE CLAIM – RECONSIDER ISSUES RELATED TO THE CLAIM AND TYPE OF SURVEILLANCE EVIDENCE REQUESTED OF THE INVESTIGATOR.

²² See *Cowles v. Balac*, [2004] O.J. No. 4534.

²³ See *Ferency*.

- ▶ HANDLE THIRD PARTY INFORMATION THAT IS CAPTURED ON TAPE CAUTIOUSLY AS PIXILATION AND/OR DELETION OF PORTIONS OF THE VIDEOTAPE MAY RENDER IT INADMISSIBLE BY A COURT DUE TO TAMPERING/MANIPULATION – VERSUS DISCLOSURE OF IDENTITY OF THIRD PARTIES, WHICH COULD POTENTIALLY LEAD TO EXPOSURE OF A COMPLAINT BY SUCH THIRD PARTIES.
- ▶ FIRST PARTY INSURERS SHOULD BE EXTREMELY CAUTIOUS WHEN CONSIDERING SURVEILLANCE OF THEIR INSUREDS WHERE THEY OWE A DUTY OF UTMOST GOOD FAITH. THIS DOES NOT MEAN SURVEILLANCE IS NEVER AN OPTION FOR FIRST PARTY INSURERS, BUT FIRST PARTY CLAIMS REQUIRE THE INSURER HAVE A MUCH STRONGER AND WELL FOUNDED BASIS FOR UNDERTAKING SURVEILLANCE, SUPPORTED BY EVIDENCE TO WARRANT SURVEILLANCE.
- ▶ DESTROY THE SURVEILLANCE MATERIALS AS SOON AS IS PRACTICABLE. THIS POLICY SHOULD BE CLEARLY DELINEATED AND IN WRITING FROM BOTH AN IN-HOUSE PERSPECTIVE, AS WELL AS FOR THE PURPOSE OF ALL SERVICE PROVIDERS.
- ▶ TO AVOID UNNECESSARY STRESS OVER *PIPEDA*, FIRST PARTY INSURERS COULD SEEK CONSENT TO INVESTIGATIONS AT THE TIME A POLICY IS UNDER-WRITTEN OR WHEN A CLAIM IS MADE.
- ▶ POLICIES AND CLAIM FORMS SHOULD INCLUDE LANGUAGE THAT PROVIDE CONSENT FOR COLLECTION, USE AND DISCLOSURE OF PERSONAL INFORMATION THAT IS REASONABLY NECESSARY TO INVESTIGATE AND VERIFY ALL CLAIMS ADVANCED.
- ▶ SHOULD A SPECIFIC SITUATION ARISE LEAVING UNCERTAINTY AS TO WHETHER SURVEILLANCE WOULD BE ACCEPTABLE UNDER THE PRIVACY LEGISLATION, IT IS BEST TO SEEK ADVICE FROM EXPERIENCED COUNSEL.

Based on the above, it is submitted that surveillance remains an acceptable and useful means to defend insurance claims. Although there now exists the need to use such investigative methods somewhat more cautiously, outside of the boundaries of reasonably expected areas of privacy, Insurers should not be any more apprehensive in relying on surveillance in defence of the merits of a claim, than during the pre-*PIPEDA* era. Surveillance may continue to be relied on as an effective tool in defending a claim when limited to a specific purpose, stated objectives, and undertaken in public places.

Monika M.L. Zauhar is a Partner in the Atlantic law firm of **Cox & Palmer. She has been practicing since 1991 predominantly in the areas of Insurance defence litigation and Administrative law. She may be reached by visiting the **Cox & Palmer** website at www.coxandpalmerlaw.com.*