

Update

Cavalluzzo Hayes Shilton
McIntyre & Cornish

FEBRUARY 1999

**Developments in Labour Arbitration:
Privacy, Video Surveillance, Drug Testing and E-mails**

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Background

“Privacy” is a concept for which the law in Canada has developed no consistent response. To begin with, commentators have noted that the term “privacy” itself is notoriously difficult to define. Some have said that it means broadly the right to be “let alone”², while others have said that privacy focuses on an individual’s “ability to control the circulation of information” about him or herself.³ The common law jurisdictions have grappled with the concept in an incremental sense through the law of property (trespass, nuisance), tort (defamation, injurious falsehood, breach of confidence), and actions founded on the law of contract.⁴ However, the courts have been slow to embrace the concept of any general right of privacy, however it might be defined. I have located only two reported Ontario cases where such a right of privacy has been accepted as actionable in tort.⁵ The most recent, the 1991

¹An associate with the firm of Cavalluzzo Hayes Shilton McIntyre & Cornish. I gratefully acknowledge the research assistance of Jo-anne Pickel on the issues of privacy and e-mails surveillance.

² This is said to embrace four distinct psychological or physical relations between an individual and others: the right to solitude, the right to maintain the intimacy of a group, the right to anonymity or to be free from surveillance, and the right to withhold information about oneself: see p. Burns, “The Law and Privacy: The Canadian Experience” (1976), 54 Can. Bar Rev. 1 at p. 6

³ M. Rankin, “Privacy and Technology: A Canadian Perspective” (1984), 22 Alta. L. Rev. 323.

⁴ See J. Irvine, “The Invasion of Privacy in Ontario - A 1983 Survey”, Law Society of Upper Canada, Special Lectures, *Torts in the 80s* (1983); see also p. Burns, above.

⁵ See *Saccone v. Orr* (1981), 34 O.R. (2d) 317 (Co. Ct.); *Roth v. Roth* (1991), 4 O.R. (3d) 740 (Ont. Gen. Div.). The courts in England have not accepted that such a general right exists: *Re (a Minor)* (1974), [1975] 1 All E.R. 697 (C.A.). In contrast, courts in the United States have readily accepted that such a common law right exists; *Nader v. G.M.* (1970), 307 N.Y.S. 2d 647; S. Warren, L. Brandis, “The Right To Privacy” (1890), 4 Harv. L. Rev. 193. The civil law in Quebec has had little difficulty in recognizing such a right: *Aubry v. Editions Vice-Versa Inc.* (1998), 157 D.L.R. (4th) 577 (S.C.C.).

decision of *Roth v. Roth*, relies on the Supreme Court of Canada's analysis, in *Hunter v. Southam Inc.*,⁶ of the *Charter* s. 8 right "to be secure against unreasonable search or seizure" to conclude that the common law recognizes a general right of privacy which is not dependant on the law of trespass or nuisance.⁷ Having gone that far however, the courts have done little to define what the elements of a cause of action to enforce a privacy right entails. Indeed, *Roth* states that "whether the invasion of privacy of an individual will be actionable will depend on the circumstances of the particular case and the conflicting rights involved. In such a manner the rights of the individual as well as society as a whole are served."⁸ In essence, the court recognizes that a right of privacy entails a balancing of interests on a case-by-case basis. As will become apparent, this is a process that labour arbitrators have applied for a considerable period of time in weighing the privacy interests of employees against the business interests of their employers.

Where the courts have been slow to move, the legislatures have acted through statute. The criminal law regulates specific types of invasions of "privacy".⁹ Many jurisdictions have enacted statutes which limit access to personal information held by a government.¹⁰ A

⁶ (1984), 11 D.L.R. (4th) 641 (s.C.C.)

⁷ *Roth v. Roth*, above, footnote 5, pp. 756-758.

⁸ Above at p. 758.

⁹ See e.g. *Criminal Code*, R.S.C. 1985, c.C-46, s. 177 (Trespassing at Night), s. 183-196 (Invasion of Privacy) s. 342.1 (Unauthorized Use of a Computer).

¹⁰ *Privacy Act*, R.S.C. 1985, c. P-21; *The Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31.

number of provinces have also enacted legislation which makes it a tort, actionable without proof of damage, for a person to willfully and without claim of right to violate the privacy of another.¹¹

For all the haphazardness of the common law and incremental approach of the legislatures, labour arbitrators over the years have had little difficulty in recognizing the privacy of employees as being something which must be considered and applied when evaluating the exercise of management rights, subject of course to any specific provisions in the collective agreement. They have done this despite the primacy of the residual rights theory - the view that any right not specifically abridged by the collective agreement resides in management - and the on-going debate amongst arbitrators and the courts over whether or not arbitrators can imply an obligation upon management to exercise their rights in manner that is not unreasonable.¹²

For many years arbitrators have recognized that the business interests of employers must be balanced against the privacy rights of their employees in a variety of circumstances. For example, arbitrators have placed limits on the rights of employers to demand medical information from employees. Absent anything to the contrary in the collective agreement, they are generally not permitted to require medical proof of fitness for duty unless they have

¹¹ *Privacy Act*, R.S.B.C. 1979, c. 336; *Privacy Act*, C.C.S.M., c. P-125.

¹² See e.g. *Metropolitan Toronto (Municipality) v. CUPE* (1990), 74 O.R. (2d) 239 (C.A.); *Stelco Inc. v. USWA, Local 1005* (1994), 17 O.R. (3d) 218 (Div. Ct.).

grounds to conclude that an employee may be unfit.¹³ Even then, arbitrators are often reluctant to require that this proof of fitness be supplied by requiring the employee to see a physician not of their own choosing. Furthermore, except in the most compelling circumstances, arbitrators often have reacted negatively to claims that employers have the right to search an employee's person and, to a lesser extent, effects.

As will become apparent, this balancing trend has continued as the privacy rights of employees and the business interests of employers have continued to intersect in new areas such as video surveillance and drug testing. This may also be relevant when arbitrators examine the extent to which employers may monitor and act upon employee e-mail.

This paper focuses on these privacy developments in the context of labour arbitration since that is the venue in which these issues most frequently arise. It, of course, goes without saying that video surveillance, drug testing and e-mail surveillance could also found the basis for an unfair labour practice complaint if the requisite legal elements are present.¹⁴

Video Surveillance

¹³ See D. J. Brown, D. M. Beatty, *Canadian Labour Arbitration* (3d) (Aurora: Canada Labour Book Inc., 1988) pp. 7-79 - 7-80, 7-154.16-7.154.18.

¹⁴ See e.g. *Royalguard Vinyl Co.*, [1994] O.L.R.B. Rep. Jan 59, where the Ontario Labour Relations Board found the installation of video surveillance during the course of a union organizing drive to be an unfair labour practice.

The use of video surveillance in the workplace is not a new development which has escaped the scrutiny of arbitrators in prior decades. An early Canadian decision is *Puretex Knitting Co. Ltd. and Canadian Textile and Chemical Union*¹⁵ which was an interest arbitration award concerning an employer's installation of cameras throughout the workplace for the purpose of deterring theft. A three-month strike was resolved with an agreement to refer the union's demand for the removal of the cameras to binding arbitration. While there had been one serious incident of theft, it was not apparent that theft was an on-going problem. Ultimately the arbitrator ordered the cameras to be removed from production, packaging and shipping areas, but permitted the employer to use them on a rotating basis in the loading dock, storage area, and parking lot. The arbitrator concluded that it was a matter of "balancing competing considerations," being the employer's desire to control theft on the one hand, and on the other, the intrinsic and serious objection that electronic surveillance "is the ultimate socializing device" which has a "fundamentally anti-human character."¹⁶

Later in *Thibodeau-Finch Express Inc. and Teamsters Union, Local 880*¹⁷, an arbitrator concluded that the unilateral installation of cameras in a maintenance area was contrary to a specific term in the collective agreement which purported to preserve existing operational practices. There had not been previously the use of video surveillance. The arbitrator concluded that the employer had failed to establish that theft was a serious problem

¹⁵ (1979), 23 L.A.C. (2d) 14 (Ellis).

¹⁶ Above, pp. 29-30.

¹⁷ (1988), 32 L.A.C. (3d) 271 (Burkett).

that necessitated the use of video surveillance and that there had been no attempt to respond to perceived problems by less intrusive means.

The sorts of consideration weighed in these cases have continued to remain important. However, it has been in the '90s that the development of the arbitral jurisprudence with respect to video surveillance has been most active.

The most influential case in this area is *Re: Doman Forest Products Ltd. and IWA, Local 1-357*¹⁸ which concerned the admissibility of surreptitious video surveillance of an employee who was discharged for an alleged abuse of sick leave. The union argued that an employee has a right to privacy which an employer may not invade unless there is a reasonable basis for doing so and all alternatives had been exhausted. Arbitrator Vickers agreed with this analysis.

First he reviewed two Supreme Court of Canada decisions under s. 8 of the *Charter* which deals with unreasonable search and seizure. In *R. v. Duarte*¹⁹ the court defined privacy as the right of the individual to determine, when, how and to what extent he or she will release personal information. In that case and in *Hunter v. Southam Inc.*²⁰ the arbitrator found that the

¹⁸ (1990), 13 L.A.C. (4th) 275 (Vickers).

¹⁹ (1990), 65 D.L.R. (4th) 240 (S.C.C.).

²⁰ (1984), 11 D.L.R. (4th) 641 (S.C.C.).

court gave a “strong affirmation of individual privacy.”²¹ While acknowledging that the *Charter* does not apply to private disputes which do not involve government, the arbitrator relied on *RWDSU, Local 580 v. Dolphin Delivery Ltd.*²² to find that nevertheless he was called upon to apply fundamental *Charter* values to private disputes. The arbitrator then considered British Columbia’s *Privacy Act* which makes a willful invasion of privacy an actionable tort with “due regard being given to the lawful interests of others.”²³ The arbitrator concluded that where the case in *Duarte* required the courts to balance the competing interests of the state and the citizen when considering s. 8 of the *Charter*, the *Privacy Act* required a similar analysis when private parties were involved. The arbitrator concluded, not surprisingly, that in this specific case a “balancing of interests” was required between the employee’s right to privacy and the employer’s right to investigate an alleged abuse of sick leave. The arbitrator stated:

Questions to be answered include:

- (1) *Was it reasonable, in all the circumstances, to request the surveillance?*

- (2) *Was the surveillance conducted in a reasonable manner?*

²¹ Above, Footnote 18, at p. 279.

²² (1986), 33 D.L.R. (4th) 174 (S.C.C.).

²³ *Privacy Act*, R.S.B.C. 1979, c. 336, s. 1, 2.

(3) *Were other alternatives open to the company to obtain the evidence sought?*²⁴

In the end the arbitrator concluded that a determination about whether the employee's right to privacy had been abused could not be made until all the evidence, including the video surveillance, had been reviewed. In a subsequent unreported decision, the arbitrator found that on the facts, these tests had not been met by the employer and accordingly refused to admit that the video tapes into evidence.²⁵

The issue was revisited in British Columbia again in *Re: Steels Industrial Products and Teamsters Union, Local 213*²⁶ which also involved the use of video surveillance in a case involving the discharge of an employee for an alleged fraudulent claim for worker's compensation benefits. The arbitrator relied on Arbitrator Vickers' analysis of the *Charter* and British Columbia's *Privacy Act* to conclude that a balancing of interests was required. Said the arbitrator:

As a general principle I would not think that a private citizen - specifically here an employer - should have greater freedom or

²⁴ Above, Footnote 18, at p. 282

²⁵ Summarized at 21 C.L.A.S. 479.

²⁶ (1991), 24 L.A.C. (4th) 259 (Blasina).

authority to monitor another private citizen that then does the state, even if the private citizen is one's employee . . .

. . .

I agree that the question of whether or not to admit video surveillance is one of balancing interests. I would not think that the right to privacy and the employer's right to investigate are necessarily equally weighed, particularly in the area of surreptitious surveillance. An arbitrator must make a qualitative assessment, and he would have to be satisfied that in the circumstances the employer's interest reasonably outweighs the employee's right to privacy - and, indeed, a free society's interest that all individuals may live in privacy without undue or unnecessary monitoring by a third party. The analysis of the problem, in my view, can be encompassed in the first two questions posed by Arbitrator Vickers, namely:

- (1) Was it reasonable, in all of the circumstances, to request a surveillance?*
- (2) Was the surveillance conducted in a reasonable manner?*

The third question posed by Arbitrator Vickers can be considered as part of the first. If the answer is “no” to either question, then the evidence is not admissible.²⁷

Again, in this case the arbitrator viewed the video tape evidence subject to ruling on the union’s objection to its admissibility. The arbitrator ultimately concluded that in applying the test that the video tape was admissible. The arbitrator concluded that given a demonstrated history of the grievor being dishonest and intransigent when confronted with alleged wrongdoing, the employer had reasonable grounds to conduct video surveillance to confirm its suspicions about his alleged abuse of worker’s compensation. Also for that reason, and after finding that the surveillance itself was done in a manner not designed to harass or cause nuisance to the grievor, the arbitrator concluded that both elements of the test had been met. The discharge was upheld.

While Ontario has no comparable privacy legislation to British Columbia, these two cases have nevertheless been relied upon by arbitrators in this province who have adopted the balancing of interests process that they advocate. In *Re: Toronto Star Newspapers Ltd. and SONG*²⁸ the arbitrator concluded that an employer does not have the right to intrude on an employee’s privacy by video-taping his or her conduct unless the employee’s interest was

²⁷ Above, pp. 274, 276-277.

²⁸ (1992), 30 L.A.C. (4th) 306 (Springate).

outweighed by the employer's. In order to demonstrate an over-arching interest in conducting such surveillance, he adopted the test from the two British Columbia cases that the employer must establish that it was reasonable for it to resort to surveillance and that its surveillance was conducted in a reasonable manner.

Arbitrator Brandt came to the same conclusion in *Re: Labatt Ontario Breweries (Toronto Brewery) and Brewery Workers' Union, Local 304*.²⁹ He did so despite noting that Ontario has no similar privacy legislation to British Columbia and after expressing his view that Ontario arbitrators have no jurisdiction to apply the *Charter* either directly or indirectly to collective agreement disputes between private parties. However, he relied on the arbitral jurisprudence with respect to searches of persons or property, drug tests and medical examinations, to conclude that the balancing of interests approach advocated in the two B.C. cases was useful as a guideline.

In this case, apparently without reviewing the video evidence, the arbitrator concluded that the surveillance was not justified. The case concerned a discharge resulting from an allegation that an employee had misrepresented the extent of his incapacity to attend work. The arbitrator concluded that the employer had unreasonably resorted to video surveillance given that:

- The grievor's previous absences were not treated as culpable;

²⁹ (1994), 42 L.A.C. (4th) 151 (Brandt).

- The grievor had previously been confronted about suspicions that he was working elsewhere while absent and had denied it. No action followed the denials. Visual surveillance after a further absence produced no results.

- The employer unreasonably suspected that the grievor was working elsewhere when it failed to contact him at home after subsequent absences, even though the grievor had telephoned to justify his absences, and his alleged injuries were not such as to prevent him from leaving the house.

- The employer also unreasonably suspected the employee given that he did not return a physician's statement within the short period of time requested by the employer. However in the past, the employee's practice was to return it when he returned to work, again without objection from the employer.

The reported arbitration cases since then have overwhelmingly adopted the same approach. What is also clear from the approach is that ultimately the determination of the admissibility in any given case will depend on the specific facts. Furthermore, while in all of these cases the question at issue is the admissibility of video evidence already obtained, the decisions necessarily reflect on the propriety of the employer's conduct at first instance:

- b. In *Re: Alberta Wheat Pool and Grain Workers Union, Local 333*³⁰ an arbitrator excluded video tape evidence in a case involving allegations of a fraudulent disability claim. The arbitrator excluded the evidence, apparently without reviewing it. This was done on the basis that while the employer had some justifiable suspicion to be concerned about a sudden improvement and equally sudden deterioration of the employee's condition (it was alleged this was because the employee wished to return to work long enough to qualify for further benefits), the employer nevertheless did not exhaust less intrusive alternatives which were available. These included confronting the grievor, questioning his doctor and seeking further medical reports.
- c. In *Re: Greater Vancouver Regional District and G.V.R.D.E.U.*³¹ the arbitrator concluded that it would be imprudent to make any final determination without first having heard all the evidence. Accordingly, the union's motion to exclude the evidence was denied, though the parties were permitted to re-argue the

³⁰ (1995), 48 L.A.C. (4th) 332 (Williams).

³¹ (1996), 57 L.A.C. (4th) 113 (McPhillips).

question at the conclusion of the case. In a subsequent award³² the arbitrator concluded that the evidence was admissible because the employer had reasonable grounds to conclude that the grievor was dishonest based on prior visual observation of his behaviour and medical reports which appeared inconsistent with his alleged disability. The arbitrator also concluded that there were no other less intrusive, reasonable alternatives to enable the employer to obtain the necessary information. The grievor had repeatedly advised his doctors and the employer that he was incapacitated, so the arbitrator rejected the assertion that he should have been confronted with the allegations that he was not disabled. Also, he had a very thick medical file which contained medical reports which appeared to rely on his self-reporting of his condition for which no objective medical evidence was available. The video evidence was thus admitted and found to support the employer's conclusion that the grievor was dishonest. The discharge was upheld.

³² *Re: Greater Vancouver Regional District and GVRDEU (Rotaru)* (1996), 59 L.A.C. (4th) 45 (McPhillips).

- d. In *Re: Toronto Transit Commission and ATU, Local 113 (Adams)*³³ an arbitrator declined to admit video tape evidence, again, in a case involving allegations of abuse of disability benefits. The arbitrator found that the employer's witness had no first-hand knowledge from which to justify a reasonable basis for the surveillance. The purported justification was alleged discrepancies between medical reports the witness had not read, and a concern that the grievor was tending to child care responsibilities rather than attending work. The arbitrator concluded that the grievor's child care responsibilities could have been questioned without necessarily alerting him to any concern that he was fraudulently abusing sick leave.
- e. In *Pacific Press Ltd. and Vancouver Printing, Pressmen Assistants and Offset Workers Union, Local 25 (Dales)*³⁴, the arbitrator concluded that there were reasonable grounds to conduct surreptitious surveillance given the grievor's history of past absences and an answering machine at the home which suggested that he was operating a business. However, on the

³³ (1997), 61 L.A.C. (4th) 218 (Saltman).

³⁴ (1997), 64 L.A.C. (4th) 1 (Devine).

second branch of the test, the arbitrator concluded that the employer had not conducted the surveillance in a reasonable manner. In this case, private investigators masquerading as hang-gliding clients engaged the grievor to provide them with a lesson and, with his permission, video-taped him in a demonstration. It was found as a fact that this activity was not inconsistent with, or harmful to his stated workplace injury. Accordingly, the evidence was ruled admissible solely for the purpose of establishing that the employer was justified in conducting further investigation of his medical condition.

While the previous cases deal with video surveillance outside the workplace in the context of allegations of the abuse of sick leave, in the case of *St. Mary's Hospital and HEU*³⁵ the appropriateness of video surveillance within the workplace was considered using the same balancing test. The case involved a union grievance arising from the discovery of a hidden video camera installed in the workplace. After an extensive review of the authorities, the arbitrator concluded:

- There is a hierarchy of protection afforded to the right of privacy. Actions which involve actual bodily intrusions, such as bodily searches, are protected by the law of trespass and assault.

³⁵ (1997), 64 L.A.C. (4th) 382 (Larson).

Accordingly, an employer may not do anything which involves touching without the employee's consent.

- Next in order of importance are those actions which involve searches of personal effects and spaces. This conduct is not governed by the law of trespass and assault, but rather by balancing the right of the employee to privacy with the employer's legitimate interests. Surveillance cases were found to be analogous.
- The arbitrator concluded that the employee's right to privacy can be assessed on a variable scale. Benign surveillance used for the benefit of employees, such as video taping for the purposes of training or to assist key supervisors who are temporarily disabled, may need little justification.
- Next are cases involving surveillance conducted to provide security to both employees and the employer. This typically involves open video monitoring. Where installed without challenge, a union is taken to have accepted any infringement of privacy. However, hidden surveillance is deemed to have the greatest potential to offend the privacy interests of employees.

Such cases require a strict justification by the employer. Monitoring of production work, for disciplinary purposes, or of social or any other sensitive areas of the workplace such as locker rooms, washrooms or lunch rooms, are the most serious kinds of infringement. Surveillance directed at a particular individual rather than a group of employees may be less serious.

- Ultimately the onus is on the employer to justify the encroachment on privacy rights by demonstrating that there is a substantial problem and that there is a strong probability that the surveillance will assist at solving that problem. The employer must also demonstrate that the surveillance is not in contravention of any terms of the collective agreement. Furthermore, it must exhaust all less intrusive alternatives and it must insure that the surveillance is conducted in a systematic and non-discriminatory way.

In this case it was found that there was a less intrusive alternative to conducting video surveillance. The justification for the surveillance was the disappearance of certain documents from a manager's desk. However, the arbitrator concluded that the less intrusive alternative was to ensure that in important management documents were kept in a secure place.

This last decision deals not with the admissibility of surreptitious video evidence, but rather with the *propriety* of an employer engaging in such conduct in the workplace in alleged reliance on its management rights to do so.

However, on the sole question of admissibility of such evidence in an arbitration proceeding, one dissenting voice to the balancing of interests approach is that of Arbitrator Bendel in *Kimberly-Clarke Inc. and IWA-Canada, Local 1-92-4*³⁶. The arbitrator rejected the British Columbia cases which spawned the balancing of interests test, as well as the Ontario cases which follow it. He concluded that the B.C. cases are not persuasive in Ontario given the inapplicability of the *Charter* in private arbitration, and the absence of the sort of privacy legislation found in B.C. He concluded that “the right to privacy has no legal underpinning in Ontario”.³⁷ On the question of admissibility, the arbitrator acknowledged that ss. 48(12)(f) of the *Labour Relations Act, 1995* permits an arbitrator to accept evidence whether admissible in a court of law or not. While acknowledging that arbitrators may exclude evidence that a court would admit, he also found that relevance is the most important criteria in determining admissibility. He also concluded that it is not prudent or proper to exclude evidence that a court would otherwise admit, save in exceedingly rare circumstances. These would include evidence prohibited by the collective agreement or obtained in violation of it, grievance procedure discussions, polygraph tests, privileged discussions, and confidential management documents. Furthermore, he noted that at common law, the illegal acquisition of information

³⁶ (1996), 66 L.A.C. (4th) 266 (Bendel).

³⁷ Above, p. 281.

does not render it inadmissible. Furthermore, he stated that it is unclear why video surveillance should be excluded and not still-photographs, the verbal testimony of a private investigator or the evidence of a manager who observes the activity.

Notwithstanding the very carefully reasoned conclusion of the arbitrator, there are a number of bases upon which to challenge the decision:

- a. As the arbitrator himself notes, the courts have recognized that an arbitrator may properly exclude evidence which might otherwise be admissible in court.
- b. It is simply wrong to assert that there is no legal authority for the proposition that there is a right of privacy in Ontario. While there is no statutory basis for such a general right as there is in British Columbia, the courts have begun to recognize such a right at common law.
- c. Arbitrators have often relied on policy underpinnings to exclude evidence in specific cases. For example, as the arbitrator himself recognizes, it is generally considered that evidence of conversations during the grievance procedure are inadmissible. Clearly, such evidence may be relevant to the proceeding.

However, it has long been considered that it is inappropriate to admit such evidence since as a matter of labour policy it is important to foster settlement discussions. The admission of such evidence is seen to impair this goal. Similarly, it should be open to arbitrators as a matter of labour policy to factor in the privacy rights of employees when considering the admissibility of evidence which is by nature very intrusive.

- d. It can be argued that the distinction between video surveillance and other forms of surveillance such as photographs and visual observance is in the level of intrusion that the former entails. The offence to privacy is not merely in the observance (though the manner in which employee activity is observed can certainly be offensive) but in the effect of the intrusion. Video surveillance has the capacity to create a permanent and extensive “real time” record of someone’s activities which clearly exceeds the capacities of still-photograph, or visual observance. On that basis, it can certainly be argued that the nature of the intrusion and its interference with privacy is more extensive and thus needs greater justification.

Drug Testing

Drug testing in Canada has largely resulted from cross-border influences from the United States. In the United States, drug testing in the workplace started in the public sector and moved to the private sector as part of the “war on drugs” promoted by the administration of President Ronald Reagan.³⁸ The rationale for drug testing in American workplaces was to penalize drug use generally as a means to reduce drug use at large. It was not limited to addressing concerns about impairment or performance alone. In contrast, the approach in Canada has been much more cautious, generally reflecting the view that samples should only be requested for cause, such as when there is evidence of impairment in the workplace.

The “privacy” concern about drug testing relates to the interest of employees in preventing invasions of their bodily integrity by employers through the collection of bodily substances from which speculation about their fitness to work might result. The arbitral and human rights authorities have so far limited an employer’s right to collect this sort of information to those occasions where there exists reasonable grounds to conclude an employee may be unfit for work due to the effects of alcohol and drugs.

We shall first review the development of the response of arbitrators to drug testing in the unionized workplace in Canada, particularly as an exercise of management rights. However, there is a small but developing body of human rights law which is also applicable.

³⁸ See *Entrop v. Imperial Oil Limited* (No. 8) (1996), 27 C.H.R.R. D/210 (Ont. Bd. Inq.). pp. D/217-D/219.

This is now relevant to the labour arbitration context because of the ability of arbitrators to apply human rights legislation when arbitrating grievances.³⁹

2. Exercise of Management Rights

One of the earliest reported cases to deal with the question of drug testing is the decision of Arbitrator M. Picher in *Canadian Pacific Ltd. and UTU*,⁴⁰ where the arbitrator upheld the discharge of a grievor who was terminated following criminal charges against him for cultivating a substantial amount of marijuana at his home. Following the charges, the grievor refused to undergo a drug test and was uncooperative with a company investigation into his conduct. The arbitrator relied on arbitral awards which support the right of an employer to require an employee to submit to a medical examination where the purpose is to confirm that he or she is physically fit to perform the assigned work in a safe manner. Relying on this principle, the arbitrator found:

Does an employer's right to require an employee to undergo a fitness examination extend to requiring a drug test? I am satisfied that in certain circumstances it must. Where, as in the instant case, the employer is a public carrier, and the

³⁹ See e.g., *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A ss. 48(12)(j); *Canada Labour Code*, R.S.C. 1985, c. L-2, ss. 60(1)(a.1).

⁴⁰ (1987), 31 L.A.C. (3d) 179 (M. Picher).

employee's duties are inherently safety sensitive, any reasonable grounds to believe that an employee may be impaired by drugs while on duty or subject to duty must be seen as justifying a requirement that the employee undergo a drug test.

...

Any such test must, however, meet rigorous standards from the stand point of the equipment, the procedure and the qualifications and care of the technician responsible for it. The result of a drug test is nothing more than a form of evidence. Like any evidence, its reliability is subject to challenge and an employer seeking to rely on its results will, in any subsequent dispute, bear the burden of establishing, on balance of probabilities, that the result is correct. The refusal by an employee so submit to such a test, in circumstances where the employer has reasonable and probable grounds to suspect drug use and risk impairment, may leave the employee liable to removal from service.

...

On the other hand, it is not within the legitimate business purposes of an employer, including a railroad, to encroach on

the privacy and dignity of its employees by subjecting them to random and speculative drug testing. However, where good and sufficient grounds for administering a drug test do exist, the employee who refuses to submit to such a test does so at his or her peril.⁴¹

In this case, the discharge was upheld because the arbitrator found that there were reasonable grounds for the employer to suspect that the grievor was heavily involved in a drug cultivation and use, and may well have been drug dependant. As a result, his lack of cooperation in the investigation, including his refusal to undergo a drug test, seriously damaged his credibility and led the arbitrator to conclude that he could be rightly discharged.

In the later decision of *Canadian National Railway Co. and UTU*,⁴² the same arbitrator allowed a grievance against discharge of a rail employee for failing to undergo a drug test. Some months prior to the discharge during a medical examination, a urinalysis test disclosed positive results for the presence of drugs in the grievor's system. Subsequent tests proved negative. The grievor admitted to prior use of marijuana and cocaine, and agreed to undergo random drug tests. However, he insisted that he had never used drugs at work. Furthermore, it was undisputed that the grievor never been found to been under the influence of drugs at

⁴¹ Above, pp. 185-187

⁴² (1989), 6 L.A.C. (4th) 381 (M. Picher).

work. Following a fatal accident at work, for which the grievor was found not to be responsible, he was ordered to undergo a further drug test. The grievor was discharged after missing several test appointments, owing he said to his unavailability due to attending courses at university. However, the grievor had offered to present himself for a test at a subsequent occasion when he was free. The arbitrator relied on his earlier award *Canadian Pacific Ltd.* to conclude that:

. . . the right that an employer may have to demand that its employees be subjected to a drug test is a singular and limited exception to the right of freedom from physical intrusion to which employees are generally entitled by law. As such it must be used judiciously and only with demonstrable justification, based on reasonable and probable grounds.⁴³

Ultimately, the arbitrator concluded that there were no reasonable and probable grounds to support the conclusion that the grievor was under the influence of drugs which would then justify a drug test. Furthermore, though the grievor had previously agreed to undertake a quarterly drug tests due to his prior admission of drug use, it was found that his university studies, which were known to the company, presented him with a valid reason for

⁴³ Above, p. 387.

not attending on the initially scheduled appointments. Given that the grievor had agreed to attend on a subsequent date, no just cause could be found.

In the subsequent case of *Canadian National Railway Co. and UTU*⁴⁴ the same arbitrator reduced a discharge to a time-served suspension. The grievor, a Canadian employee of a train company working in the United States, injured himself repairing a light on a locomotive. The American train master required the employee to submit a urine sample for drug testing, and the grievor complied. The sample subsequently proved positive for marijuana. The grievor was then dismissed.

The arbitrator accepted that it was well known that certain American regulations applied to CN employees working in the United States. The applicable regulation, incorporated in the company's general operating instructions, provided that an employee could be subject to post-accident testing, and that a positive urine test leads to a presumption of impairment at the time the test was taken. This presumption could be avoided by the employee also agreeing to undergo a blood test, though in this case the grievor refused. A grievor who refused to cooperate by providing a blood test was disqualified from working in the United States for a period of nine months.

The arbitrator found that the rules had been clearly brought to employees' attention insofar as their employment within the United States was concerned. This, and the grievor's

⁴⁴ (1990), 11 L.A.C. (4th) 364 (M. Picher).

violation of the rules justified some discipline. However, the arbitrator also found that it had not been made clear to Canadian employees that a breach of the American regulations in the United States could result in their termination from employment in Canada. Accordingly, it was found that there was no basis to impose discharge. The arbitrator further found that the American "presumption of impairment" from a positive urinalysis test had no logical or scientific basis given that a positive result could only show prior exposure and no precise information concerning when, where or in what quantity the drug was taken. The union had also attempted to argue that the results of the drug tests could not be used on the basis of alleged illegality. The arbitrator rejected this contention.

In *Provincial - American Truck Transporters and Teamsters Union, Local 880*⁴⁵ Arbitrator Brent upheld a union grievance over the implementation of mandatory and universal drug testing for drivers by a transport company. The arbitrator relied on the decision in *Canadian-Pacific* and the cases involving the limits on the right of an employer to conduct employee searches. The arbitrator stated:

Although public policy is often a difficult thing to determine, Canadian jurisdictions have made clear policy statements indicating a desire to rid the roads of impaired drivers. Having said that, the public good does not necessarily require a

⁴⁵ (1991), 18 L.A.C. (4th) 412 (Brent).

wholesale disregard for personal liberty. Is there any reason to treat the issue of drug and alcohol testing as being so different from searches to prevent employee theft-cases where the interests of the employer and safeguarding his property and the privacy interests of the employees have been balanced for years? We think not.

...

If mandatory universal testing is to be justified, absent a specific term to allowing it, then there should at least be evidence of a drug and/or alcohol problem in the workplace which cannot be combated in some less invasive way.⁴⁶

The arbitrator concluded that there was no evidence to support the conclusion that drug and alcohol use in the workplace was a problem. Furthermore, she concluded that nothing in the collective agreement waived the employee's right to privacy absent reasonable grounds to demand a drug test.

⁴⁶ Above, pp. 424-425.

In *Esso Petroleum Canada and CEP, Local 614*⁴⁷ a B.C. board of arbitration considered a union grievance concerning a very broad-ranging alcohol and drug policy which, among other things, provided:

- That the presence in the body of illicit drugs, unprescribed drugs and a blood alcohol concentration of in excess of .04% were prohibited;
- That current or candidates for safety sensitive positions were required to notify management if they had a current or past substance abuse problem or a past conviction relating to drugs;
- For mandatory random drug and alcohol testing of all safety sensitive employees, as well as testing after a significant work accident or on the basis of a reasonable and probable grounds.

The unreported full text of the award, dated May 24, 1998, gives one of the most extensive arbitral analysis on the development of drug testing in the workplace, as well as the legal debate in Canada concerning its propriety. It notes two Supreme Court of Canada Charter decisions dealing with s. 8 which note that a higher standard of review is required when a search and seizure relates to the integrity of the body. This is given that an invasion of the sanctity of a person's body is considered much more serious than an invasion of his or

⁴⁷ (1994), 56 L.A.C. (4th) 440 (McAlpine), an abbreviated version of an unreported case.

her office or home.⁴⁸ The board concludes that a higher standard of justification for a search of the body, such as with a drug test, is required than for other searches. Nevertheless, it relies on cases such as *Doman Forest Products Limited* and *Provincial-American Truck Transporters* to conclude that the rights of employees to privacy and an employer's legitimate business interests must be balanced with a two-part test:

From these authorities we distill a two step test:

The first, being the test of justification or adequate cause. Is there evidence of a drug and/or alcohol problem in the workplace? Is there a need for management's policy?

Second being a test of reasonableness including a consideration as to the alternatives available and whether the problem in the workplace could be combated in a less invasive way.⁴⁹

In the end, the board ruled: that the employer's work rules concerning presence in the body of alcohol and drugs were not acceptable; that safety sensitive employees could be required to disclose present but not past substance abuse problems; that mandatory random

⁴⁸ See *R.v. Pohoretsky* (1987), 39 D.L.R. (4th) 699 (S.C.C.); *R.v. Dyment* (1988), 55 D.L.R. (4th) 503 (S.C.C.).

⁴⁹Footnote 47, at p. 447.

testing for safety sensitive employees was acceptable in the context of rehabilitation for a reasonable time,⁵⁰ but was otherwise unacceptable; that post-accident and reasonable cause testing were acceptable.

The decision of Arbitrator Whitaker in *Metropol Security, a Division of Barnes Security Services Ltd. and USWA, Local 5296 (Drug and Alcohol Testing)*⁵¹ relies on *Provincial-American Truck Transporters* to conclude that a test of reasonableness must be applied to an employer policy on random drug testing. The policy was imposed by the employer, a security company, on the demand of a client, Imperial Oil Limited. In this case, the employer conceded that it would not have imposed testing but for the demand for Imperial Oil, and indeed it did not impose this testing at work sites other than at Imperial Oil.

In this case, the arbitrator ruled that there was no evidence of substance abuse or performance problems in the workplace which would require testing, nor was there any concern that existing monitoring practices were inadequate. It was also not required by law. Accordingly, the arbitrator found it to be unreasonable and was not justified merely on the basis of customer demand. The arbitrator also concluded that he had no jurisdiction to rule on pre-employment testing given that the union's bargaining rights applied only to employees

⁵⁰ See also *Fiberglass Canada Inc. and CTWU, Local 1305* (1989), 5 L.A.C. (4th) 302, where an arbitrator ordered random testing as part of a reinstatement.

⁵¹ (1998), 69 L.A.C. (4th) 399 (Whitaker).

and not prospective employees. The arbitrator also applied the provisions of Ontario's *Human Rights Code*, which will be discussed below.

The relationship between drug testing and customer demands, and also the danger that is posed by unfounded suspicion of drug abuse absent any proof of employment problems, is amply demonstrated in the case of *C.H. Heist Ltd. and UCWU, Local 848*.⁵² The employer provided vacuum operations to various petro chemical companies. The grievor worked for the employer at the work sites of various customers. Two supervisors of one customer suspected the grievor of smoking marijuana in a shed, though at the hearing the arbitrator concluded that there was no evidence of physical impairment, no evidence of smoke, cigarettes, butts or matches, nor of conclusive proof that the supervisor smelled marijuana smoke. However, their suspicions resulted in the suspension of the grievor pending investigation, and this led to him being barred from the work sites of other customers. The grievor protested his innocence, and the employer strongly recommended that he obtain a drug test to "prove" his innocence. The subsequent test proved negative.

The arbitrator ultimately concluded that there was no just cause for the suspension given that there was no proof of misconduct. It ruled that the concept of just cause did not permit the discipline of an employee merely at a customer's request. The arbitrator also found

⁵² (1991), 20 L.A.C. (4th) 112 (Verity).

that the drug test was an unwarranted invasion of the employee's privacy since there was no reasonable and probable grounds to suspect drug abuse.

3. Human Rights Applications

As noted above, the authority of labour arbitrators to apply human rights legislation in Ontario and the federal jurisdiction, notwithstanding any conflicts with the collective agreement, means that the *Human Rights Code*⁵³ and *Canadian Human Rights Act*⁵⁴ and decisions related to drug testing reached thereunder will have application in arbitration proceedings. At present there are two key cases. While the courts have been quick to state that in the human rights context, the issue is not one of privacy, it is respectfully submitted that in a limited sense this is not correct. It can be inferred from these decisions that a right of privacy is recognized by these cases to the extent that they recognize the right of handicapped workers to avoid testing which could disclose information derived from bodily substances, absent reasonable grounds to conclude that they may be unfit to work due the use of alcohol or drugs.

The leading Ontario case is *Entrop v. Imperial Oil Limited (No 8)*.⁵⁵ The case concerns a substance abuse policy implemented by Imperial Oil Limited at the behest of its

⁵³ R.S.O. 1990, c. H.19 as amended.

⁵⁴ R.S.C. 1985, c. H-6 as amended.

⁵⁵ (1996), 27 C.H.R.R. D/210 (Ont. Bd. Inq.). The case actually involves eight interim decisions concerning both procedural and substantive matters. For a review of the development of the substance abuse policy at issue see also (1995), 23 C.H.R.R. D/196.

American parent Exxon. While the case is multi-faceted and deals with such issues as policy requirements to disclose past substance abuse problems, reprisal for filing human rights complaints and the jurisdiction of a human rights board of inquiry, for our purposes the eighth decision dealing with drug and alcohol testing is relevant. The employer imposed a policy which provided for pre-employment testing, random drug testing of safety sensitive employees, as well as testing for cause, post accident, certification for safety sensitive positions, and for re-instatement after substance abuse treatment.

The Code prohibits discrimination with respect to employment because of handicap. However, unlike the federal legislation, the Ontario statute does not expressly include substance dependency within the s. 10(1) definition of “because of handicap”. However, on the basis of expert evidence, the Board of Inquiry concluded that “drug abuse and drug dependency are diseases, illnesses, malfunctions and mental disorders, which can create mental impairment and result in mental disorder and physical disability,” and accordingly constitute a handicap within the meaning of the Code.⁵⁶

The board then applied the standard two-part test for assessing claims of discrimination under the Code: that the complainant must make out a prima facie case of discrimination, and if so, the employer bears the onus of meeting any defense that it may have. The board concluded that a prima facie case of direct discrimination was made out in the following ways:

⁵⁶ Above, p. D/213.

- The testing procedures were measures to assist the employer in identifying persons who have handicaps or perceived handicaps and who will be disciplined. The evidence was that those who tested positive in a pre-employment test were not hired, and those who tested positive in a subsequent test were disciplined. In the case of safety sensitive employees, the penalty was automatic termination.

- The discipline of employees who refused to submit to a test was also direct discrimination.

- It found on the evidence that the employer perceived occasional drinkers and drug users to be handicapped given that it classed them together with dependant users and found them to be equally unfit for duty.

The arbitrator concluded that the only defense to a prima facie case of direct discrimination is found in s. 17 of the Code which reads:

17(1) The right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

(2) The commission, a board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating these needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.⁵⁷

The board found that the onus of proving incapacity lies on the employer, and that this means it must establish the defense on an objective basis, by a preponderance of evidence. It ruled that the employer had to prove with clear and convincing evidence that the requirements of the policy were directly connected to job performance and that its assessment of an employee's incapacity was both fair and accurate. It also found that the section 17 defense is a more burdensome defense than existed in prior legislation.

In earlier decisions, reaffirmed in this one, the board ruled that freedom from impairment at work by alcohol and drugs is a bona fide occupational requirement. However, after extensive expert evidence, the board concluded that a positive drug test through urinalysis cannot establish impairment at the time of the test. It demonstrates merely exposure to a drug at some point in the past. In contrast, there was expert evidence that less invasive

⁵⁷ It appears that s. 17 affords an employer the only defense available when discrimination on account of handicap is made out, whether it is classed as direct or indirect discrimination; *Ontario Nurses Association v. Etobicoke General Hospital (1993)*, 14 O.R. (2d) 40 (Ont. Div. Ct.).

techniques could be used to detect impairment and reduce the problems posed by substance abuse in the workplace including supervisory and peer assessment, employee assistance programs and health promotion programs.

With respect to alcohol testing through a breathalyser, the board found that it was difficult to draw a direct link in each case between blood alcohol levels and impairment. However, most of the experts testified that breathalysers were useful for measuring impairment due to alcohol. However, one of Imperial's key goals in implementing testing was to deter drug and alcohol use, and it argued that on this basis alone it was justified in using testing. However, on the evidence, the board concluded that there was a lack of a definitive research which could demonstrate a cause-and-effect relationship between the implementation of testing in the workplace and deterrence of drug and alcohol use. The employer also argued that a positive test gave it a "reasonable apprehension" of past, present or future impairment on the job by the employee. The board concluded that this was no more than a stereotypical assumption or impressionistic evidence which was insufficient to meet a defense under section 17. Accordingly, the board ruled:

- Pre-employment and random drug testing were unlawful because a positive drug test did not correlate with impairment;
- Drug testing which takes place for cause, after an accident, upon certification of a safety sensitive employee and after re-instatement of

a rehabilitated employee may be permissible but only if the respondent can establish that the testing is necessary as one facet of a larger process of assessment of drug abuse.

- Random alcohol testing is unlawful because the respondent failed to show that such screening was reasonably necessary to deter alcohol impairment on the job. As with drug testing, the board found the other forms of alcohol testing to be permissible if part of a larger process of assessing alcohol abuse.

An appeal to the divisional court was dismissed.⁵⁸

The leading federal case is *Canadian Civil Liberties Association v. Toronto-Dominion Bank*.⁵⁹ The Toronto-Dominion Bank implemented a policy in 1991 which provided for mandatory drug testing by urinalysis of all new employees after an offer of employment is made, and all returning employees who had previously terminated their employment. An offer of employment was made only after the individual signed a document agreeing to be tested.

⁵⁸ *Martin Entrop and Imperial Oil Limited* (unreported), Court File No. 597/96, Feb 6, 1998, (Ont. Div. Ct.) leave to appeal to the Ontario Court of Appeal granted May 12, 1998.

⁵⁹ (1994), 22 C.H.R.R. d/301 (Can. H.R. Trib.) reversed in part (1996), 25 C.H.R.R. D/373 (F.C.T.D.), reversed (unreported), July 23, 1998, Court file No. A-392-96, (Fed. C.A.).

While a positive test resulted in slightly different consequences, depending on the drug,⁶⁰ the general result was that this would lead to a requirement that the employee be assessed at an addiction centre, at the bank's expense, possibly including further treatment. Inevitably, it would be followed by further drug tests. Failure of further drug tests and refusal to participate in rehabilitation would lead to termination, whether or not there was any proof of job performance problems.

The *Canadian Human Rights Act* specifically defines "disability" in section 25 as including "previous or existing dependence on alcohol or a drug." The tribunal rejected the bank's proposition that the Act protected only dependence on legal drugs and not illicit ones. It concluded that the Act provides protection regardless of the nature of the drug. The fact that the use of illegal drugs could lead to criminal sanctions did not conflict with such a finding, the tribunal ruled.

However, the tribunal concluded that a prima facie case of discrimination was not made out. It concluded that any termination which resulted from the policy was as a result of a persistent refusal to comply with a condition of employment and that it was, thus, not necessary to consider whether not a perception of dependence was at the root of this employer action. It noted that termination resulted after attempts at accommodation and

⁶⁰ The one exception is codeine where a convincing explanation for the positive test could result in the matter not being pursued further. Codeine is a drug which can show up in drug tests after the ingestion of prescribed medication such as Tylenol.

repeated failure of tests, whether or not the employee was in fact drug dependent or merely a causal user.

However, in the event that it was wrong on this finding, the tribunal ruled that the discrimination would be adverse effect discrimination, and not direct discrimination. It stated that this was because the testing applied equally to a whole class of employees, while employment was terminated only for the small minority who tested positive on several occasions. On that basis, the tribunal then applied the duty to accommodate which the Supreme Court of Canada has applied to cases of adverse impact discrimination.⁶¹ The tribunal found that by referring employees for assessment after positive tests, and by paying for whatever treatment was required while maintaining the employees on the payroll, the bank had met its duty of accommodation. It found that to require more would constitute undue hardship.

However, in the event that the discrimination was direct and not adverse effect as it had ruled, the tribunal then considered the bona fide occupational requirement defense which was available pursuant to section 15 of the Act. This required the application of the Supreme Court of Canada's two-part test⁶² which involves assessing whether the limitation was

⁶¹ See e.g. *Centre Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 72 D.L.R. (4th) 417 (S.C.C.).

⁶² See *Ontario (Human Rights Commission) v. Etobicoke* (1982), 132 D.L.R. (3d) 14 (S.C.C.); *Brossard v. Quebec* (1988), 53 D.L.R. (4th) 609 (S.C.C.).

imposed in good faith (the subjective element) and whether the requirement was reasonably necessary/rationally connected to the performance of the job (the objective element).

The tribunal concluded that testing was imposed in good faith. However, it concluded that the bank would fail to meet the objective element of the test and, accordingly, would fail to establish a bona fide occupational requirement. This was because it found that the bank had conducted no research to support its impressionistic assumption that it might have a drug problem amongst its employees, and that there was no statistically valid evidence to support the conclusion that bank employees were reflective of the drug use in the general population. Furthermore, it found that there was only one example of theft by a bank employee who was drug dependent, and in this case it was an individual who would not have been subject to the policy. No other thefts at the bank had been linked to the use of drugs. Furthermore, while there was evidence, in the form of American studies, showing a correlation between drug use and job performance in the United States postal service, there was no evidence to show any correlation with the bank employee population. It also found that the testing was not “reasonably necessary” to assure the efficient and economical performance of work, because the vast majority of employees were not subject to testing, and those who passed the initial screen were not monitored again in the future unless there was reasonable grounds to conclude that there was a problem.

The tribunal concluded that if testing were reasonably necessary, the bank would have to test all employees on a regular basis. Ultimately, it found that the testing was a serious

invasion of privacy of individuals which could only be seen as reasonable in the face of substantial evidence of a problem.

On a judicial review application, the Federal Court Trial Division found that the tribunal was incorrect in concluding that no discrimination occurred, since a sub-group of those who would be adversely treated by the policy included drug dependent employees. However, the court agreed with the tribunal's decision that, in the event it was wrong that there was no discrimination, it was adverse impact discrimination. This was because it was "a neutral rule" applicable to a larger group, which applied in a negative fashion to a protected group. However, the court then concluded that the tribunal had erred in assessing whether or not the bank had accommodated drug dependent employees because it had failed to address the question of whether or not drug testing was "rationally connected" to the performance of the job. However, the court stated that this did not require a consideration of individual performance issues, since the point of undue hardship was reached for an employer when it was faced with the continued presence of an employee who could not be rehabilitated and persisted in the use of illegal drugs.

In a subsequent decision, the Federal Court of Appeal dismissed the appeal of the bank and upheld the cross-appeal of the respondents by allowing the application for judicial review and setting aside the decision of the tribunal. It referred the matter back to a differently constituted panel on the basis that the bank's drug testing policy is a prohibited discriminatory

practice. However, the 2-1 majority disagreed on whether the discrimination could be characterized as direct or indirect.

Justice Robertson rejected the contention that the Act protects only those dependent upon “legal” drugs, noting the impracticality of this given that “legal” drugs may also be obtained and used in an “illegal” fashion.⁶³ The judge faulted the tribunal’s conclusion that there was no prima facie discrimination, particularly since it relied on the bank’s steps to attempt to accommodate persons who tested positive. Stated the Judge:

A finding of reasonable accommodation does not negate the legal conclusion that an employment policy has a discriminatory effect on certain employees. That is why the legal term “prima facie discrimination” is used in the jurisprudence. The accommodation doctrine is a defense to a prima facie case of discrimination, not a cleansing agent. In the context of the Act, the legal effect of the defense once established is to place a discriminatory practice outside the prohibited category.⁶⁴

⁶³ Paragraph 16

⁶⁴ Paragraph 20

The Judge also noted that the tribunal had failed to appreciate that if a rule was not “reasonably necessary” or rationally connected to job performance (as it is so found), then the fact that the employer was still willing to “accommodate” employees was irrelevant.⁶⁵ The Judge also concluded that the fact that the bank treated casual dependent drug users the same was irrelevant for the purposes of the discrimination analysis since the “central issue is whether the bank’s policy has the effect of depriving or tending to deprive drug dependant person of employment opportunities.”⁶⁶ The Judge failed to see how the conclusion could be avoided that the testing practice was discriminatory since it aimed at insuring a workplace free of illegal drug use and thus “must necessarily impact negatively on those who are drug dependant.”⁶⁷ As to the debate over whether testing was directly or indirectly discriminatory, the Judge stated:

*I cannot accept that a work rule is neutral when it targets the removal of employees who fall within a class protected by human rights legislation. An employment policy aimed at achieving a drug-free work environmentshould not be deemed neutral when by design it is directed to all those who use illegal drugs, and by necessity, those who are drug dependant.*⁶⁸

⁶⁵ Paragraph 21

⁶⁶ Paragraphs 22 and 23

⁶⁷ Paragraph 24

⁶⁸ Paragraph 31

While direct discrimination has usually required that a policy be discriminatory “on its face”, the judge stated:

I see no reason why an impugned employment policy has to be patently exclusionary before qualifying as direct discrimination. Direct discrimination may also arise where the exclusion of a protected group is evident on a casual reading of the challenged policy. The bank’s policy of achieving a drug-free work environment must necessarily effect those who are drug dependent. There is a sufficient proximity between the bank’s policy and the category of drug dependant persons as to conclude that we are dealing with a case of direct discrimination. In conclusion, I find the bank’s policy of eliminating drug users from its workforce, on its “face”, directly discriminatory.⁶⁹

While Justice McDonald agreed in the result, the judge found that the discrimination was indirect discrimination rather than direct. The judge stated:

⁶⁹ Paragraph 34. In stating this, the judge recognized at Paragraph 35, that there is no duty to accommodate in the case of direct discrimination given that the Act, unlike the Ontario Code, does not incorporate one.

The bank's drug testing policy constitutes adverse effect discrimination because of the rule that those who test positive three times or refuse to undergo a urinalysis test are dismissed. While this rule applies equally to all new and returning employees, it impacts adversely on those employees who are dependant on drugs. The policy, therefore fits directly in the definition of adverse effect discrimination: the policy is an employment rule that is equally applicable to all to whom it is intended to apply, but is discriminatory because of it affects a person or group of persons differently of others to whom it may apply. While the reason for dismissal may be a result of the "persistent" use of an illegal substance, nevertheless, the rule directly impacts more negatively on a protected class of individuals under the Canadian Human Rights Act - dependant drug users.⁷⁰

The judge concluded on the basis of the evidence before the tribunal that there was no rational connection between the policy and job performance. The judge also found that individual job performance must be considered in the context of reasonable accommodation stating:

⁷⁰ Paragraph 69

If an employee is not abusing drugs while at work, and his or her work performance meets the employer's job requirements, then the disability poses no problem. If, however, an employee exhibits poor performance and the bank believes it may be related to a drug dependency, then (and only then) should the bank be able to test the employee and, if necessary, send the employee to some form of rehabilitation or counseling program. To comply with the reasonable accommodation component an employee cannot be tested unless after receiving treatment his or her work performance remains inadequate. Thus, if after receiving treatment, the employee's work performance is fine, no further test should be undertaken. If after receiving treatment the employee's performance continues to remain inadequate, the bank is justified in re-testing and dismissing the employee if the poor performances are related to drugs. The bank need not send the employee for further treatment.⁷¹

The judge agreed with the findings of the Ontario Board of Inquiry *Entrop* that objective evidence of poor performance was required.

⁷¹ Paragraph 103

In his dissent Chief Justice Isaac agreed that a prima facie case of discrimination had been made out, but concluded that it was adverse impact discrimination. He agreed with the tribunal that reasonable accommodation had been made out.

One of the only reported arbitral decisions to rely on human rights legislation for an analysis of drug testing in the workplace is the case in *Metropol Security and USWA*⁷².

The parties agreed that a person suffering from an alcohol or drug dependency was handicapped, and that random drug testing and subsequent removal from work discriminates against such persons. However, the parties disagreed on the type of discrimination, with the union arguing that it was direct, while the employer argued that it was indirect. Ultimately, the arbitrator did not resolve this dispute since he found that even if the employer was correct, it could not meet any defense available to it because the testing program was not reasonable. In assessing the reasonableness of the policy, the arbitrator determined that the analysis would be the same as is used by arbitral authorities in analyzing drug testing as an exercise of management rights. Again, he concluded that mere customer preference cannot form the basis of a defense.

E-mails

⁷² Above, Footnot 51.

We were unable to locate any reported arbitration decisions dealing with the question of admissibility of e-mail evidence or the propriety of management surveillance of employee e-mail. However, apart from counter-balancing privacy considerations, there should be no question that e-mails are records which can be compelled and relied upon in legal proceedings.⁷³ This is subject to such objectives as arguments about privilege, breach of confidence and other privacy considerations.

In the context of employer monitoring of e-mails, one of the challenges posed is that this form of communication can be compared in different circumstances to many other types of communication, each of which attracts its own privacy considerations. One could argue that the technology, which includes inter-office communication and the ability to communicate with the world at large through the internet, is at various stages not unlike an inter-office memo, a posting on a bulletin board, a telephone conversation and in, other circumstances, person-to-person mail. For some of these, the privacy expectations and protections are well established. For others it is less obvious.

One line of argument is that the matter can be seen in light of a legitimate exercise of an employer's property rights. This argument considers that since an employer owns the computer system and the e-mail program, that employees have no reasonable expectation

⁷³ See, *Entrop v. Imperial Oil Limited (No. 7)* (1995), 23 C.H.R.R. D/2.3 (Ont. Bd. Inq.) where a finding that an employer committed a reprisal against the human rights complainant was founded, in part upon comments from one manager to another in an e-mail. See also discussion in J.R. Brooke, "Your Company's E-mail System: An Efficient Communications Network or a New Weapon in Employer-Employee Litigation?" (1995), 5 E.L.L. Rep. 20.

of privacy and that accordingly the employer is entitled to read anything that appears upon the system.⁷⁴ However, given the multi-faceted use of e-mail in the context of both workplace and private communication, it seems far too simplistic to analyze the questions solely on this basis and reject any place for the weighing of employee privacy interests.⁷⁵ While employer property and other legitimate workplace business interests are clearly important and relevant considerations, a simple resort to proprietary interests fails to properly recognize the place of this form of communication in workplace human interaction. In many respects, this form of computerized communication can be analogized to a form of workplace "space." As with any other employer search of workplace "space," the extent of any privacy interest for which will depend on the circumstances.

For example, an e-mail generally distributed throughout a workplace will clearly not have the same privacy expectation that will have an e-mail sent from a work station to a colleague, friend, spouse or union official. Having said that, however, it is recognized that absent the use of encryption technology, e-mail communications, particularly over the internet, are far from secure.⁷⁶ Nevertheless, it is suggested that the fact that unauthorized access to e-mail communications may occur does not itself eliminate any privacy expectation that employees may have, depending on the circumstances.

⁷⁴ See discussion in J.R. Brookes, above.

⁷⁵ See discussions in: L.L. Maltby, "Workplace Electronic Monitoring" (1993), 3 E.L.L. Rep. 66; J.T. Baumhart, "The Employer's Right to Read Employee E-mail: Protecting Property or Personal Prying?" (1992), 8 Labor Lawyer 923; J.A. Flanagan, "Restricting Electronic Monitoring in the Private Workplace" (1994), 43 Duke L.J. 1256.

⁷⁶ See for example, *Privacy Commission: 1997-98 Annual Report* (Ottawa: Minister of Public Workers and Government Service Canada, 1998) pp. 58-68.

Given that arbitrators in Canada appear not to have analyzed the privacy considerations that may attach to e-mail in Canadian workplaces, given the variable nature of e-mail, it is hard to predict how these questions will be approached.

However, given the extent to which arbitrators have analyzed privacy considerations in other contexts, the following are worth considering:

- a. As with any other exercise of management rights, one might expect that work rules enacted to regulate the use of e-mail systems will likely to have to satisfy the kinds of requirements that are exemplified by cases such as *KVP Co. Ltd. and Lumber & Sawmill Workers Union, Local 2537*.⁷⁷ Accordingly, relevant considerations to the enforceability of such rules will include: the extent to which notice has been given including notice of the disciplinary consequences which will result from a violation; the clearness or ambiguity of the notice; the reasonableness of the policy and the consistency of application. Several American arbitration decisions consider a variety of these factors. For example, in *Re: Allied Signal Engines*⁷⁸ an arbitrator overturned a discharge of an employee for misuse of an e-mail system over an extended period, including excessive personal use of it. The arbitrator found that the

⁷⁷ (1965), 13 L.A.C. 73 (Robinson).

⁷⁸ 106 LA (BNA) 614,

employer had been aware of and allowed the conduct to go on for a considerable period of time. The employer had not been definitively ordered to stop his conduct, he had never been adequately warned that it could lead to his discharge. Nor had he been told specifically what was and what was not appropriate use of the e-mail system. In *Conneaut (Pa.) School District and Conneaut Education Association*⁷⁹ an arbitrator allowed a grievance over a warning letter issued to a librarian for alleged inappropriate criticisms of an employer policy in an e-mail that was widely distributed. In this case, the employer had no rules or regulations governing the use of e-mail, and encouraged employees to communicate with co-workers to discuss the policy, including through use of the e-mail system. The arbitrator adopted a “balancing of interests” approach to weigh the employer’s legitimate interests with the employee’s rights of free speech. While the arbitrator found that the grievor had no right to use the e-mail system for purely personal activities⁸⁰, in this case the inappropriate criticisms were contained within an otherwise appropriate message sent to other librarians, a use the employer had encouraged. Accordingly, the

⁷⁹ 104 LA (BNA) 909,

⁸⁰ The arbitrator stated that this a finding assumes the lack of any past practice whereby employees were permitted de minimis personal use of school equipment such as telephones.

infraction was not found to be a clear cut misuse of the e-mail system and the grievance was allowed.

- b. Where it can be said that a privacy right may be at issue in a given case involving the monitoring of e-mail, an assessment of the reasonableness of the employer's conduct should necessarily include the sorts of considerations that arbitrators have applied in other circumstances: was it reasonable to conduct the monitoring, and was the monitoring conducted in a reasonable manner. This includes a consideration of any legitimate business interest that the employer might have, such as concerns about use of work time, harassment or denigration of co-workers, maintenance of confidential employer information, criminal activity. A consideration of alternatives to e-mail monitoring might also be considered. In assessing the reasonableness of the conduct of the monitoring, it will be important to review the manner in which it is conducted in light of the business interest it purports to serve. For example, if an employer attempts to justify its actions out of a concern that a particular employee is spending too much time writing e-mail rather than performing other job functions, an employer who steps beyond merely recording the transactional data to reviewing the contents of messages may have some difficulty in justifying this step.⁸¹ Similarly,

⁸¹ J.T. Baumhart, above, pp. 947-948.

an employer who unnecessarily discloses the content of e-mail messages which might otherwise be considered private, undermines any defense of reasonableness that it might have. Furthermore, the general and unrestricted monitoring of all employee e-mail messages must surely be much harder to justify than in isolated cases, in the same way as with general video surveillance. Ultimately, however, as in the cases concerning video surveillance, justification of e-mail monitoring will often turn on the facts and be highly dependant on the nature of the communications monitored, the privacy interest at stake, and the legitimacy of the business interest served.