

Video Surveillance, Evidence and PIPEDA: A Comment on *Ferenczy v. MCI Medical Clinics*

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One of the most common uses of surveillance is in the area of evidence gathering for investigation by litigators. Private investigators have long been retained for this purpose, and law enforcement officers routinely utilize surveillance devices to assist in the prosecution of a crime. The admissibility of video surveillance evidence obtained by private and government investigators is obviously not a new issue.¹ What has come to the forefront is the application of the *Personal Information Protection and Electronic Documents Act*² in the context of video surveillance evidence, and its impact on civil litigators. Privacy interests inherent in the collection, use, and disclosure of personal information may be protected under PIPEDA, which clearly adds another consideration to the issue of admissibility of surveillance evidence. The impact of PIPEDA on video surveillance evidence in the employment context has been addressed by the federal Privacy Commissioner, who has assessed the legitimacy of surveillance on a “reasonableness” standard.³ The Ontario Superior Court, in *Ferenczy v. MCI Medical Clinics*,⁴ has now interpreted PIPEDA in the litigation context in which a private investigator was used to gather information by video surveillance. While much of Dawson J.’s decision is *obiter*, his analysis with respect to video surveillance and PIPEDA may be an indication of how courts will deal with investigative evidence collected in the litigation process. The end result in *Ferenczy* is likely correct, but Dawson J.’s PIPEDA analysis appears to be a fairly transparent effort to avoid transforming litigation “into something very different than it is today.”⁵ While the insurance industry may have breathed a sigh of relief, for privacy advocates, this decision is likely a cause for concern.

The plaintiff in *Ferenczy* commenced an action against her doctor for medical malpractice in the treatment of removing a cyst from her wrist. At trial, she testified that it was difficult to grasp a cup with her injured left hand. At that point in the cross-examination, defense counsel sought to admit video surveillance evidence taken by a private investigator hired by the defendant showing the plaintiff holding a Tim Horton’s coffee cup for a period of time in her left hand. The Court ruled that the surveillance tape could be admitted in the cross-examination of the plaintiff to impugn credibility.

It was relevant evidence and the probative value outweighed its prejudicial effect.⁶

The plaintiff’s counsel objected to the use of the surveillance evidence on the basis that it was personal information collected in the course of commercial activity without the plaintiff’s consent, in contravention of PIPEDA. Dawson J. ruled that even if personal information was collected by video surveillance without the plaintiff’s consent, there is no provision under PIPEDA that prohibits its admissibility.⁷ Rather, PIPEDA provides a process for complaints to be made to the federal Privacy Commissioner, but the Court indicated that it “has no direct impact on the admissibility of evidence in this trial.”⁸ While this was enough to settle the admissibility question in this case, Dawson J. went on to consider the application of PIPEDA in the context of video surveillance, making three notable findings. First, he found that the making of the videotape was not a commercial activity because the private investigator was an agent of the doctor who was collecting information to defend himself against the lawsuit. This was, in Dawson J.’s view, a “personal purpose”, and therefore, outside the application of PIPEDA. Second, even if PIPEDA did apply, by commencing the action, the plaintiff had given implied consent to the collection, use, and disclosure of personal information insofar as it related to the lawsuit. And finally, even if there was no implied consent on the part of the plaintiff, the exception provisions under PIPEDA applied, which permitted the defendant’s collection, use, and disclosure of personal information without consent.

Commercial Activity and Agency

The video surveillance was conducted by a licensed private investigator hired by the Canadian Medical Protective Agency (CMPA), which, *inter alia*, provides legal assistance to physicians who are sued for medical malpractice. The plaintiff argued that the private investigator paid by the CMPA was collecting and making a record of the plaintiff’s personal information in the course of commercial activity without her consent. Dawson J. disagreed, finding that the correct interpretation of PIPEDA is to view the investigator as an agent of

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the doctor who was collecting, using, and disclosing the information for the doctor's "personal use to defend against allegations brought by the plaintiff".⁹ Thus, PIPEDA did not apply because the information was being collected for "personal or domestic purposes"¹⁰ and not in the course of commercial activity.

This interpretation seems a considerable stretch of the "personal purpose" exception under paragraph 4(2)(b). The defendant had, at least, a professional interest in gathering information in defending the lawsuit. The term "commercial activity" is defined very broadly under PIPEDA as including every transaction, act, or conduct that is of a commercial character, whether it is a single transaction or occurs in the regular course of business conduct.¹¹ This arguably captures the CMPA, on behalf of the defendant doctor, retaining a commercial investigator to collect personal information about the plaintiff. Dawson J. found the way to avoid this conclusion, or an unfair result, was to characterize the doctor's interest in collecting the information as personal, thus setting up the agency theory.

Given the lengths to which Dawson J. appears to go to take this litigation outside the application of PIPEDA, the question arises as to what effect the new PIPEDA Regulations, presumably not available prior to the rendering of this decision, would have made on Dawson J.'s analysis. The result in *Ferency* is not inconsistent with the amended PIPEDA Regulations dealing with investigative bodies.¹² Paragraphs 7(3)(d) and (h.2) permit the disclosure of personal information to and by an investigative body without the knowledge and consent of the individual if the investigative body is specified by the Regulations. The new Regulations amend the definition of "investigative bodies" to include licensed private investigators or detectives.¹³ It is made clear that the *disclosure* of personal information to and by private investigators without knowledge and consent is permitted. The issue in *Ferency* was whether the information could be collected in the first place, and in any event, Dawson J. found the defendant's collection and disclosure of the plaintiff's personal information by the private investigator to be for personal purposes. On the other hand, the amended privacy regulations seem to remove any doubt that private investigators are subject to PIPEDA. The regulations merely add them to the named "investigative bodies" that can disclose personal information without knowledge and consent. Presumably this was done to ensure the investigative body would be able to disclose the results of its investigation (the collection of information) to its client or other interested parties without consent. The amendment suggests that PIPEDA was intended to apply to private investigators retained to conduct surveillance for the purpose of verifying the legitimacy of a personal injury claim. Courts may not, therefore, find it necessary to resort to the application of the *Ferency* agency theory to private investigators in the litigation context where PIPEDA is raised. It will, however, be interesting to see how courts deal with this issue,

as inevitably, PIPEDA will be argued by plaintiffs seeking to exclude video surveillance evidence.

Implied Consent

Dawson J. concluded that even if PIPEDA did apply, by starting the action, the plaintiff had given implied consent to the collection and use of the personal information insofar as it related to defending the lawsuit, particularly in the circumstances where the recording was done in a public place. In his view, the plaintiff must have known that she was putting her injury and its effects on her life into issue. Having started this action, it could not be said, according to Dawson J., that the plaintiff did not consent to the gathering of information about the nature and extent of her injury.¹⁴

Under PIPEDA, personal information can only be collected, used, and disclosed with the knowledge and consent of the individual.¹⁵ The Act contemplates that implied consent may be appropriate in certain circumstances.¹⁶ Dawson J. may, implicitly, be making a reasonableness assessment. However, without any express reference or consideration of "reasonableness",¹⁷ *Ferency* casts a broad net for capturing personal information, allowing defendants to rely on implied consent to collect and disclose personal information in any number of disputes being litigated. The impact of PIPEDA may call for a more nuanced discussion of when and to what extent some kinds of personal information can be collected for the purposes of civil litigation.

Notwithstanding its far-reaching implications, even if one accepts that starting a civil action implies consent to gather personal information for the purposes of verifying a claim, how broadly can a plaintiff expect information about his or her injury and its effects on his or her life be to collected and disclosed? The collection of personal information is still subject to the reasonableness standard provided in PIPEDA.¹⁸ Dawson J. assumes the collection of the information was reasonable, but does not articulate criteria upon which this assessment is made.

Prior to the enactment of PIPEDA, courts generally found plaintiffs to have, at best, a reduced expectation of privacy in public places, allowing defendants to use private investigators to conduct video surveillance of a plaintiff, provided there was a legitimate purpose for the surveillance, such as gathering information relevant to a lawsuit, and where the observation was not so constant and obtrusive as to go beyond reasonable bounds.¹⁹ In the employment context, video surveillance evidence has been admitted if the employer satisfied the three-pronged test established in arbitral jurisprudence.²⁰ Where employers undertake investigative video surveillance of employees outside the workplace, the employer must demonstrate that initiating the surveillance was reasonable in all the circumstances, that it was conducted in a reasonable manner, and that there were no

other alternatives available to the employer to obtain the evidence sought. PIPEDA is consistent with these approaches by mandating that a reasonableness standard be applied to information-gathering by surveillance. This creates an important limitation on those collecting personal information. Surveillance activities that a reasonable person would not consider appropriate cannot be justified.

Ferency falls short here by assuming that implied consent in the litigation context justifies the collection of personal information by video surveillance in public places, without taking into account the reasonableness of the surveillance. In the end, the result would probably not have been different, given the circumstances of location and purpose of the surveillance and the likelihood of meeting the reasonableness test as required under subsection 5(3) of PIPEDA. However, the decision leaves open the extent and nature of information-gathering a plaintiff is actually consenting to. The question remains as to whether a plaintiff has a reasonable expectation of privacy. *Ferency* leads to the conclusion that there is no expectation of privacy in public places once an action is commenced. Surely, PIPEDA is of some consequence in the litigation process where there is a need to balance the rights of the defendant to gather the facts and verify the legitimacy of the claim with the privacy rights of the plaintiff.

Exemption from Consent Requirement

The most interesting finding by Justice Dawson is that even if his previous conclusions are incorrect, the exception to the consent principle in section 7 of PIPEDA applies. Specifically, paragraph 7(1)(b) provides that personal information can be collected without consent if “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 the collection is reasonable for [the] purpose related to investigating a breach of an agreement or a contravention of the laws of Canada or a province”.²¹ Justice Dawson held that “the laws of Canada or a province” includes the common law, including the law of tort, and that the video surveillance “related to investigation” of a tort claim.²² Further, conducting the video surveillance with the plaintiff’s knowledge or consent would “compromise the availability or accuracy of the information”.²³ Therefore, in Justice’s Dawson’s view, since paragraph 7(1)(b) applied, the plaintiff’s personal information could be collected without her consent and used without her consent, pursuant to paragraph 7(2)(d).²⁴

Arguably, most cases where it is necessary to verify the legitimacy of a personal injury, particularly those made by persons suspected of fraudulent claims, would justify information-gathering by video surveillance and be captured by the first of the three-prong requirements under paragraph 7(1)(b). The second requirement under

paragraph 7(1)(b) is that the collection must be reasonable, mirroring the subsection 5(3) reasonableness standard. The absence of any discussion on the reasonableness of the surveillance weakens the overall analysis of the impact of PIPEDA in relation to video surveillance in the litigation context because an effective balance between the plaintiff’s privacy interests and the defendant’s interests in defending himself or herself has not been achieved. The third requirement under paragraph 7(1)(b) was given a wide interpretation by Dawson J. so as not to limit the exception to contractual breaches or fraudulent acts that violate federal or provincial laws. The broad reading appears to contemplate that personal information can be collected and disclosed during any litigation process and that the paragraph 7(1)(b) exception extends to non-agreement situations.

An Ontario arbitration decision has considered the application of PIPEDA in relation to video surveillance evidence, ruling that the surveillance evidence was inadmissible because it was obtained in violation of paragraph 7(1)(b).²⁵ In *Ross*, the employee was terminated for misrepresenting his health status. The employee had suffered a back injury while at work. He was off work and then placed on administrative duties to accommodate his injury. After several months, he continued to claim he was unable to resume his duties as a truck driver. Informing his supervisor that he would be moving during his upcoming vacation, the employer hired a private investigator to conduct video surveillance of the employee who was filmed moving furniture. The arbitrator found the consent exception in paragraph 7(1)(b) was inapplicable, ruling that there were no reasonable grounds for the investigation:

There were any number of other means that were available to the employer to test the true extent of Ross’ restrictions and the *bona fides* of his recovery . . . This is a case, where the employer, without any evidence that the employee was malingering or had made misrepresentations or spread disinformation as to his physical abilities, orders surreptitious video surveillance in the hope of trapping the unsuspecting employee during the course of moving furniture at his place of residence at a time and place that he had voluntarily disclosed to his employer.²⁶

In the arbitrator’s view, the employer’s interests do not justify random video surveillance to see what it can catch. Rather, surveillance is an extraordinary step that can only be resorted to where there is reasonable and probable cause to justify it.²⁷ The employer “attempted to cast an electronic web to see whether it could catch the employee while moving his family”.²⁸ The gathering of personal information by video surveillance was “not reasonable for any purpose related to the investigation of a breach of the employment agreement”.²⁹ Thus, its collection without the knowledge or consent of the employee was contrary to PIPEDA. Although the employer could rely on paragraph 7(1)(b) insofar as it related to an investigation of a “breach of an agreement”, the admissibility question ultimately failed by not meeting the reasonableness standard imposed under the Act. The decision is somewhat surprising, given that the employer had what appeared to be legitimate reasons to

suspect the employee was committing fraud. However, *Ross* indicates that organizations wishing to rely on paragraph 7(1)(b) of PIPEDA must have a reasonable basis for undertaking surveillance.

Even if courts follow *Ferency's* broad reading of paragraph 7(1)(b), at least some consideration has to be given to the reasonableness qualifier. *Ross* and the federal Privacy Commissioner's findings³⁰ may provide some guidance as to how reasonableness will be interpreted in the context of video surveillance and PIPEDA, although the extent to which this type of analysis will be applied in the civil litigation process is uncertain. Had Dawson J. considered the reasonableness qualifier in his analysis, and assuming there was a reasonable basis for conducting the surveillance of this plaintiff, the result would likely be the same. However, subject to the circumstances leading to the surveillance activity, another court could reach a different conclusion when assessing whether the collection of personal information by video surveillance was reasonable. For example, if only reasonable surveillance measures may be used, intrusive surveillance activity may constitute a violation of PIPEDA where the information was capable of being gathered by other means.

Notes:

¹ As a general rule, relevant evidence is admissible subject to a discretion to exclude the evidence where the probative value is outweighed by its prejudicial effect. See, for example, *R. v. Morris*, [1983] 2 S.C.R. 190 and J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at 23.

² S.C. 2000, c. 5 [hereinafter PIPEDA].

³ See, for example, PIPEDA Case Summaries #114, #264, #265, #273, and #279, available at <http://www.privcom.gc.ca>, Commissioner's Findings. See also Finding #269, where an employer hired a private investigator to conduct video surveillance on an employee in order to determine the veracity of his medical condition. The Assistant Privacy Commissioner clearly recommends that video surveillance outside the workplace is to be used as a last resort, should only be contemplated if all other avenues of collecting personal information have been exhausted, and private investigators should be instructed to collect personal information in accordance with PIPEDA.

⁴ 70 O.R. (3d) 277 [hereinafter *Ferency*].

⁵ *Ibid.*, at para. 27.

⁶ *Ibid.*, at para. 16.

⁷ Dawson J. acknowledges that information gathered by video surveillance is captured by the definition of "personal information" under subsection 2(1) of PIPEDA, *ibid.*, at para. 22.

⁸ *Ibid.*, at para. 15.

⁹ *Ibid.*, at para. 30.

¹⁰ PIPEDA, *supra* note 2. Under paragraph (4)(2)(b), the Act does not apply to "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".

¹¹ *Ibid.*, subsection 2(1). Note: The Ontario Superior Court of Justice, since *Ferency*, had an opportunity to rule on the meaning of "commercial activity" in *Rodgers v. Calvert*, [2004] O.J. No. 3653. The Court found that the Peel County Game and Fish Protection Association was not involved in commercial activity in the sense of engaging in commerce and trade. The case is limited in its application, but does provide some insight as to what factors may be considered in assessing "commercial activity".

¹² The Regulations Specifying Investigative Bodies, S.O.R./2001-6, as am. By S.O.R./2004-60, section 1.

¹³ *Ibid.*, subparagraphs 1(w)(i) and (ii); 1(x)(i) and (ii).

In the end, *Ferency* is notable not so much for what was said, but the implications of what was not discussed in any depth, namely the reasonable expectation of privacy and the reasonableness of the surveillance. Not surprisingly, Justice Dawson concludes by stating that PIPEDA "leaves a lot to be desired in terms of clarity and usefulness", and in particular, with regard to the conduct of litigation.³¹ His analysis and interpretation of the Act says as much. *Ferency* likely reaches the correct result, but marginalizes the impact of PIPEDA.

It can be expected that plaintiffs will continue to challenge the admissibility of video surveillance evidence by raising PIPEDA for reasons related to genuine privacy concerns. Fraudulent personal injury claims will also continue. For the reasons stated, *Ferency* does not resolve the issue of investigative evidence and the impact of PIPEDA in the litigation context. It is, however, the first case to provide assistance to civil litigators on how courts will interpret PIPEDA, and as such, cannot be ignored.

¹⁴ *Ferency*, *supra* note 3 at para. 31.

¹⁵ PIPEDA, *supra* note 2, Schedule A, Principle 3, Cl. 4.3.

¹⁶ *Ibid.*, Cl. 4.3.4.

¹⁷ PIPEDA, *supra* note 2, subsection 5(3) provides that an "organization may collect, use or disclose personal information only for purposes that a reasonable person would consider appropriate in the circumstances".

¹⁸ *Ibid.*

¹⁹ See, for example, *Druken v. R.G. Fewer and Associates, Inc.* (1998), 171 Nfld. & P.E.I.R., 312 (Nfld. T.D.); *Penny v. Manitoba Public Insurance Corp.* (1991), 72 Man. R. (2d) 10 (Q.B.); *Rusche v. Insurance Corp of British Columbia* (1992), 4 C.P.C. (3d) 12 (B.C.S.C.); and *Unger v. Lutz* (1996), 24 B.C.L.R. (3d) 124 (S.C.).

²⁰ *Re Doman Forest Products Ltd. and International Woodworkers, Local I-357* (1990) 13 L.A.C. (4th) 275 (Vickers, B.C.); *Re Toronto Star Newspapers Ltd. and Southern Ontario Newspaper Guild, Local 87* (1992), 30 L.A.C. (4th) 306 (Springate, Ont.); *Re Labatt Ontario Breweries (Toronto Brewery) and Brewery, General & Professional Workers Union, Local 304* (1994), 42 L.A.C. (4th) 151 (Brandt, Ont.); *Re Greater Vancouver Regional District and Greater Vancouver Regional District Employees' Union* (1996), 57 L.A.C. (4th) 113 (McPhillips, B.C.); and *Re Toronto Transit Commission and Amalgamated Transit Union, Local 113 (Russell)* (1999), 88 L.A.C. (4th) 109 (Shime, Ont.).

²¹ PIPEDA, *supra* note 2.

²² *Ferency*, *supra* note 4 at para. 33.

²³ *Ibid.*

²⁴ PIPEDA, *supra* note 2, paragraph 7(2)(d) provides that personal information can be used without knowledge or consent if it was collected under paragraph 7(1)(b).

²⁵ *Ross v. Rosedale Transport Ltd.*, [2003] C.L.A.D. No. 237, 2003 CarswellNat 3620 (Ont. Arb.) [hereinafter *Ross*].

²⁶ *Ibid.*, at para. 36.

²⁷ *Ibid.*

²⁸ *Ibid.*, at para. 37.

²⁹ *Ibid.*

³⁰ *Supra* note 3.

³¹ *Supra* note 4 at para. 34.