

Tale of the Tape

Policing Surreptitious Recordings in the Workplace

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[T]he law recognizes that we inherently have to bear the risk of the "tattletale" but draws the line at concluding that we must also bear, as the price of choosing to speak to another human being, the risk of having a permanent electronic recording made of our words.

R. v. Duarte (1990),
1 SCR 30 at 48, 53 CCC (3d) 1.

I. INTRODUCTION

Almost 130 years ago future United States Supreme Court Justice Louis Brandeis and Samuel Warren warned that “numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”¹ The right to privacy espoused by Brandeis and Warren was that each individual had the right to choose to share or not to share with others information about their ‘life, habits, acts, and relations.’

The *mechanical device* at the heart of the article was the advent of the ‘detective camera’ that could take instantaneous pictures. Previously the art of photography required an individual to knowingly participate in or consciously ‘sit’ for the creation of their picture. However, advances in photography made it possible to instantaneously and surreptitiously take pictures and distribute those to the world at large through newspapers,

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¹ Louis Brandeis & Samuel Warren, "The Right to Privacy" (1890) 4:5 Harv L Rev 193 at 195.

magazines or other forms of media.² Warren and Brandeis argued that the right to privacy was the right of each individual to exercise some control over information recorded about them by others which both reflected and affected their image or personality.

In *Alberta v UFCW, Local 401*³ the Supreme Court of Canada recently underscored the importance of a person's right to privacy given recent developments in technology, noting that the ability to control one's personal information is "intimately connected to their individual autonomy, dignity and privacy ... fundamental values that lie at the heart of a democracy."⁴ Moreover, the Court noted, these values are "increasingly significant in the modern context, where new technologies give organizations an almost unlimited capacity to collect personal information, analyze it, use it and communicate it to others for their own purpose."⁵

By simply appearing in public, in this case crossing a picket line, workers were being videotaped by members of the UFCW for the purpose of placing the images online to deter them from crossing. The Court stated that by being in public "an individual does not automatically forfeit his or her interest in retaining control over the personal information which is thereby exposed."⁶

Today micro digital recorders can surreptitiously record our every movement, conversations, and non-verbal communications, and then broadcast them instantaneously to the world at large through multiple forms of media.⁷ As such we should expect that what is whispered in the

² Until 1889 taking photographs was a complicated process. However, on September 4, 1888 George Eastman patented his photographic apparatus known as the improved 'detective camera', making it simple for amateur photographers to take pictures. The cameras went on sale in 1889 for \$25.00. US patent No. 388,850.

³ *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 SCR 733 [*Alberta v UFCW*]. Also see *R v Spencer*, 2014 SCC 42 at para 40, [2014] 2 SCR 212, "privacy also includes the related but wider notion of control over, access to and use of information, that is, 'the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others'".

⁴ *Ibid* at para 19.

⁵ *Ibid* at para 20.

⁶ *Ibid* at para 27 [emphasis added].

⁷ Today you can buy an "8GB Mini HD Camcorder Spy Pen Video DVR DV Digital Video Recorder USB Surveillance Pinhole Cam" for less than George Eastman's original detective camera. See <<http://www.ebay.com/bhp/spy-pen>>.

closet today is being recorded and broadcast from the roof-tops if not stored for a similar purpose later on.

Indeed, when it comes to the workplace, the recordings are not often as overt as the picket line videotaping in *Alberta v UFCW*. *ABC News* reported that employees are increasingly using digital devices to *secretly* record conversations, and sometimes using the recordings to launch complaints against their employers. While the frequency of surreptitious workplace recordings is unknown, the article suggests that it happens often enough that employers should assume that all meetings with employees are being recorded.⁸

Employers understandably want control over the documentation of what occurs in their workplace and policies have been created by some employers that prohibit surreptitious recordings, specifically to address the need to:

- Foster and maintain frank discussions between employees, co-workers, and supervisors;
- Encourage the free flow of information within the organization;
- Protect confidential information and trade secrets;
- Prevent workplace disruption from fear such recordings are occurring; and
- Respect for the privacy of all employees, customers, and guests.

However, irrespective of policy, there is one profession that poses an interesting backdrop to the discussion on surreptitious workplace recordings ~ policing. With the push to equip all uniform police officers with body-worn cameras to record their activities and interactions with individuals in the field,⁹ what are the implications or expectations of privacy in the police workplace itself from one officer surreptitiously recording another officer?

The Calgary Police Service, which has a very robust body worn camera (BWC) policy, but does not yet issue them on a full scale, prohibits the

⁸ Ki Mae Heussner, "Are You Being Secretly Recorded at Work?" *ABC News* (19 April 2011), online: ABC <abcnews.go.com/Technology/secretly-recorded-work/story?id=13409126>.

⁹ Mike McCaig, "Survey: Almost All Police Departments Plan to Use Body Cameras, *Governing*" *Governing* (26 January 2016), online: *Governing* <<http://www.governing.com/topics/public-justice-safety/gov-police-body-camera-survey.html>>. Nearly every large police department in a new nationwide survey said it plans to move forward with body-worn cameras, with 95 percent either committed to body cameras or having completed their implementation.

making of audio or visual recordings with a BWC for any purpose not permitted in the policy. It is prohibited to:

- Disseminate BWC images to any person or entity unless authorized by law;
- Use a BWC to record any activities that are not required for a valid law enforcement purpose;
- Use a BWC in a covert capacity;
- Use a non-police issued BWC or similar device;
- Knowingly record interactions with a confidential informant or otherwise any situation that would reveal confidential police investigative or tactical techniques;
- Record a strip search; and
- Record uninvolved bystanders or benign interactions with the public, to the extent reasonably possible.¹⁰

However, many police departments do not have such robust policies, or do not regulate the use of recording devices outside of specific investigations or for BWC (if they have them), in particular by off-duty members in the workplace; by members out of uniform (i.e. plainclothes officers); or by non-sworn staff members.

In *Rebutting the Presumption of Guilt*,¹¹ Craig MacMillan considered how personal interest recordings could help protect police officers in Canada against allegations of misconduct. Two possible approaches were that (1) the officer is not acting as an agent of the state when the recordings are made to protect their *personal* interests; or (2) if an officer is considered to be an agent of the state even where the records are to protect personal interest, there is no reasonable expectation of privacy in communications with *known* agents of the state.

However, I review the risks and consequences of such activities by examining analogous cases, drawing heavily on traditional doctrinal research to conclude that it may not only be unlawful, but that any evidence obtained may not be admissible in any proceedings, and that employees may be subject to discipline up to and including dismissal for engaging in surreptitious workplace recordings.

While my focus is on policing, the general discussion may be helpful to any corporate counsel or human resource manager faced with such a

¹⁰ Calgary Police Services, “Body Worn Cameras Ref #IN-007-1”, September 2015 update (Calgary: Bureau of Community Policing, 2015) [“Body Worn Cameras”] online: <https://www.calgary.ca/cps/Documents/Body_Worn_Camera_Policy.pdf> at 3-4.

¹¹ Craig S MacMillan, “Rebutting the Presumption of Guilt: How Can Police Officers Protect Themselves Against Allegations of Misconduct?” (1995) 1:1 Appeal 1 at 10-20.

situation in the workplace and provides some general ideas on having a broad-based policy to deal with surreptitious recording in the workplace.

II. SETTING THE STAGE

A. *Ledoux c Mont-Tremblant*

On July 3rd, 2017, the Quebec Court of Appeal ordered a new trial against Michel Ledoux, the former Chief of the Mont-Tremblant Police Department, for using surreptitious recording devices in the police station to identify officers involved in a psychological harassment campaign against him during contentious contract negotiations in early 2011.¹²

Some of the tactics used to intimidate or ‘destabilize’ the Chief during negotiations included the use of posters of him dressed as a member of the Ku-Klux-Klan, with a penis in his face, as a baboon having anal sex, and insulting messages associating him with sexually transmitted diseases and mental illness. A fake bomb was also placed outside his office door and a mannequin of him in uniform was hung in front of the station.

Fearing he would lose control of the department and to identify those responsible for the posters and to stop the harassment, he bought a surveillance system that included a clock and a key-chain, using department funds, and secretly placed these recording devices about the station. Some of the conversations recorded included the police union representatives and their lawyers.

Shortly after contract negotiations were concluded and a new collective agreement was adopted, the surreptitious recordings were discovered by another member of the Mont-Tremblant Police Department. The Sûreté du Québec was called in to investigate and criminal charges of illegal wiretapping and unlawful use of surveillance devices were subsequently laid against Chief Ledoux. A jury acquitted Chief Ledoux and in a 2015 wrongful dismissal decision, the Court of Quebec concluded that he was the victim of a “vicious and degrading” harassment campaign that justified

¹² *R c Ledoux*, 2017 QCCA 1041 at para 62, EYB 2017-281843. Also see Graeme Hamilton, “Quebec police chief harassed by his own officers ordered to face new trial” National Post (4 July 2017), online: National Post <<http://nationalpost.com/news/canada/quebec-police-chief-harassed-by-his-own-officers-ordered-to-face-new-trial/>>.

the resort to secret video and audio surveillance to identify his tormentors and ordered his reinstatement; the town settled out of court instead.¹³

B. *Floyd v New York*

On August 12, 2013, Justice Scheindlin upheld a class action law suit against the New York City Police Department (NYPD) for a pattern and practice of racial profiling and unconstitutional stop-and-frisks.¹⁴

The testimony included several police officers who began secretly recording their colleagues and supervisors at work. Recordings were made of roll call meetings, street encounters, of commanders, and supervisors. It included small talk and stationhouse banter. In all, hundreds of hours of police officers talking about their jobs were secretly recorded by other officers.¹⁵

Notwithstanding Warren and Brandeis' concern, *private* individuals may, in most jurisdictions, secretly record any conversations they participate in with another person. However the dynamic is altogether different in the workplace, especially when that individual is a police officer. In Canada, and in many US States, police officers must apply for a court order to record conversations they are party to unless there is a risk to their safety. Even then the records of such conversations made without a court order must be destroyed when the safety risk passes without incident. Unlawful recordings

¹³ *Ledoux c Mont-Tremblant (Ville de)*, 2015 QCCQ 6709 at para 628, [2015] JQ no 7117. Appeal for judicial review dismissed, *Mont-Tremblant (Ville de) c Massol*, 2016 QCCS 2091, [2016] JQ No 4172. Also see Graeme Hamilton, "Court orders reinstatement of Quebec police chief harassed by his own officers", *National Post* (5 August 2015), online: National Post <<http://nationalpost.com/news/canada/court-orders-reinstatement-of-quebec-police-chief-harassed-by-his-own-officers>>. The Court noted that, at the time, no other officers faced any discipline for their conduct in the affairs.

¹⁴ *Floyd v City of New York*, 959 F Supp (2d) 540 (SDNY 2013).

¹⁵ See testimony and recordings by Pedro Serrano, Adhyl Polanco, & Adrian Schoolcraft, "Floyd v New York City Trial Updates", (12 March 2013), Centre for Constitutional Rights, online: <<https://ccrjustice.org/floyd-v-new-york-city-trial-updates>>. Also see Scheindlin's decision, *supra* note 14 at 596, where she states:

Three NYPD officers from three precincts made secret recordings revealing institutional pressure to increase enforcement numbers: Officers Adrian Schoolcraft, Adhyl Polanco, and Pedro Serrano. The three officers' recordings provide a rare window into how the NYPD's policies are actually carried out. I give great weight to the contents of these recordings.

are generally inadmissible in both civil and criminal matters, and may be subject to some kind of sanction.

However, it is neither against the federal law or the state law in of New York for a police officer to covertly record or intercept private communications to which he or she is a party. This has been the case since at least 1971.¹⁶ As a result when one municipal or state police officer in New York secretly records another without their knowledge or consent, there is no prohibition on such conduct and any evidence gathered is generally admissible.

Nevertheless, while participant surveillance by non-state parties is not illegal, any evidence derived therefrom may still be excluded to protect the spirit of trust and confidence that needs to exist between the parties. For example, in the *Matter of Harry R. v Esther R.*, a New York Family Court judge held that secret recordings made by a father of his children in a custody dispute with his ex-wife were not admissible because the recordings violated the confidence and trust between the father and his children. The Judge stating:

These children, like any other children, are entitled to feel that they may communicate freely with their parents without fear that those communications will be recorded and revealed later. The court cannot prevent Mr. R from recording these conversations. But it can preclude their use in this proceeding, although otherwise admissible, to protect the spirit of trust and confidence that needs to exist between child and parent in order for the children's emotional health to be safeguarded.¹⁷

In Florida, like New York, it is not illegal for a law enforcement officer or state agent to surreptitiously record or intercept an electronic communication where they are a party to the communication. However the recording must be for the purpose of obtaining evidence of a criminal act.¹⁸

¹⁶ See *United States v White*, 401 US 745 (US S Ct 1971) [*White*]. Although there is a policy exception in the United States Attorneys' Manual where it is known that one of the parties to the conversation will be certain political or government officials such as a member of Congress, federal judge, Governor, or Attorney General of any State or Territory. See US, Office of the United States Attorneys, *US Attorneys' Manual*, (Washington: US Government Printing Office, 2002) at 9-7.302, online: USAM <http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/7mcrm.htm>.

¹⁷ *Matter of Harry R v Esther R*, 510 NYS (2d) 792 at 796 (NY Fam Ct 1986).

¹⁸ US, Title XLVII, *Criminal Procedure and Corrections*, Fla Stat 934 s 934.03(2)3(f) (2017). A criminal offence in Florida includes both felonies and misdemeanours, but does not

C. Officer Jackson's GoPro

On June 24, 2014 Miami Police Officer Marcel Jackson was using his own private GoPro audio/visual device to record his interactions with the public. On that day he conducted a traffic stop of Lieutenant David Ramras of the Miami Police Department's Internal Affairs and an altercation ensued. Jackson produced the recording to support his claims that Ramras was the aggressor, however he was relieved of duty and Ramras was reassigned.

Responding to public enquiries, Miami Police Chief Manny Orosa stated that Jackson had been relieved of duty, not because of any breach of the State's privacy laws, but because of Jackson's failure to preserve relevant evidence and public records.¹⁹ While working as a police officer any records made by Jackson belonged to the department. As such the recordings had to be maintained, preserved, and retained in accordance with Florida's *Public Records* statute (Title X, c. 119) and were subject to access and disclosure requests under that statute as well as in accordance with federal disclosure requirements in *Brady v Maryland* (similar to *Stinchombe* in Canada).²⁰

Outside of this exception for law enforcement in the collection of evidence, Florida is one of 12 states that prohibit the recording of conversations without "all party" consent. That is, it is illegal for anyone in Florida to covertly record a conversation to which they are a party without the prior consent of all participants. Any such recordings are inadmissible in either criminal or civil proceedings.

The harsh reality of this absolute prohibition was recently affirmed by the Florida Supreme Court in *McDade v State* where a 16-year old girl secretly recorded her step-father insisting she perform sexual acts with him in his bedroom. Her evidence was that she had been raped weekly since she was 10-years old and the recordings supported her evidence. McDade was convicted at trial and the admission of the recordings was affirmed on

include a noncriminal traffic violation of any provision of chapter 316 (Motor Vehicles) or any municipal or county ordinance (US, *Title XLVI Crimes*, Fla Stat 775 s 775.08 (2017)).

¹⁹ Charles Rabin & David Smiley, "Secret dash cam captures Miami cops' traffic stop scuffle", *Miami Herald* (14 July 2014), [Rabin & Smiley]. online: Miami Herald <www.miamiherald.com/news/local/community/miami-dade/article1975519.html>.

²⁰ In *Brady v Maryland*, 373 US 83 (US S Ct 1963), the US Supreme Court held that the prosecution must disclose all materially relevant evidence to the defence.

appeal that “any expectation of privacy McDade may have had is not one which society is prepared to accept as reasonable”. However this was overturned on further appeal by the state’s highest court based on a clear reading of relevant legislation:

Privacy expectations do not hinge on the nature of [a] defendant’s activities – innocent or criminal. In fact, many Fourth Amendment issues arise precisely because the defendants were engaged in illegal activity on the premises for which they claim privacy interests [internal citations omitted].

...

It may well be that a compelling case can be made for an exception from chapter 934’s statutory exclusionary rule for recordings that provide evidence of criminal activity—or at least certain types of criminal activities. But the adoption of such an exception is a matter for the Legislature. It is not within the province of the courts to create such an exception by ignoring the plain import of the statutory text.²¹

The law is opposite in Washington where, s. 9.73.090(2) of the Washington State *Privacy Act*, specifically requires police to obtain a court order before they can intercept communications with the consent of one of the parties:

(2) It shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication or conversation or one of the parties to the communication or conversation has given prior consent to the interception, recording, or disclosure: PROVIDED, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony.²²

Even recordings made by federal agents pursuant to federal laws, which allow consensual recordings, are inadmissible in state court proceedings

²¹ *McDade v State*, 2014 WL6977944 at 14 (S Ct Fla 2014), rev’ing 114 So (3d) 465, 467 (Fla (2d) DCA 2013). The court also applied its previous ruling in *State v Walls*, 356 So (2d) 294 (S Ct Fla 1978). As a result of this decision the Florida legislature passed an exception to the “all party” consent law, effective July 1, 2015, that allows recordings in cases involving an “unlawful sexual act or an unlawful act of physical force or violence against a child”.

²² US, *Violating Rights of Privacy*, RCW tit 9 s 9.73.090. online: RCW <<http://apps.leg.wa.gov/rcw/default.aspx?cite=9.73.090>>.

when the recordings are made in violation of the Washington statute.²³ Police testimony about such recorded conversations is also inadmissible in any civil or criminal case.²⁴

The law in Canada is similar to that in Washington. Other than *Ledoux*, there are no reported cases of police officers secretly recording other police officers while working in Canada, there are analogous cases from other sectors that suggest covert or surreptitious participant surveillance by police officers in the workplace without a court order may not be admissible in any proceedings principally because they may be against the law, but also because they would undermine the spirit of trust and confidence between the parties (employer v. union; employer v. employee; employee v. employee; supervisor v. subordinate).

III. CRIMINAL LAW

If a police officer is making a surreptitious recording while they are at work, are they making it as a police officer or as a private individual? Can the two ever be separated in the workplace? If the recording is being made at work, there must be workplace issues involved, even if they are perceived to be personal. In such cases all police departments in Canada have policies, regulations and Collective Agreements that outline how workplace issues are to be investigated ~ usually by Human Resources, Professional Standards (Internal Affairs) or Management. They may also be subject to Grievance Arbitration or outside agency review.²⁵

Even if it is a personal issue, like an off-duty relationship turned sour or concern about an extra-marital affair, isn't the officer still conducting an investigation if not collecting evidence or information? If they are collecting

²³ See *State v Williams*, 617 P (2d) 1012 (Wash Sup Crt 1980).

²⁴ US, *Admissibility of Intercepted Communication in Evidence*, RCW tit 9 s 9.73.060. online: RCW <<http://app.leg.wa.gov/RCW/default.aspx?cite=9.73.050>>. Also see Tara McGraw Swaminatha, "The Fourth Amendment Unplugged: Electronic Evidence Issues & Wireless Defenses" (2005) 7 Yale J L & Tech at 51.

²⁵ Cf The City of Winnipeg and The Winnipeg Police Association, *Collective Agreement* (Winnipeg: 26 March 2014) at 185. online: <http://winnipeg.ca/corp/CollectAgree/pdfs/WPA-CA-2012-2016-DRAFT.pdf>>. In such cases the Police Association may also be a party to the complaint. Also see Manitoba, The City of Winnipeg, "Schedule A to by-law No 7610/2000 - City of Winnipeg Police Service Regulations" (Winnipeg: 24 May 2000). online: <<http://clkapps.winnipeg.ca/dmis/documents/docext/bl/2000/2000.7610.pdf>>, regarding the reporting and investigation of internal disciplinary matters.

evidence, albeit for a personal reason, do the time, place, and subjects of the recording bring the workplace into it? If they are doing it to protect themselves from false allegations, who are they protecting themselves from – the public, criminals or colleagues? Does it matter? Is the public's expectation to be left alone from unwanted, secret recordings by the state any different from that of another officer? Is there a legitimate need that the recording device is even concealed?

As Craig MacMillan noted earlier, can there ever be an expectation of privacy when an individual is talking to a police officer that they (the police officer) will not record the conversation – at least in their note book? Even with a 911 emergency phone call, can a caller seriously expect their conversation will be private, if not recorded?²⁶ If there is no expectation of privacy, does it matter if it's the public the officer is dealing with or a fellow officer? Even if there is no expectation of privacy, are the police still entitled to retain a permanent copy the recording?²⁷

Police officers first experimented with body worn recording devices in England in 1994 to thwart allegations of invented confessions. In some English and US jurisdictions officers now wear body worn video cameras all the time.²⁸ However visibly displaying the devices and publicly announcing

²⁶ *Cf R v Monahan* (1981), 60 CCC (2d) 286, [1981] OJ No 70 (CA), aff'd [1985] 1 SCR 176, 16 CCC (3d) 576 without reasons, where a telephone call made to a police operator was recorded. It was not reasonable to expect that the communications in question, which threatened a police officer, would not be listened to or recorded by the police switchboard operator. However, see *Re Vancouver Police Order F13-12*, [2013] BCIPCD No 15, in which B.C. Privacy Adjudicator Flanagan held that the release of a 911 call to a third party, although lawfully recorded, would be an unreasonable invasion of privacy.

²⁷ The City of Winnipeg, *Records Management by-law No. 86/2010* (Winnipeg, 21 July 2010), s. 105(11). online: <http://clkapps.winnipeg.ca/dmis/docext/ViewDoc.asp?DocumentTypeId=1&DocId=5220>. The retention period for police investigative reports is 25 years after they become obsolete or superseded.

²⁸ Recent surveys suggest that about 25% of the United States 17,000 police agencies were using them, with fully 80% of agencies evaluating the technology. See Jan Stanley, "Police Body-Mounted Cameras: with Right Policies in Place, A Win for All", *American Civil Liberties Union* 2nd Version (March 2015). Online: <<https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all>>.

the police department is making such recordings does take away any expectation of privacy a person has in being recorded.

Recording individuals by an agent of the state is a delicate balance between public and private rights, but it becomes a risky proposition when it is being done while the officer is working, especially when it is surreptitious. In what capacity is it being done? Why is it being done? Does the *Charter* apply? What about workplace privacy? What is the departmental policy on privacy in the workplace? What are the labour and employment issues?

A. *R v Duarte*

The *Criminal Code* of Canada does not necessarily prohibit people from surreptitiously recording their own conversations. However where a police officer is involved in making those recordings a one-party consent application must be made to a judge under s. 184.2.²⁹ There is an exception under s. 184.1 where there is a fear of bodily harm and the purpose is to protect against bodily harm. However, any recordings made under this section must be destroyed where the bodily harm or threat of bodily harm did not occur (usually applies to undercover officers or agents wearing the devices as a ‘safety-line’).

The reason for this protection is the realization that if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance. The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private. A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning.³⁰

Justice La Forest continued that if a person’s right to be left alone included their right to determine for himself when, how, and to what extent he will release personal information about himself, then clandestine recordings should only be made upon satisfying a detached judicial officer that an offence has been or is being committed and that interception of that communications stands to afford some evidence of it.

²⁹ *Criminal Code of Canada*, RC 1985, c C-46, s 184.2.

³⁰ *R v Duarte*, [1990] 1 SCR 30 at 44, 53 CCC (3d) 1. Per La Forest J for a unanimous court [*Duarte*].

Where the instrumentality of the state is involved, without the consent of the originator or intended recipient thereof, without prior judicial authorization, the Court was clear that a person's rights and freedoms guaranteed by the *Constitution* are infringed.³¹ *Duarte* firmly established that electronic surveillance falls under the rubric of section 8 of the *Charter*. As a result of the decision Parliament enacted sections 184.1 and 184.2 as part of a series of amendments to the *Criminal Code* in Bill C-109 in 1993.³²

Section 184.1 provides that a police officer may intercept private communications to which he or she is a party without warrant where there is a risk of bodily harm to the officer. However, the contents of the communications are inadmissible as evidence in any proceedings (including any subsequent application for a search warrant or wiretap) except where actual or threatened bodily harm occurs. If nothing suggests that bodily harm occurred or is likely to occur all recordings, notes, and transcripts must be destroyed. Otherwise prior judicial authorization is required *ex parte* and in writing to a provincial court judge or a judge of a superior court of criminal jurisdiction.

Furthermore, section 183.1 of the *Criminal Code* addresses one party consent to interceptions made by or intended to be received by multiple persons and confirms that a communication may be a "private communication" notwithstanding that it involves more than one other person.³³ Therefore, a communication to or involving a group of persons may be a "private communication". Determining whether it was in fact a private communication would be evaluated on a reasonableness standard that anyone *other than* the members of the group would intercept it.

This was exactly the issue before the Supreme Court in *R v Wong*,³⁴ decided a month after *Duarte*, where the police conducted electronic surveillance of a hotel room to determine whether it was being used as an

³¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11 [Charter]*. Section 8 states that "Everyone has the right to be secure against unreasonable search or seizure".

³² An Act to Amend the *Criminal Code*, the *Crown Liability and Proceedings Act* and the *Radiocommunication Act* (Bill C-109), SC 1993, c 40, s 4.

³³ Although "private communications" refers to "the person intended by the originator to receive it" and is used in the singular, section 33(2) of the *Interpretations Act*, RSC 1985, c I-21, s 33(2) states: "Words in the singular include the plural, and words in the plural include the singular".

³⁴ *R v Wong*, [1990] 3 SCR 36, 60 CCC (3d) 360 [Wong].

illegal gambling den. The police entered the room and installed a camera to covertly record the activities. The Crown argued, and as found by the Ontario Court of Appeal, there was no reasonable expectation of privacy in the hotel room full of people, as “a person attending a function to which the general public has received an open invitation can have no interest in ‘being left alone’”.³⁵

Justice La Forest, again writing for the majority of the Supreme Court, stated that while a large number of people attended the hotel room “it is not part of the reasonable expectation of those who hold or attend such gatherings that as a price of doing so they must tacitly consent to allowing agents of the state unfettered discretion to make a permanent recording of the proceedings”.³⁶ Individuals do not automatically forfeit their privacy interests simply because they are surrounded by others.

Electronic surveillance also affects an individual’s section 7 and 11(d) *Charter* rights. Section 7 provides, “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”³⁷ The Crown also has an obligation to preserve and disclose evidence as a principle of fundamental justice as set out in *R v Stinchcombe*.³⁸

Section 193(1) of the *Criminal Code* further provides that where a private communication has been intercepted without the consent, express or implied, of the originator thereof, and such private communication (or any part thereof) is willfully used or disclosed, that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Where there has been a lawfully obtained court order to intercept private communications, the courts have applied the exemption provided for in s. 193(2)(a), permitting the disclosure in civil proceedings of private communications intercepted in the course of criminal investigations, including police disciplinary hearings.³⁹ In addition the Court stated:

³⁵ *Ibid* citing Cory J at 48.

³⁶ *Ibid* at 51.

³⁷ *Supra* note 31 at s. 11(d). Section 11(d) states that “Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”.

³⁸ *R v Stinchcombe*, [1991] 3 SCR 326, 68 CCC (3d) 1 [*Stinchcombe*].

³⁹ *Imperial Oil v Jacques*, 2014 SCC 66 at para 71, [2014] 3 SCR 287, citing *Re Board of Commissioners of Police for City of Thunder Bay v Sundell* (1984), 15 CCC (3d) 574, 1984

[s]ection 193(2)(a) provides that a disclosure is not an offence under s. 193(1) if it is made “in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person who makes the disclosure may be required to give evidence on oath”. “Civil proceedings”, whether in a traditional form or not, always include an exploratory stage ... if Parliament had intended that the exemption would apply only at the time evidence is given, as the appellants argue, then it would not have included the words “or for the purpose”. Since it did include those words, we must assume that they are not redundant, must avoid depriving them of meaningful effect, or “effectivity”, and must recognize that they reflect an intention to give the exemption a generous scope that encompasses the exploratory stage of civil proceedings.⁴⁰

However, where electronic evidence has been unlawfully obtained or destroyed, section 24(2) of the *Charter* provides a remedy. Although intercepted communications are often regarded as real evidence, the reliability of which is seldom in question, section 24 states that where a court concludes that anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied, the evidence may be excluded. For example in *R v Malik and Bagri*, the Air India bombing trial, Justice Josephson held that the Canadian Security Intelligence Service (C.S.I.S.) had committed unacceptable negligence in erasing audiotapes containing recordings of intercepted conversations. As a result the right to disclosure under section 7 of the *Charter* had been violated.⁴¹

The admissibility of intercepted conversations raise a number of questions quite apart from the legality of the interception. Privately recorded conversations are more likely to be found inadmissible than those recorded by the state as it is often more difficult for private individuals to show the information is accurate, authentic, and trustworthy. For example, some of the requirements for admissibility include a showing that:

- 1) The recording device was capable of recording the events offered in evidence;
- 2) The operator was competent to operate the device;
- 3) The recording is authentic and correct;
- 4) Changes, additions, or deletions have not been made in the recording;
- 5) The recording has been preserved in a manner that is shown to the court;
- 6) The speakers on the tape are identified; and
- 7) The conversation elicited was made voluntarily and in good faith, without any kind of inducement.⁴²

CarswellOnt 1406 (Ont Div Ct), which in turn applied *Re Trumbley et al and Fleming et al*, (1984) 12 WCB 436, 5 OAC 368 (Ont Div Ct).

⁴⁰ *Ibid* at para 48. Internal citations omitted.

⁴¹ *R v Malik and Bagri*, 2004 BCSC 554 at para 22, 119 CRR (2d) 39.

⁴² *Cf R v Andalib-Goortani*, 2014 ONSC 4690, [2014] OJ No 4499 see below note 142.

In the United States the argument in favor of consent interceptions is that the speaker risks the indiscretion of his listeners and holds no superior legal position simply because a listener elects to record his statements rather than subsequently memorializing or repeating them.

Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights ... For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, or (2) carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks".⁴³

However, the Court in *White* was not unanimous. Both Justices Douglas and Brennan dissented. Justice Brennan stating that "the threads of thought running through our recent decisions are that these extensive intrusions into privacy made by electronic surveillance make self-restraint by law enforcement officials an inadequate protection, that the requirement of warrants under the Fourth Amendment is essential to a free society."⁴⁴ When deciding *Duarte* the Supreme Court of Canada followed the general reasoning of the dissenting Justices in *White*.

This lack of 'self-restraint' by government officials has been considered by several courts in Canada, even where proper authorizations have been obtained. Specifically the untrammelled discretion by the police to intercept anyone they want without limitation has been found to be an unlawful delegation of a judge's function. The police cannot simply be 'walking microphones'.⁴⁵

⁴³ *White*, *supra* note 16 at 751.

⁴⁴ *Ibid*, at 761-62.

⁴⁵ See *R v Monte*, 1993 CarswellOnt 6918 at para 23 (Ont SC), 20 WCB (2d) 434 (WL Can); and *R v Lee*, 2002 BCSC 1912 at para 7, 80 WCB (2d) 910 applying *R v Paterson*, *Ackworth and Kovach*, [1985] OJ No 28, 18 CCC (3d) 137 (Ont CA), affirmed in *R v Ackworth*, [1987] 2 SCR 291, 39 CCC (3d) 575.

Furthermore evidence gathered during a valid consent authorization will be excluded where there was insufficient evidence to support a reasonable belief that such evidence would even be obtained in the supporting affidavit. An ex-post facto justification that incriminating evidence was obtained is insufficient. Bad faith and ignorance of *Charter* standards on behalf of the police cannot be rewarded or encouraged and the court must disassociate itself from such conduct.⁴⁶

B. Police Stations

Are police stations a private place? Is there any expectation of privacy that you will not be recorded in a police station, whether as a private individual or as a police officer?

In *R v Parsons* the Ontario Court of Appeal commented on the propriety of police surreptitiously filming an accused as he walked down a hallway inside the police station. The purpose of the film was to use it in a video line-up of other people walking down the same hall way, to show the victim of a robbery. The court applauded the use of this technique and found that it did not breach the accused's s. 7 rights under the *Charter*.⁴⁷

The Ontario Court of Appeal subsequently applied its decision in *Parsons* in *R v Pelland*,⁴⁸ a case where the police surreptitiously audio-recorded a suspect to create a repository of the accused's voice for possible future use as evidence of his identification. The recordings were subsequently used to produce a voice line-up for identification purposes in a sexual assault. In admitting the recordings the Court stated:

[...] we are not persuaded that the appellant had any reasonable expectation of privacy in the *sound of his voice*. The sound of one's voice is a physical characteristic much the same as a person's physical appearance. Accordingly, we are of the view

⁴⁶ *R c Laflamme*, 2013 QCCA 58, 117 WCB (2d) 1. Application for leave to appeal SCC dismissed without costs May 30, 2013 (docket 53268). Also see *R v Grant*, 2009 SCC 32 at para 75, [2009] 2 SCR 353:

[I]gnorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith.... Wilful or flagrant disregard of the *Charter* by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct.

⁴⁷ *R v Parsons* (1993), 24 CR (4th) 112, 84 CCC (3d) 226 (Ont CA) [*Parsons*].

⁴⁸ *R v Pelland*, [1997] OJ No 1539, 99 OAC 62 (Ont CA) [*Pelland*].

that the surreptitious recording of the appellant's voice did not amount to a violation of his s. 8 Charter rights ... Similarly, we reject the appellant's submission that his right to security of person under s. 7 of the Charter was violated.⁴⁹

The Court of Appeal did not apply the Supreme Court's decision in *Duarte* or s. 184.2 of the *Criminal Code*. However, they did find the taking of the voice sample was 'insubstantial, of very short duration and left no lasting impression'. As such a distinction appears to have been made between the content or message in the recording and the mere sound of it.

In *R v Van Ossellaer* the accused was left alone in a police interview room with the video camera on. The accused spoke aloud to himself. The utterance was captured on video by means of a readily visible camera in the room. At least one police officer was monitoring the video-taping at all times, but the accused was never told that his statements were being monitored or that they were being recorded on video-tape. The Court held that even if the monitoring of the accused constituted a *Charter* breach, the reputation of the administration of justice would be adversely affected if such cogent and important evidence were excluded.⁵⁰

However, where there was regular signage throughout the police station and the accused was told he would be on videotape there is no issue of a *Charter* breach as in *R v Pickton*. Specifically the Court stated:

Although I am satisfied that Mr. Pickton possessed a subjective expectation of privacy for a limited period, I cannot conclude that it was objectively reasonable. Signs warning of video surveillance were posted in the booking area of the detachment. Cameras were in plain view in the facility and, most significantly, in his cell. Further, the police specifically warned Mr. Pickton that he would be subjected to audio and video monitoring and recording. In those circumstances, his subjective belief was simply not reasonable.⁵¹

While a readily visible camera is a factor to be considered along with proper signage and warnings, there is generally a reduced expectation of privacy when under arrest and in a police facility. Indeed *Parsons* and *Pelland* both suggest that there may be little or no expectation of privacy in one's physical presence or characteristics being recorded surreptitiously. In any

⁴⁹ *Ibid* at para 11-12.

⁵⁰ *R v Van Ossellaer*, 1999 WL 33203128 (BCSC), *aff'd* on other grounds, 2002 BCCA 464, 167 CCC (3d) 225. Leave to appeal SCC refused (2003), 192 BCAC 160 (note), 315 WAC 160 (note).

⁵¹ *R v Pickton*, 2006 BCSC 383 at para 79, 259 CCC (3d) 254, *aff'd* 2009 BCCA 299, 288 BCAC 246. Also see *R v Ramsoondar*, [2001] OJ No 897, 449 WCB (2d) 396 (Ont CJ).

event can there really be an objective expectation of privacy where the individual does not own, use, possess, control or regulate access to the place they are in, and where there are clear warnings given or signage present they are possibly being recorded?⁵²

In addition, concealed recording equipment might provide a benefit when dealing with sophisticated criminals to lull them into a false sense of security that they were not being recorded (however the police should *never* create a reasonable expectation of privacy by telling the accused they are not being recorded) or when running wiretap project where an accused is placed in an interview room with a co-accused, family member or an undercover officer. While the use of such equipment to record private conversations between two parties would require proper court authorization (see for example, in *R v Mojtahedpour*⁵³), concealed equipment would also be conducive to creating a false sense of privacy in such circumstances notwithstanding signage and warnings.

However, this would not extend to restricted areas of a police facility where the public (or prisoners) do not have access or which are inherently more private (toilet stalls, bathrooms, showers, change rooms, etc). In such cases cameras and other recording equipment should either *not* be installed (i.e. private areas) or should be obvious and installed with reasonable notice to the police membership (common work areas) with reasons, along with proper signage (unless installed pursuant to a court order).

For example, even where there has been a clear warning and signage that a prisoner (who has a reduced expectation of privacy) may be recorded, privacy interests may trump such knowledge or consent. Such was the case in *R v Mok* where evidence of impaired driving was stayed where Ms. Mok was filmed using the toilet in her cell. Applying the Supreme Court's decision in *Wong* surveillance could, in appropriate circumstances, constitute an unreasonable search even where notice had been given verbally and in writing.⁵⁴

⁵² See *R v Edwards*, [1996] 1 SCR 128 at para 45, 104 CCC (3d) 136 for a list of factors to be considered where assessing a person's privacy interests in property.

⁵³ *R v Mojtahedpour*, [2003] BCJ No 48, 171 CCC (3d) 428, rev'ing [2001] BCJ No 1238, 50 WCB (2d) 298. The police placed the accused and his parents together in a victim assistance interview room to hopefully generate and record an inculpatory conversation between them.

⁵⁴ *R v Mok*, 2014 ONSC 64, [2014] OJ No 44, leave denied, 2015 ONCA 608, 82 MVR

Furthermore, like the decision in *Harry R. v Esther R.*⁵⁵ recordings that are neither illegal nor unlawful may still be excluded where they violate the confidence and trust between the parties. This is most evident in family law matters where one parent secretly records the other, or conversations with their children.

The concern, as noted by Justice Smith in *Norland v. Norland*, is that “it does not take much imagination to see how an adult could manipulate a conversation, particularly with a child, to make it appear that the child is unhappy living in the home of the other parent and wishes to live with them. Nor would it be difficult to orchestrate a conversation with a spouse to make that person appear aggressive and unreasonable”⁵⁶ Furthermore there is the background context and accuracy that such recordings capture what they purport to:

Another danger is that I have no guarantee that Ms. K has put forward the entire recording of those conversations that she has transcribed and exhibited to her affidavits. I note, for example, that the recording of S’s conversation on August 6th to begin like an epic tale: i.e.: in the middle of the action. What preceded the taped bits of that conversation? How did S come to be talking about that particular subject? Did S volunteer it out of the blue, so that Ms. K had to ask her to wait a moment then rush to get her tape recorder, then press record and finally signal S to continue? Did Ms. K have the recorder at the ready, then prompt S to talk about the mobile phone, and finally press record only after she had posed her question? Was the recorder running all the while and Ms. K made it seem as if it had been turned on just as S introduced the subject of her phone? These are obvious and troubling questions.⁵⁷

For more information on the admissibility of secretly recorded conversations in a family law context in Canada see “The Ten Evidence “Rules” That Every Family Lawyer Needs to Know.”⁵⁸

(6th) 1 (*Charter* violation found but stay issued by trial judge set aside on appeal); Also see *R v Stennett*, 2016 ONCJ 77, [2016] OJ No 729 and *R v Scott*, 2016 ONCJ 177, [2016] OJ No 1700 for similar decisions.

⁵⁵ *Supra* note 17. See also *Norland v Norland*, [2006] OJ No 5126 at para 63, [2007] WDFL 2768 (Ont SCJ).

⁵⁶ *Ibid.*

⁵⁷ *K(LK) v K(EJG)*, 2013 BCSC 2030 at para 96, [2013] BCJ No 2444.

⁵⁸ Rollie Thompson, Q.C., “The Ten Evidence “Rules” That Every Family Law Lawyer Needs to Know”, (2016) 35:3 Can Fam LQ 285 at 304-307.

IV. LABOUR LAW

Although an audio-recording in the workplace may frequently be considered relevant, it may nevertheless be inadmissible because to admit it would be (a) an unwarranted invasion of privacy; (b) it would have a chilling effect on the conduct of labour relations; or (c) because the party tendering it refused to disclose it prior to the hearing.

While employers may conduct investigations into employee behaviour where certain circumstances exist, this does not mean that they have an unqualified right to intrude on employee privacy. In this regard, arbitrators have developed a three-part test to balance privacy and management rights to implement workplace surveillance.

- (1) Was it reasonable to resort to surveillance?
- (2) Was the surveillance itself conducted in a reasonable manner?; and
- (3) Was there a less intrusive means available to the employer, or had the employer exhausted less intrusive means?

A further consideration is whether the employees had notification they may be monitored. While the arbitral decisions suggest that there is no definite requirement to notify employees they are being monitored, when the surveillance devices are installed covertly employers will be required to justify the surveillance more strictly. In fact, even where a group meeting is being covertly recorded by a manager present at the meeting, it may be deemed to be harassment.⁵⁹

In general, while it may be 'legal' for a non-state party to surreptitiously record a conversation with another party in Canada without their knowledge or consent, this is not conclusive in labour relations matters. Indeed, where the employer is a government employer, the reception of covertly recorded evidence is subject to attack on the ground that an employee's *Charter* rights may have been infringed.

Furthermore, in an early decision, Arbitrator Blasina canvassed police surveillance cases and the application of the *Charter* to the labour context. While neither applied to the case, he adopted the principles or "values" in *Duarte* and *Wong* relating to electronic audio surveillance in the workplace that, as a general rule of labour relations, an employer should not have any greater authority to covertly monitor its employees than the state is entitled

⁵⁹ *St. Mary's Hospital v Hospital Employee's Union* (1997), 64 LAC (4th) 250, 48 CLAS 288 (British Columbia) (Larson).

to monitor private citizens. He said that great circumspection is called for when an employer seeks to electronically monitor the activity of an employee and that it is “clearly ... at the extreme [edge] of the employer's authority under [the collective agreement]”.⁶⁰

However even prior to the decisions in *Duarte* and *Wong*, arbitrators would exclude covertly recorded evidence that would profoundly undermine harmonious labour relations. While tape-recording, if proved, can be the best evidence like a photograph or videotape, where the actions of the employer or employee were designed to subvert the collective bargaining relationship to admit into evidence a tape taken secretly would provide that technique with a degree of respectability quite undeserved.

For those who would say that lying by one party is less desirable than the taping of such lies, I would agree. I would, however, respond that the cure for lying does not rest with the possibility of every word said being taped, but does, rather, rest and is well served by the long-term work place requirement to build integrity and trust as well as by the short-term rigours of cross-examination. In short, persistent liars at the work place do not last.⁶¹

In *Siemens Westinghouse and C.A.W.* arbitrator Barrett reached a similar conclusion. Although the Union argued that the secret tape recording was relevant to a central matter in issue – credibility, and ought to be admitted he sided with the employer that there were strong policy considerations militating against the admission of such recordings.

Relying on *Greater Niagara General Hospital* and *Miletich* Barrett did not find any compelling reason of fairness that would lead him to overlook the

⁶⁰ *Re Steels Industrial Products v Teamsters Union, Local 213* (1991), 24 LAC (4th) 259 at 28, 25 CLAS 556 (Steels).

⁶¹ *Re Greater Niagara General Hospital v OPSEU, Local 215* (1989), 5 LAC (4th) 292, 14 CLAS 16 (Joyce). Also see *Re M Miletich and Hotel, Restaurant & Culinary Employees & Bartenders Union, Loc 40* (November 1, 1984) BCLRB No 398/84, at 10 [Miletich] where the panel stated that arbitrators:

[...] should not condone any practice which would have no other purpose than to create a climate of distrust and antagonism. It is our opinion that to allow the production of these tapes would be to interfere with, rather than to promote, proper relations between a union and its bargaining unit members ... to allow the tapes into evidence would be to encourage parties in every dispute, to distrust each other, to disrupt their desire for resolution and to prolong proceedings at the Labour Relations Board by interminable delays due to the necessity to adjudicate each and every application for admission of taped conversations into evidence .

negative consequences of admitting such evidence in a labour relations context. In addition he found the evidence to be self-serving, and accordingly ruled the tape recording to be inadmissible.⁶²

Similarly in *Jones v St. Jude Medical*⁶³ the United States Sixth Circuit Court of Appeals declined to find that an employee's secret recording of conversations with other employees, management, or clients were necessary under the United States *Civil Rights Act* to protect against discrimination. The Court did not see why the employee needed to violate the company's no-recording policy to oppose the employer's alleged discriminatory treatment and stated that other methods could have been pursued that complied with the employer's policies ~ she might have taken notes of the conversations, obtained the information she needed through legal discovery, or simply asked her interlocutors for permission to record.

While Jones argued that her conduct was reasonable because the recordings were not illegal; did not breach confidential information; were not disruptive of business operations; and were not disseminated beyond the litigation, the Court found that none of this absolved her of breaching the company's no-recording policy ~ which was not attacked ~ and her termination was upheld. The decision illustrates that a recording policy can generally provide a legitimate, non-discriminatory reason for disciplining an

⁶² *In Siemens Westinghouse and CAW-Canada, Local 512 (Willett) (Re)*, (2002) 114 LAC (4th) 264, 72 CLAS 20 (Barrett). Also see *Teamsters, Local 31 v DHL International Express Ltd*, (1995), 28 Can LRBR (2d) 297 at para 41, where the Canada Industrial Relations Board espoused a policy that evidence in the form of surreptitious audio recordings is normally inadmissible because of the paramount importance of maintaining trust and informality in the parties' ongoing relations:

It must be remembered that parties who appear before the Board typically continue in an ongoing labour relations relationship with one another. The successful functioning of that relationship is dependent, as far as possible, on mutual trust and respect. It is difficult to imagine how open and frank discussions, in an atmosphere of mutual trust and respect, could be carried on if either party was concerned that the other might be recording the conversation to be played back to the Board or in another forum at some subsequent period of time.

⁶³ *Jones v St. Jude Medical Center Inc*, 504 F App'x 473 (6th Cir 2012). Also see Michael J Gibson, "Just Because It's Legal Doesn't Mean You Can Do It: The Legality of Employee Eavesdropping and Illinois Workplace Recording Policies" (2015) 46:2 Loy U Chicago LJ 913.

employee, if the policy is focused appropriately to meet the stated needs and purposes of the company.

Two very recent decisions from the Canada Labour and Manitoba Labour Boards also supported the exclusion of secretly recorded audio tapes. In *Jazz Aviation v Canadian Airline Dispatchers' Assn.* Arbitrator Burkett balanced the relevance of the audio-recording with the impact on the collective bargaining relationship.⁶⁴

As part of his balancing process Burkett considered the decision of Arbitrator Weatherill in *Direct Energy and Unifor, Local 975* where he concluded that all relevant evidence should be admitted, but weighed. Although Weatherill considered the risk that surreptitious recordings served to undermine the trust required in sustaining harmonious and constructive collective bargaining relationships ~ an important matter of public policy ~ he applied the general rule set out by Justice L'Heureux-Dube in *R v L(D.O.)*, [1993] 4 SCR 419, to admit all relevant and probative evidence and allow the trier of fact to determine the weight which should be given to that evidence, in order to arrive at a just result.⁶⁵

Notwithstanding this general rule espoused by L'Heureux-Dube that all relevant and probative evidence should be admitted, applying the decisions in *Greater Niagara General Hospital and Miletich*, Arbitrator Burkett was not prepared to admit the recordings into evidence, deciding that the effect of doing so would seriously undermine the relationship between these parties and send the wrong message to the labour relations community that such practices were acceptable.⁶⁶ Nevertheless Burkett was prepared to admit into evidence any *viva voce* testimony of any Union witness who had not heard the tape or read a transcript of the tape.

A similar ruling, applying both *Greater Niagara General Hospital and Miletich*, was delivered by the Manitoba Labour Board (W.D. Hamilton, R. Panciera, J.H. Baker), holding that secret tape recordings were inadmissible. Recognizing that the authorities went both ways, the Board held that allowing the tapes into evidence would interfere with, rather than promote, proper relations between a union and its bargaining unit members. Based

⁶⁴ *Jazz Aviation LP v Canadian Airline Dispatchers' Assn.*, [2014] CLAD No 182, 244 LAC (4th) 244 (Burkett).

⁶⁵ *Ibid* at para 19, citing *Direct Energy and Unifor, Local 975 (Grievance of D Pialis -Days Off)* October 17, 2013 (Weatherill).

⁶⁶ *Ibid* at para 25.

on these policy considerations the Board ruled that the surreptitious recordings were inadmissible.⁶⁷

More recently, in *B.C. Ferry Service Inc.*, Arbitrator McEwen refused to admit secretly recorded conversations into evidence. However it was not the recording of the conversations she found objectionable, rather the clandestine nature of secret recordings in general without notice to the other participants. Adopting the decision in *Miletich* McEwen held that such conduct undermined labour relations and “to allow the tapes into evidence would be to encourage parties in every dispute to distrust each other, to disrupt their desire for resolution and to prolong proceedings.” Any party offering such evidence would have to demonstrate that the value of the evidence outweighed the damage to labour relations and the expectation of privacy.⁶⁸

This was probably most succinctly articulated by Vice President Sams in a recent Australian Fair Work Act decision:

In my view, there could hardly be an act which strikes at the heart of the employment relationship, such as to shatter any chance of re-establishing the trust and confidence necessary to maintain that relationship, than the secret recording by an employee of conversations he or she has with management. Although there may be sound reasons why an employee (or an employer for that matter) believes it is necessary to secretly tape workplace conversations, I consider such an act to be well outside the normal working environment and contrary to the well understood necessity for trust and fidelity in the relationship between employee and employer.⁶⁹

⁶⁷ *C (D) v MAHCP (Re)*, 2012 CLB 5047, 212 CLRBR (2d) 41 (MLB).

⁶⁸ *BC Ferry Service Inc v British Columbia Ferry and Marine Workers' Union* (Mehta Grievance), [2015] BCCAAA No 35, 123 CLAS 46 British Columbia Collective Agreement Arbitration, Joan I McEwen (Arbitrator), May 26, 2015, part IV.

⁶⁹ *Trevor Thomas v Newland Food Company Pty Ltd*, [2013] FWC 8220 at para 185. Also see *Lever v Australian Nuclear Science and Technology Organisation*, [2009] AIRC 784, where Deputy President Drake stated at para 103:

Applying ordinary Australian community standards I do not accept that any employee or any employer would be content to have any meeting they were attending secretly tape recorded. The ordinary conduct of personal, business and working relationships in our community is predicated on the basis that if there is to be any record of a meeting it will be agreed in advance. Anything else is quite properly described as sneaky. Its very sneakiness makes it abhorrent to ordinary persons dealing with each other in a proper fashion.

In Canada, Arbitrators have repeatedly upheld the privacy rights of employees, stating that “it is well established that persons do not by virtue of their status as employees lose their right to privacy and integrity of the person.”⁷⁰ However, where employees are meeting off-site in a social context, such recordings may be admissible in a labour arbitration hearing.

In a very recent grievance involving members of a firefighting crew in the Fort Nelson area, Arbitrator Dorsey made a preliminary ruling dismissing a union application to exclude surreptitiously recorded comments made during the course of a dinner conversation away from the firefighter’s base. While Dorsey held that covert recordings are generally inadmissible in labour disputes because their value is outweighed by the possible deleterious and chilling effect admissibility would have on workplace cooperation, collaboration, open settlement discussion and frank exchange in problem solving ~ in this case the after work social context of the situation removed it from workplace collaboration. As a result the “effect the recording might have on either the presentation of the union or employer’s case is secondary to the prejudicial effect exclusion of the recording will have on the credibility and acceptability of the outcome of this arbitration process”.⁷¹

The *Labour Relations Act*⁷² of Manitoba provides the legislative source for an arbitrator’s jurisdiction. The Act confers jurisdiction to deal with all disputes related to the collective agreement. The Supreme Court decisions in *Weber v Ontario* and *Board of Police Commissioners of the City of Regina v Regina Police Association* confirm that a statutorily appointed arbitrator has jurisdiction over all issues arising out of an agreement between parties.⁷³

⁷⁰ *Monarch Fine Foods Co Ltd v Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647* (1978), 20 LAC (2d) 419, [1978] OLAA No 8 (Picher).

⁷¹ *British Columbia Government and Service Employees' Union v BC Public Service Agency (Admissibility of Surreptitious Recording Grievance)*; [2016] BCCAAA No 129, British Columbia Collective Agreement Arbitration, James E Dorsey, Q.C. (Arbitrator), October 27, 2016, at para 18, online: <https://www.scribd.com/document/334830828/BCGEU?irgwc=1&content=10079&campaign=Skimbit%2C%20Ltd.&ad_group=725X16461X464127faf8aa27f302349729606367d7&keyword=ft750noi&source=impactradius&medium=affiliate>.

⁷² *Labour Relations Act*, CCSM c L10.

⁷³ *Weber v Ontario*, [1995] 2 SCR 929, 24 OR (3d) 358 and *Board of Police Commissioners of the City of Regina v Regina Police Association Inc*, [2000] 1 SCR 360, 183 DLR (4th)14.

In *George v Anishinabek (Police Service)*, a discipline hearing into allegations of discreditable conduct, the Ontario Court of Appeal affirmed that where a dispute expressly or inferentially arises out of a collective agreement, an arbitrator has exclusive jurisdiction. That is, if “the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement,” then “the claimant must proceed by arbitration and the courts have no power to entertain an action in respect to that dispute”.⁷⁴

Where an employee is claiming a tortious violation, the correct forum is before an arbitrator *if* the underlying dispute is related to the collective agreement. Indeed cases after *Weber* confirm that arbitrators have exclusive jurisdiction over a variety of tort claims such as conspiracy, interference with contractual relations, deceit, negligence, negligent misrepresentation, infliction of mental distress, and defamation where the dispute essentially relates to the collective agreement.⁷⁵

Furthermore the Supreme Court has held that where legislation is employment related, such as the *Human Rights Code* and the *Employment Standards Code*, they are effectively read into collective agreements, granting an arbitrator jurisdiction where the dispute essentially relates to the collective agreement.⁷⁶ Assuming privacy legislation is also employment related to the claim, an arbitrator may apply that as well.

⁷⁴ *George v Anishinabek (Police Service)*, 2014 ONCA 581, 321 OAC 391, citing both *Weber* and *Regina Police Association*.

⁷⁵ *Blanco-Arriba v British Columbia*, [2001] BCJ No 2376 at para 39, 2001 BCSC 1557 (BC SC) (QL).

⁷⁶ *Parry Sound (District) Social Services Administration Board v Ontario Public Service Employees Union, Local 324 (OPSEU)*, [2003] 2 SCR 157, 230 DLR (4th) 257. However, where the claim cannot be connected to the collective agreement see, *Toronto Police Services Board and Toronto Police Services Association*, 2006 CanLII 50481 (ON LA), where Arbitrator Surdykowski, stated at para 14: “Arbitrators do not have separate independent jurisdiction over tort or other claims that arises out of or with respect to an employment relationship unless the claim is connected to a collective agreement (...) That is, the essential character of the claim [must] expressly or inferentially concern the interpretation, application, administration or alleged violation of the particular collective agreement”.

V. PRIVACY LAW

A. The *Privacy Act*

The *Privacy Act*⁷⁷ of Manitoba is a short piece of legislation passed in 1970 that makes a privacy violation a tort. Its key provisions, contained in section 2, are:

- (1) A person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person.
- (2) An action for violation of privacy may be brought without proof of damage.

Without limiting the generality of section 2, the privacy of a person may be violated ... 3(b) by the listening to or recording of a conversation in which that person participates, or messages to or from that person, passing along, over or through any telephone lines, otherwise than as a lawful party thereto or under lawful authority conferred to that end. Remedies under section 4 may include:

- (a) award damages;
- (b) grant an injunction if it appears just and reasonable;
- (c) order the defendant to account to the plaintiff for any profits that have accrued, or that may subsequently accrue, to the defendant by reason or in consequence of the violation; and
- (d) order the defendant to deliver up to the plaintiff all articles or documents that have come into his possession by reason or in consequence of the violation.

Section 7 of the Act further provides that no evidence obtained by virtue or in consequence of a violation of privacy in respect of which an action may be brought under this Act is admissible in any civil proceedings.

Based in part on the 1967 *Report of the Royal Commission of Inquiry into Invasion of Privacy*⁷⁸ Manitoba's *Privacy Act* is unique from other provincial privacy legislation for its absolute exclusionary rule in civil cases and the fact it does not grant exclusive jurisdiction to any particular decision making body. As such an arbitrator in Manitoba could also consider a privacy breach where the dispute essentially relates to the collective agreement.

The origin of the 1967 *Royal Commission of Inquiry* was the discovery of eavesdropping devices in a hotel room occupied by a union leader. The devices had been placed there by a private investigator working for another union. The focus of the Commission was the nature and extent of the use

⁷⁷ *Privacy Act*, CCSM c P125.

⁷⁸ British Columbia, Office of the Deputy Provincial Secretary, *Commission of Inquiry into the Invasion of Privacy* (Victoria: The Queen's Printer 9 August 1967).

of recording devices and records thereof for the purpose of invading the privacy of persons or organizations ... with a view to determining whether any legislative enactment ... [was] necessary for the preservation of privacy as a civil right.⁷⁹

While the *Privacy Act* provides a personal remedy for any individual that has had their rights violated, arbitrators have tended to make the most use out of the provincial privacy legislation in workplace surveillance cases. The leading decision being *Doman Forest Products Ltd and IWA*, in which an employee was discharged based on video surveillance. When the employer sought to introduce the video evidence Arbitrator Vickers made the following comments:

The first thing to note is that the right to privacy is not absolute. It must be judged against what is “reasonable in the circumstances” and, amongst other things, is dependent upon competing interests such as “the relationship between the parties.” It may be violated by the “surveillance,” which I take to be both visual and electronic. The *Privacy Act*, therefore, gives the grievor a legal right to privacy in certain circumstances, quite apart from any contractual right he may have with the company.

...

While no specific provision exists in the collective agreement insuring a right to privacy it is, in my opinion, impossible to read this agreement outside of the value system imposed by the *Charter* and the statement of law contained in the *Privacy Act*. Indeed, the company did not argue that the *Privacy Act* was inapplicable.⁸⁰

The *Doman* decision has been applied regularly in Manitoba. In at least two decisions the fact an employee was covertly recorded in a public place did not negate their privacy rights. The issue to be determined was its reasonableness and level of intrusiveness.

Here, the surveillance of the grievor's activities was done at a public construction site. Again, I agree with Mr. Peltz that the *Privacy Act* does not *exempt* surveillance in public places from its ambit and neither does the arbitral case law exclude protection of an employee's privacy when the surveillance is done in public places ... It does go to the issue of whether or not a particular surveillance is “unduly” intrusive. The Manitoba legislation adopts similar templates because section 2(1)

⁷⁹ British Columbia, *Royal Commissions and Commissions of Inquiry under the Public Inquiries Act in British Columbia 1943-1980*, by Judith Antonik Bennett (Victoria: The Queen's Printer, 1982) at 20.

⁸⁰ *Doman Forest Products Ltd and IWA, Local 1-357* (1991), 13 LAC (4th) 275, [1990] BCCAAA No 401 (Vickers). Also see *United Steelworkers, Local 7552 v Agrium (Schulte Grievance)*, [2009] SLAA No 9, 185 LAC (4th) 296 (Hood).

makes it a tort for a person to “... substantially, unreasonably and without claim of right” violate the privacy of another person.⁸¹

In provinces that do not have their own privacy tort legislation, such as Ontario, the common law has stepped in to fill the void by recognizing that the law needs to protect people from unreasonable intrusion into their private lives. In *Jones v Tsige* the Ontario Court of Appeal outlined what needs to be proven to make out the tort at common law:⁸²

1. An unauthorized *intrusion*;
2. The intrusion was highly offensive to a reasonable person;
3. The matter intruded upon was private; and
4. The *intrusion* caused anguish and suffering (although the Court suggests this last one will be assumed when the first three are satisfied).

In *Angelo v Moriarty*, a common law claim of intrusion upon seclusion pursuant to the Court's inherent jurisdiction was brought against James Moriarty by the individual Board of Directors for the Fraternal Order of Police, Chicago Lodge No. 7. Moriarty, also a Board member, had posted two videos (with audio) of a private Board meeting from September 2013 on YouTube. The Plaintiffs contended that this “publication was highly offensive or objectionable to a reasonable person due, in part, to the implication set forth in the YouTube videos that the Plaintiffs ratified or allowed then-President of FOP #7 Michael Shields to violate the FOP's Constitution and By-Laws.”⁸³

The tort, as formulated in Illinois, is the same as that outlined in *Jones v Tsige*. However, the court dismissed the claim. While injury may have resulted from *uploading* the surreptitious recording, the way the tort is framed the injury must flow from the intrusion, in this case the actual making or recording of the videos, and *not* the publication. As a result the

⁸¹ *Canada Safeway Ltd v UFCW, Local 832*, [2003] MGAD No 10 at para 23, 72 CLAS 219 (Hamilton), quoting *Re New Flyer Industries Ltd v Canadian Auto Workers, Local 3003*, (2000) 85 LAC (4th) 304, 59 CLAS 76 (Peltz). Also see *Wong*, *supra* note 34, for the proposition that individuals do not automatically forfeit their privacy interests simply because they are surrounded by others.

⁸² *Jones v Tsige*, 2012 ONCA 32, 108 OR (3d) 241. Also see *Hopkins v Kay*, 2014 ONSC 321, 119 OR (3d) 251. In Manitoba see *Grant v Winnipeg Regional Health Authority et al*, 2015 MBCA 44, 319 Man R (2d) 67 where the common law privacy tort was adopted by Monnin JA notwithstanding the existence of the Manitoba *Privacy Act*, *supra* note 77 regarding the misuse of his personal information.

⁸³ *Angelo v Moriarty*, 2016 WL 640525 Case No 15 C 8065 (ND Ill 2016).

court concluded that the plaintiff had failed to adequately allege the tort of intrusion upon seclusion because the alleged offensive conduct and subsequent harm resulted from the defendants' act of publication, not from an act of prying (intrusion). "In other words, Plaintiffs have pleaded themselves out of court by admitting that Defendant's publication of the videos on YouTube caused their injury".⁸⁴

Besides the *Privacy Act*, surveillance without consent or notification can also fall under provincial or federal privacy legislation regarding the collection, storage, retrieval, and disclosure of personal information. It will generally not apply in individual cases as the legislation seeks to balance competing rights and interests in the collection, use and disclosure personal information in the course of business operations.

However, police officers who secretly tape record other individuals while they are at work place themselves and the organization at risk. Having a policy prohibiting such recordings in the workplace can protect the organization and place the employee on notice if such recordings are occurring.

Firstly the *Freedom of Information and Protection of Privacy Act*⁸⁵ applies to public bodies ~ which police departments are. The Act regulates the collection, use, retention and disclosure of personal information, including:

- (h) information about the individual's political belief, association or activity,
- (i) information about the individual's employment or occupation, or occupational history,
- ...
- (l) the individual's own personal views or opinions, except if they are about another person,
- (m) the views or opinions expressed about the individual by another person.

The result is that secretly recording others while an officer is working subjects them to *FIPPA's* requirements regarding the collection, use, retention and disclosure that information. *FIPPA* does not apply to private

⁸⁴ *Ibid*, Part III. Additional claims that Moriarty violated the *Federal Wiretap Act*, 18 USC § 2511, and the Illinois *Eavesdropping Statute* were also dismissed as Moriarty was a party to the communication. However, depending on the circumstances, a range of other legal remedies such as harassment, breach of confidence, nuisance, trespass, may still be available.

⁸⁵ *Freedom of Information and Protection of Privacy Act*, CCSM c F175 [*FIPPA*]. All provinces have similar legislation. For federal law enforcement agencies the *Privacy Act*, RSC, 1985, c P-21 would apply.

activities so it would not apply when an officer is not working, but it does beg the question if it is done while the officer is at work or in the workplace ~ who do the recordings belong to? We have already canvassed this issue that any records made while an officer is working are the property of the police agency. As such the officer has specific legal obligations regarding the collection, use, retention, and disclosure of those recordings.⁸⁶

Privacy can be defined as the state of desired “in access” or as freedom from unwanted access, with “access” meaning perceiving a person with one’s senses, including hearing them or obtaining information about them. Thus, speaking theoretically, a person’s privacy will be interfered with if another obtains, listens to, or finds out information about them against their wishes or enables others to do the same.

Most commentators agree that privacy is important because it promotes a number of other ends which are essential for human flourishing. For example, theorists such as Charles Fried, Stanley Benn, and James Rachels argue that privacy is necessary for the development of relationships. Friendship and intimacy would be impossible, they say, without the ability to reveal oneself more fully to some people than to others. Wider social interactions are also seen as dependent on people’s ability to include some and exclude others from their inner circle.⁸⁷

A person can be humiliated by exposure of something which he or she has no reason to be ashamed. The affront felt by a man who is photographed comforting his dying child in hospital is unlikely to be lessened because it makes him look like a caring father.⁸⁸

B. Charter Values

As discussed above, assessing the reasonableness of an expectation of privacy involves more than a factual inquiry; it also involves a normative one. As noted by Bennett, J.A. for a unanimous court of appeal, “in everyday experience people discuss matters and entrust their private thoughts with others holding the implicit expectation that the information will be kept confidential.”⁸⁹

⁸⁶ Also see *supra* note 1 where Officer Jackson was relieved from duty, not for making a recording with his personal GoPro device, but for failure to maintain, preserve and retain the recording in accordance with Florida’s *Public Records* statute. See also, *supra* note 19.

⁸⁷ *Law, Liberty, Legislation: Essays in honour of John Burrows QC*, Jeremy Finn & Stephen Todd, eds (Wellington, NZ: LexisNexis NZ, 2008) at 232.

⁸⁸ *Ibid.*

⁸⁹ *R v Craig*, 2016 BCCA 154 at paras 117-18, 130 WCB (2d) 32 [Craig].

While *Craig* dealt with on-line text messages sent to and held by a third party, the issue is similar – the receipt and retention of communications by a non-state agent. Craig had a direct interest in the recorded messages because he was party to them. They were a permanent record of his private communications.

The primary argument raised against an expectation of privacy in *Craig* was his “loss of control” over the message once sent [or said]. In other words ownership and control of the recordings by the recipient are relevant considerations. By simply communicating the information to another, he ran the risk that that person may reveal it to others.

This type of risk analysis is based on United States precedent that in communicating with another, an individual “takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to another... even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”⁹⁰

However such risk analysis is inconsistent with existing Canadian law.⁹¹ Accordingly, although ownership and control (of the records or recordings) are relevant considerations, they are not determinative nor should it be given undue weight. As noted by the court in *Craig*:

Although the expectation of privacy in these circumstances may be diminished somewhat, it is by no means obliterated. “A reasonable though diminished expectation of privacy is nonetheless a reasonable expectation of privacy, protected by s. 8 of the *Charter*” ... In the ordinary course, people reasonably expect the other party to maintain confidentiality in private communications.⁹²

Craig still had a privacy interest because he authored the content of the messages. As such, where the action or activity occurs in the police workplace, the *Charter* will apply. Even if the dispute or issue that led to the secret recording is determined to be a private one, albeit on work time or property, the *Charter* will still have some application in the subsequent use of that information.

⁹⁰ Cf *United States v Miller*, 425 US 435 at 442, (96 S Ct 1976). Also see *Hoffa v United States*, 385 US 293 at 302 (SC US 1966).

⁹¹ *Craig*, *supra* note 89 at paras 108-116.

⁹² *Ibid* at para 121, citing *R v Cole*, 2012 SCC 53 at para 9, [2012] 3 SCR 34 and *R v Buhay*, 2003 SCC 30 at para 22, [2003] 1 SCR 631.

Although the Supreme Court has held that the *Charter* does not apply to private, common law litigation directly, the judiciary must “apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution”.⁹³ In adopting such language the Court was careful to distinguish between *Charter* ‘values’ and *Charter* ‘rights’, limiting the application of the former to the interpretation of the common law.

Indeed, as we have already seen, *Charter* values have been imported into labour and employment law outside the criminal law context in workplace privacy cases such as *Re Steels Industrial Products*⁹⁴ and *Doman Forest Products*.⁹⁵

VI. BREACH OF CONFIDENCE

Breach of confidence deals with unauthorised use or disclosure of certain types of confidential information. While the majority of cases have concerned business records or trade secrets⁹⁶ it can apply to personal information as well. The elements of breach of confidence include components of breach of privacy.

First, the information itself must have the necessary quality of confidence about it. It applies only to information that remains confidential. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. It will not attach to trivial information. Third, there must be an unauthorized use of that information to the detriment of the party communicating it, which is not outweighed by the public interest in disclosure.⁹⁷

Breach of confidence is the misuse of confidential information, including information of a private character. It is a doctrine restraining the dissemination of confidential information improperly or surreptitiously obtained. As noted by Laws J in *Hellewell v Chief Constable of Derbyshire*:

⁹³ *Dolphin Delivery Ltd v RWDSU, Local 580*, [1986] 2 SCR 573 at 38, 33 DLR (4th) 174. Also see *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 92, 24 OR (3d) 865 (note) and *WIC Radio v Simpson*, 2008 SCC 40 at para 16, [2008] 2 SCR 420.

⁹⁴ *Supra* note 60.

⁹⁵ *Supra* note 80. Also see Lorne Sossin & Mark Friedman, “*Charter* Values and Administrative Justice” (2014) 67 SCLR (2d) 391.

⁹⁶ *Cf Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14.

⁹⁷ *Coco v A N Clark (Engineers) Ltd* (1969), [1969] RPC 41 at 47 (Ch).

If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence. It is, of course, elementary that, in all such cases, a defence based on the public interest would be available.⁹⁸

Information provided to public authorities will most often include an obligation of confidence. For example the City of Winnipeg *Police Service Regulation By-law* specifically prohibits the disclosure of “confidential information to anyone who is not authorized to receive it”, including personnel information.⁹⁹

In the labour context, breach of confidence has been used to grant injunctions to suppress the further disclosure of confidential documents or information, even where they pass to third parties¹⁰⁰ or to discipline employees who have disclosed confidential information including details of a harassment complaint.¹⁰¹ Rather than seeking to prevent a privacy breach, it has also been used as a cause of action where disclosure has already occurred.¹⁰²

A duty of confidence will also arise whenever a party knows or ought to know that the other person can reasonably expect their privacy to be protected. This approach was used by Lord Goff in *Attorney-General v*

⁹⁸ *Hellewell v Chief Constable of Derbyshire*, [1995] 1 WLR 804 at 807 (QB). Also see *Francome v Mirror Group Newspapers Ltd*, (1984) 2 ALL ER 408, [1984] 1 WLR 892 regarding an injunction to stop the publication of transcripts of calls from an illegal recording device placed on the jockey John Francome’s private telephone line.

⁹⁹ The City of Winnipeg, *By-Law No. 7610/2000* (Winnipeg: 24 May 2000) s 20.05(c). online:
<<http://clkapps.winnipeg.ca/dmis/documents/docext/bl/2000/2000.7610.pdf>>.

¹⁰⁰ *Cf Fraser Health Authority v Hospital Employees’ Union*, 2003 BCSC 807, 226 DLR (4th) 563, *Telus v Telecommunications Workers’ Union*, 2005 BCSC 642, 46 BCLR (4th) 315 and *Cadbury Schweppes v FBI Foods*, [1999] 1 SCR 142, 59 BCLR (3rd) 1.

¹⁰¹ *Heritage Credit Union v USW, Local 1-405* (2009), 186 LAC (4th) 252, [2010] BCWLD 3397. Also see *GR Baker Memorial Hospital Society and HEU*, (1997), 50 CLAS 305, [1997] BCCAAA No 815, and *Yellowknife Education District No 1 and USWA, Local 8646* (1992), 28 CLAS 135, 1992 CarswellNat 2258.

¹⁰² *Kawartha Pine Ridge District School Board and Elementary Teachers’ Federation of Ontario* (2008), 169 LAC (4th) 353, 92 CLAS 369.

*Guardian Newspapers (No 2)*¹⁰³ and confirmed in *Campbell v MGN Ltd* by the House of Lords¹⁰⁴ Whether a duty arises will depend on all the circumstances of the relationship between the parties and the nature of the material in question.

In *Constable McPhee v Brantford Police Service* a police officer was dismissed, in part, for breach of confidence after he had accessed police databases on numerous occasions in an attempt to obtain personal information on individuals for his own private use and not for police business. His conduct was found to have seriously undermined the public's confidence and trust that officers will honour their sworn oath governing the use of confidential information systems. As one of the systems, CPIC, is managed by the RCMP, the conduct was found to have seriously eroded the trust with that agency under the terms of the operating agreements allowing the Brantford Police to access the system. The panel concluded that only a substantial meaningful penalty would prevent or reduce the damage to the reputation of the Service.¹⁰⁵

Courts have also been held that activities in public may, in certain circumstances, also attract a reasonable expectation of privacy. A person walking down the street, for example, can expect to be observed by others, but may not expect their movements to become a permanent record. This is especially so in the context of visual surveillance employed by the state.

For example, in *Peck v United Kingdom*¹⁰⁶ the applicant was recorded on a municipal CCTV system carrying a large knife shortly after a suicide attempt. The recording saved his life as the CCTV operator alerted the police. However, the subsequent dissemination of the footage to local newspapers and television stations in order to publicize the value of the CCTV system infringed his rights. Similarly in Canada, as noted by the Supreme Court in *R v Spencer* quoting Justice La Forest in *R v Wise* [1992] 1 SCR 527:

In a variety of public contexts, we may expect to be casually observed, but may justifiably be outraged by intensive scrutiny. In these public acts we do not expect to be personally identified and subject to extensive surveillance, but seek to merge into the 'situational landscape': p. 558 (emphasis added), quoting M. Gutterman, "A Formulation of the Value and Means Models of the Fourth Amendment in the

¹⁰³ *Attorney-General v Guardian Newspapers (No 2)*, [1990] 1 AC 109 (HL (Eng)).

¹⁰⁴ *Campbell v MGN Ltd*, [2004] 2 All ER 995 (HL (Eng)).

¹⁰⁵ *McPhee v Brantford Police Service*, 2012 CanLII 102122 (ON CPC) at para 127.

¹⁰⁶ *Peck v United Kingdom* (2003), 36 EHRR 41.

Age of Technologically Enhanced Surveillance” (1988), 39 *Syracuse L. Rev.* 647, at p. 706. The mere fact that someone leaves the privacy of their home and enters a public space does not mean that the person abandons all of his or her privacy rights, despite the fact that as a practical matter, such a person may not be able to control who observes him or her in public.¹⁰⁷

Furthermore, information, specifically audio recordings made by police officers while working, is the property of the police department, not the officer, and may not be used or disclosed without the permission of the department.¹⁰⁸ While “use” does require some active employment of the information for some purpose, it is extremely broad and could include threatened disclosure in order to influence another.¹⁰⁹ Such a use may also involve misfeasance in public office.

A. Misfeasance in Public Office

Where a police activity is undertaken in bad faith, a claim in misfeasance in public office may lie; this could occur where damaging information is obtained and used by an officer because of a grudge they have against the other person. A claim against of negligence may also lie where damages result.

In *Odhavji Estate v Woodhouse* the Supreme Court set out the essential elements of the tort of misfeasance in public office:

- a) The official engaged in unlawful conduct in the exercise of his or her public functions; and,
- b) The official was aware that the conduct in question was unlawful and likely to injure the plaintiff.¹¹⁰

Although a public officer may make a decision adverse to the interest of certain individuals, so long as the decision is rational, made in good faith, and it is not inconsistent with the obligations of public office, the tort will

¹⁰⁷ *R v Spencer*, 2014 SCC 43 at para 44, 375 DLR (4th) 255. Also see *Alberta v UFCW*, *supra* note 3, as well as *Aubry c Éditions Vice-Versa Inc*, [1998] 1 SCR 591, 339 DLR (4th) 379 regarding the application of the Quebec Charter to protect against non-consensual photography in public places and the harms to autonomy interests.

¹⁰⁸ Cf Vancouver Police Department, “Regulations and Procedures Manual”, (Vancouver: Police Department, May 2006) at s 1.9.1 [Vancouver Police Department], online: <<http://vancouver.ca/police/assets/pdf/manuals/vpd-manual-regulations-procedures.pdf>>.

¹⁰⁹ *Leach v Bryam*, 68 F Supp (2d) 1072 (D Minn 1999).

¹¹⁰ *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263.

not apply. However, Justice Iacobucci for the Court concluded that the tort was not just limited to the abuse of statutory powers, but was “more broadly based on unlawful conduct in the exercise of public functions generally”. He continued:

[T]here is no principled reason... why a public officer who wilfully injures a member of the public through intentional *abuse* of a statutory power would be liable, but not a public officer who wilfully injures a member of the public through an intentional excess of power or a deliberate failure to discharge a statutory duty. In each instance, the alleged misconduct is equally inconsistent with the obligation of a public officer not to intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions.¹¹¹

Iacobucci concluded that the tort could be grounded in a broad range of misconduct, and that the essential question is whether the alleged misconduct is deliberate and unlawful. “Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties”.¹¹²

B. Whistleblower Protection

Information collected by or provided to public authorities will often include an obligation of confidence. Employees owe a duty of loyalty to their employers and are required, with certain exceptions, to disclose incidents of wrongdoing to their employer first in order to provide them with an opportunity to remedy it.

While most provinces and US states have whistleblower legislation that protects those who report suspected wrongdoing; such legislation usually sets forth specific categories of disclosures that are protected by law, with any disclosure falling outside those very specific boundaries being unprotected. Resort to social media, newspaper reporters, discussions with neighbors, or sharing information with patrons of a bar are not proper disclosure.

Whistleblowing occurs when employees reveal corporate wrongdoing, usually in their own organization and to the proper authorities. In April 2007 Manitoba’s *Public Interest Disclosure (Whistleblower Protection) Act* came

¹¹¹ *Ibid* at para 30.

¹¹² *Ibid* at para 29.

into force¹¹³ offering a mechanism for the disclosure of wrongdoings in the public service and provisions to protect whistleblowers. The Act covers the public service of Manitoba, including government agencies, departments, and specified offices. While it does not include municipal governments, recent attempts have been made to include them.¹¹⁴

Employees who reasonably believe that they have information that could show that a wrongdoing has been committed, or is about to be committed, can make a disclosure to his or her supervisor, a designated officer, or to the Ombudsman. A disclosure must be in writing and contain certain information required by the Act. Wrongdoing is defined as including:

- a) an offence under an Act or Regulation of the Legislature or the Parliament of Canada;
- b) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment; or
- c) gross mismanagement of public funds or a public asset.¹¹⁵

Such “up-the-ladder” reporting to a supervisor or designated officer reconciles an employee’s duty of loyalty to his or her employer with the public interest in the suppression of unlawful activity. Failure by a whistleblowing employee to try to resolve the matter otherwise may be categorized by courts and labour arbitrators as disloyal and inappropriate conduct. As noted by the Supreme Court of Canada in *Merk v Iron Workers Union, Local 771*:

Whistleblower laws create an exception to the usual duty of loyalty owed by employees to their employer. When applied in government, of course, the purpose is to avoid the waste of public funds or other abuse of state-conferred privileges or authority. In relation to the private sector (as here), the purpose still has a public interest focus because it aims to prevent wrongdoing “that is or is likely to result in an offence”. (It is the “offence” requirement that gives the whistleblower law a public aspect and filters out more general workplace complaints.) The underlying idea is to recruit employees to assist the state in the suppression of unlawful conduct. This is done by providing employees with a measure of immunity against employer retaliation.

...

¹¹³ *Public Interest Disclosure (Whistleblower Protection) Act*, CCSM c P217, [Whistleblower Act].

¹¹⁴ Bill 39, *The City of Winnipeg Charter Amendment and Public Interest Disclosure (Whistleblower Protection) Amendment Act*, 4th Session, 40th Leg, Manitoba, 2015.

¹¹⁵ *Whistleblower Act*, *supra*, note 113, s 3.

The general principles of labour relations provide, I believe, the appropriate context. In employment law, there is a broad consensus that the employee's duty of loyalty and the public's interest in whistleblowing is best reconciled with the "up the ladder" approach.¹¹⁶

While an employee can make a public disclosure without first going "up-the-ladder" where they reasonably believe that the matter constitutes an imminent risk of a substantial and specific danger to the life, health or safety of persons or to the environment, and that there is insufficient time to make a disclosure in accordance with the requirements of the Act, they must first make the disclosure to an appropriate law enforcement agency or the chief provincial public health officer (as applicable). Immediately thereafter, the employee must make the disclosure to his or her supervisor or a designated officer. Finally, the provisions that allow an employee to make a public disclosure are subject to any direction that the appropriate law enforcement agency or chief health officer considers necessary in the public interest, if any.¹¹⁷

When done in accordance with the Act, no reprisals may be taken against an employee, or directing that one be taken, because the employee has, in good faith, sought advice about making a disclosure in accordance with the Act, made a protected disclosure or cooperated in an investigation under the Act.

However, where an employee's alleged "wrongdoing" relates to his or her unfair treatment by the employer, such complaints must be grieved or arbitrated under applicable labour laws. Disclosure falling outside the very specific confines of the whistleblower legislation is unprotected. For example, in *Van Duyvenbode v Canada* the Ontario Court of Appeal dismissed the plaintiff's argument that his public letter writing campaign was protected by whistleblower legislation as his grievances consisted of personal workplace issues ~ not institutional wrong-doing that had a public interest component attached to them. As such his complaints should have been heard by the proper labour tribunal. There was no air of reality to his claim that he was a whistleblower.¹¹⁸

¹¹⁶ *Merk v International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70 at paras 14 and 16, [2005] 3 SCR 425. Also see *Haydon v Canada*, 2004 FC 749, [2005] 1 FCR 511, aff'd 2005 FCA 249, [2006] 2 FCR 3, leave to appeal SCC dismissed January 19, 2006 (Docket: 31153).

¹¹⁷ *Whistleblower Act*, *supra*, note 113, s 14(1)-(2).

¹¹⁸ *Van Duyvenbode v Canada (Attorney General)*, 2009 ONCA 11, [2009] OJ No 28, aff'ing 2007 CanLII 26614 (ON SC) at para 6.

Even where an employee has publicly disclosed instances of actual or perceived governmental wrongdoing, disciplinary action has followed. However, the discipline has usually resulted not from the violation of a specific statute, but because the employee has breached their common law duty of loyalty owed to his or her employer. In *Anderson v IMTT Quebec* the Federal Court of Appeal upheld Anderson's dismissal on the grounds that it resulted from the breakdown of the relationship of trust with his employer, his obvious lack of loyalty toward his employer and his attempts to discredit it, and not of anything to do with his whistleblowing disclosure:

[87] The reason for the dismissal was not that the complainant had sought compliance with or enforcement of the health and safety provisions of the Code, but merely that there had been a breakdown of the relationship of trust as a result of the complainant's clear lack of loyalty and the disrepute he had caused the company.

[88] The complainant acted disloyally toward the respondent when, on November 20, 2008, he forwarded an email regarding errors made by a colleague to Mr. Frédéric Perron, a health and safety technician and when, on March 16 and 30, 2009, he forwarded to the union president an email he had sent Mr. Fiset in which he questioned the competence of the terminal manager, as well as a copy of the complaint he had filed against Mr. Dion with the Ordre des ingénieurs du Québec.

[89] In his fierce determination to discredit the terminal manager and his colleagues, the complainant wound up discrediting [his employer].¹¹⁹

A mandatory prerequisite for whistleblowing involves the reporting of the wrongdoing "up-the-ladder" within the organization and that all such reporting mechanisms be exhausted before the confidential information may be disclosed externally. Even then it must first be reported to an enforcement or regulatory agency which shall be advised on any proposed release of information. As such surreptitiously recorded conversations, even if they allegedly involve allegations of wrongdoing, must be reported "up-the-ladder".

¹¹⁹ *Anderson v IMTT Quebec Inc*, 2013 FCA 90, para 19, [2013] FCJ No 346 quoting with approval 2011 CIRB 606 paras 85-87, 2011 CCRI 606.

VII. POLICE CODE OF CONDUCT

A. Deceit / Conduct Unbecoming

Police officers are held to high ethical standards. These standards are enforced both internally and externally through a number of mechanisms. For example the City of Winnipeg *Police Service Regulation By-law* provides that a member commits discreditable conduct where they act in an inappropriate manner, on or off duty, or in a manner likely to bring discredit upon the reputation of the Service; or makes a misleading, oral or written statement or entry in any document or record pertaining to their member's duties; or without proper authority conceals any evidence, document or record, or alters, erases, or adds to any entry therein.¹²⁰ Punishment can range from a warning to dismissal.

Other than the criminal law requirement that agents of the state obtain prior court authorization for covert surveillance where there is an expectation of privacy, there is no specific prohibition on covertly recording other police officers or members of the public. However, such a practice may be deemed likely to bring discredit upon the reputation of the Service. There are no cases on point. However, by analogy to the legal profession it could be deemed to be an unethical or deceitful practice to surreptitiously record other police officers.

B. Law Society Rules

Lawyers have very strict rules regarding the surreptitious recording of other lawyers or their clients. For example the Manitoba Law Society Code of Professional Conduct prohibits its members from using any device to

¹²⁰ *Supra* note 99, s 20(1)(e)-(g). Also see *City of Winnipeg Employee Code of Conduct* Part B, which states:

Employees must observe the highest standards of conduct in the performance of their duties, regardless of personal consideration. The public interest must be their primary concern. Their conduct in their official affairs must be above reproach at all times ... Employees must not engage in any conduct or activity ... which might detrimentally affect the City's reputation, make the employee unable to properly perform his or her employment responsibilities, cause other employees to refuse or be reluctant to work with the employee, or otherwise inhibit the City's ability to efficiently manage and direct its operations.

record a conversation between the lawyer and a client or another lawyer, even if lawful, without first informing the other person of the intention to do so.¹²¹

Chapter XVI of the Canadian Bar Association Code of Professional Conduct rule on “Avoidance of Sharp Practices” extends this prohibition to “anyone else”, even if lawful, without first informing the other person of the intention to do so.¹²² The rationale for the rule, which also exists in the United States and other Commonwealth countries, is to increase public confidence in the legal profession. Surreptitious recording suggests trickery and deceit. In *People v Smith*, the Colorado Supreme Court stated:

The undisclosed use of a recording device necessarily involves elements of deception and trickery which do not comport with the high standards of candor and fairness to which all attorneys are bound.¹²³

Members of the Bar can only earn a reputation as persons of honor, integrity, and fair dealing where they do not resort to deceptive practices or artifice. Surreptitious recordings demean the Bar as a whole in addition to the particular attorney involved.¹²⁴

The Colorado Rule was also considered to apply to a lawyer’s conduct both in the representation of clients and in the lawyer’s conduct arising in their private life. Specifically, the ban on conduct involving dishonesty, deceit, fraud, or misrepresentation was deemed to apply regardless of whether the attorney was acting in professional or private capacity, but

¹²¹ Law Society of Manitoba, *Code of Conduct*, section 7.2-3. All other Law Societies in Canada have similar provisions. See for example s 7.2-3 Code of Conduct, Law Society of Upper Canada; s 7.2-3 of the Federation of Law Societies; and s 7.2-3 Law Society BC - Professional Conduct Handbook; and Chapter XVI.

¹²² The Canadian Bar Association Code of Professional Conduct, Chapter XVI, Avoidance of Sharp Practices, commentary 5. The Nova Scotia Barristers’ Society Handbook also includes “anyone else”.

¹²³ *People v Smith*, 778 P (2d) 685 at 687 (SC Colo 1989). Also see *People v Selby*, 606 P (2d) 45 (SC Colo 1979) where a criminal defense attorney secretly audio-taped a preliminary hearing in a courtroom, a conference with the district attorney, and the judge in the judge’s chambers. He used some of the recorded information in his motion to disqualify the judge. He was disbarred.

¹²⁴ See Colorado Bar, *Formal Opinions*, Opinion 112 (11/07) 4-37, Surreptitious Recording of Conversations or Statements. Adopted July 19, 2003. Online: <http://www.cobar.org/Portals/COBAR/repository/ethicsOpinions/FormalEthicsOpinion_112_2011.pdf>.

argued that rule applied only to private conduct when it is so grave as to call into question the lawyer's fitness to practice law.¹²⁵

This type of deceptive practice or misrepresentation was at issue in *Bayly (Re)*. There, a lawyer and Principal Secretary of the Northwest Territories telephoned the territorial Conflict of Interest Commissioner on behalf of the Deputy Premier. He did not tell her that the call was on speakerphone and that other people were present, or that the conversation was being recorded. The lawyer was subsequently brought before the Law Society of the Northwest Territories.¹²⁶

The decision-maker appointed by the Law Society of the Northwest Territories found that while the misinformation regarding the speakerphone was not deliberate, it "was such a great omission that the integrity of the legal profession could be brought into disrepute," thus breaching the rule that "[t]he lawyer must discharge with integrity all duties owed to clients, the court or tribunal or other members of the profession and the public." Although it was noted that Bayly "did not make the recording himself and was placed in that unenviable position by his employer," his failure to rectify the situation was nonetheless grievous:

The image of the member, the Deputy Premier and other senior government staff listening to [the Commissioner] on the speakerphone, while the call was tape recorded, without [the Commissioner's] knowledge, is an image that sears the respect that the public has for lawyers.¹²⁷

In *Nova Scotia Barristers' Society v Ayres*, another lawyer was disciplined for surreptitiously using a tape recorder to record a conversation with a client or former client, without first informing them of her intention to do so.¹²⁸ Although Ayre claimed the reasons for making the recordings were two-fold: to make "voice notes" and "to protect myself", which she felt was necessary due to her past experiences, including discrimination by others. As such she felt she did not violate the letter or spirit of the Rule as the

¹²⁵ See David B Isbell & Lucantonio N Salvi, "Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct" (1995) 8:4 *Geo J Leg Ethics* 791 at 816; and Patrick O'Rourke, "Discipline Against Lawyers for Conduct Outside the Practice of Law" (2003) 32:4 *Colo Lawyer* 75.

¹²⁶ *Bayly (Re)*, 2002 CanLII 53208 (NWT LS).

¹²⁷ *Ibid* at 5.

¹²⁸ *Nova Scotia Barristers' Society v Ayres*, 1998 NSBS 1. Also see *Law Society of Upper Canada v Paul Ross*, 2011 ONLSAP 4.

recordings were not done to take advantage of anyone. Furthermore, as she was not a state agent, and such recordings were not illegal.

The decision-maker appointed by the Barristers' Society agreed that such non-consensual recordings were not illegal. However, the gravamen of the ethical transgression lay in the absence of the client's knowledge and consent. Not whether it was criminal.

While Ayre argued that it was not unethical to protect oneself against liars and those who are motivated by discrimination, the decision-maker assumed without deciding that such recordings might in some exceptional cases be so justified and thereby not unethical, such was not the case and the actions in tape recording were not motivated by these concerns. Rather the tapes were used to discredit a client and also to support an independent complaint against the client. Furthermore, if the intent was innocent, then disclosure would have been made habitually.

In finding Ayre guilty of professional misconduct, the decision-maker stated that "it is a cornerstone of the legal profession that every lawyer has a duty to conduct his or her affairs with integrity. Integrity is the basis on which our rules of professional responsibility are founded. If we do not maintain this fundamental duty, the legal profession cannot expect to retain the public trust or preserve the reputation of the profession". After careful consideration of all of the foregoing, the Panel, by majority, hereby sentenced her to:

- a. a suspension for a minimum term of six months, and continuing until the Society shall have received an opinion of a qualified medical practitioner that the Member is medically and psychologically fit to practice law.
- b. attend and successfully complete the Skills Training component of the Bar Admission Course offered through the Nova Scotia Barristers' Society, within one year of the date of this decision;
- c. attend and successfully complete the Legal Profession and Professional Responsibilities Course offered through Dalhousie Law School, within one year of the date of this decision;
- d. reimburse the Society for its costs amounting to \$200,034.99.¹²⁹

It is also worth considering the New Zealand Court of Appeal decision in *Harder v Proceedings Commissioner* where it was pointed out that while consent recordings are not illegal, they may still be excluded where they are unfair. Not unlike the New York decision in *Matter of Harry R. v Esther R.*

¹²⁹ *Ibid* at 124-25.

the Court compared this to the Rules of Professional Conduct for Barristers and Solicitors which read:

It is an invasion of a person's privacy to tape a conversation without that person's consent. It is unprofessional and discourteous for one practitioner to do so in respect of another. If a practitioner wishes a conversation by telephone or otherwise to be taped, the specific consent of the other practitioner or employee must first be obtained. Practitioners should note Privacy Principles 2 to 4 of the Privacy Act 1993.¹³⁰

The Court then reasoned that unfairness had been made out. Lawyering is an honourable profession and the client was entitled to assume the lawyer would behave appropriately. The duty owed to his client did not entitle him to abandon proper professional standards.

In New York, where the law allows surreptitious recordings, the Association of the Bar of the City of New York is also more liberal. Providing that a lawyer may tape a conversation without disclosure of that fact to all participants if the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good. However, undisclosed taping entails a sufficient lack of candor and a sufficient element of trickery as to render it ethically impermissible as a routine practice.¹³¹

Suffice to say, as a highly regulated profession, police officers should be held to no less a standard than lawyers in ensuring public trust and confidence.

C. Body Worn Cameras

Policies and procedures regarding overt recordings would equally apply to covert recordings in terms of security, storage, retention and disclosure. As many police agencies look at Body Worn Cameras as a means of

¹³⁰ *Harder v Proceedings Commissioner*, [2000] NZCA 129 (CA) citing paragraph 7 of New Zealand Law Society, *Rules of Professional Conduct for Barristers and Solicitors*, 1998.

¹³¹ The Associations of the Bar of the City of New York, *Re: Undisclosed Taping of Conversations by lawyers*, 2003-02. online: <<http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2003-02-undisclosed-taping-of-conversations-by-lawyers-1>>. Also see, Ohio Board of Commissioners on Grievances & Discipline, *Re: Surreptitious (Secret) Recording by Lawyers*, 2012-1, in which 10 state Bars are identified as holding that surreptitious recording is both illegal and unethical for lawyers. In 9 other states surreptitious recording is unethical, but allowed in certain circumstances.

recording police interactions with the public, guidelines have been issued identifying the risks and proper procedures for their use. For example in February 2015 the heads of all Canada’s privacy agencies endorsed the document “Guidance for the use of body-worn cameras by law enforcement authorities”.¹³²

The privacy commissioners were clear that before embarking on *overt* recordings, police agencies should establish written policies and procedures that clearly identify the program objectives and set out the rules governing the program. These policies and procedures should include the elements listed below:

- The legislative authorities for collecting personal information under the program.
- Criteria for context-specific continuous recording and/or turning cameras on and off, as applicable.
- Privacy protections for employees whose personal information is captured.
- Individuals’ right to make a complaint to the agency’s privacy oversight body regarding the management of a recording containing personal information.
- A provision for regular internal audits of the program.
- The name and contact information of an individual who can respond to questions from the public.
- The circumstances under which recordings can be viewed. Viewing should only occur on a need-to-know basis. If there is no suspicion of illegal activity having occurred and no allegations of misconduct, recordings should not be viewed.
- The circumstances under which recordings can be disclosed to the public, if any, and parameters for any such disclosure. For example,

¹³² Office of the Privacy Commissioner of Canada et al, *Guidance for the use of body-worn cameras by law enforcement authorities*, online: PCC <http://publications.gc.ca/collections/collection_2015/cpvpc-opc/IP54-61-2015-eng.pdf>.

faces and identifying marks of third parties should be blurred and voices distorted wherever possible.

- A mechanism for dealing with any breaches whereby personal information is accessed without authorization or disclosed contrary to the provisions of applicable privacy laws.
- A process for responding to requests for access to recordings, including access to personal information and access to information requests under freedom of information laws.
- Retention periods and disposal provisions.¹³³

These policies and procedures should be made available to the public to promote transparency and accountability. Furthermore retention policies for recordings, including recordings to be used as evidence, should be consistent with applicable laws, such as the *Canada Evidence Act* and the applicable *Police Services Act*, or municipal records retention by-laws.

Furthermore it should be clear that audio recordings made by police officers while working are the property of the police department, not the officer, and may not be used or disclosed without the permission of the department.¹³⁴ As such any rules and policies that apply to overt recording would apply equally to covert recordings including recordings made using an officer's own personal device.

D. BYOD (Bring Your Own Device)

Many employees want to bring their own personal communication devices to work ~ some for work purposes and others for personal reasons such as maintaining contact with friends and family. The current generation of cell phones, or smart phones, all have the capability to take pictures, videos, and make sound recordings. Generally there is no prohibition on employees bringing their own devices to work (BYOD).

Some of the main reasons companies are generally accepting of employees bringing their own devices are related to increased employee satisfaction, productivity gains (employees are happier, more comfortable and often work faster with their own technology), and cost savings (device

¹³³ *Ibid.*

¹³⁴ Cf "Body Worn Cameras", *supra* note 10. Also see Vancouver Police Department, *supra* note 108.

purchase and maintenance). Some 43% of employees even connect to their work emails on their own smartphones in order to get ahead and ease their workload.¹³⁵

While such practices as BYOD may be here to stay, they do create information and governance challenges when it comes to the use of personal devices at or for work purposes. These challenges include the duty to maintain the security and confidentiality of any work-related information used or stored on the device. Employers need to consider how BYOD policies can be integrated into the workplace, dealing with such diverse topics as social media, harassment and discrimination, records retention, compliance and ethics, as well as employee privacy. “Allowing employees to use their personal devices at work make it easier for them to defame the company, their co-workers, customers, vendors, competitors and others or to unlawfully harass their co-workers or subordinates ~ whether via social media, texting or good, old-fashioned phone calls. Employees using their personal devices may feel more at ease to engage in such inappropriate activity than they would on company-provided equipment”.¹³⁶

Law enforcement agencies also need to consider security issues surrounding information stored on such devices, outside of inappropriate use. For example a recent Freedom of Information request to the London Metropolitan Police revealed that 534 mobile phones, 115 BlackBerry devices, and 136 PDAs had been lost since 2010. While these were work issued devices, the risk from lost, stolen, or misplaced personal devices containing information recorded at work is perhaps even greater due to the lack of control an employer has over security applications (if any) on an employee’s personal device.

¹³⁵ Unify, “BYOD: Bring your own Policy”, 2nd ed (Germany: 2016), online <http://www.unify.com/~media/internet-2012/documents/white-paper/BYOP_Bring_Your_Own_Policy.pdf>. However, a recent survey by the Canadian Federation of Independent Business (CFIB), found that 61 per cent of Canadian employers said the biggest challenge to workplace productivity were their employees’ use of personal cellphones during work hours. Online: CFIB <<http://www.cfib-fcei.ca/english/article/7602-small-business-views-on-the-canadian-workforce.html>>.

¹³⁶ Paul G Lannon & Phillip M Schreiber, “BYOD Policies: What Employers Need to Know”, *HR Magazine* (1 February 2016), online: HRMagazine <<https://www.shrm.org/hr-today/news/hr-magazine/Pages/0216-BYOD-policies.aspx>>.

Once information is in the wrong hands the employer loses control over what is done with it. There have been cases where public officers have inappropriately recorded videos of crime scenes, victims, or witnesses with their personal devices and then seen them posted on social media. In 2010 Firefighter Terrance Reid used his personal phone to videotape the body of Dayna Kempson-Schacht, the victim in a fatal vehicle accident. Reid shared the video with other firefighters on his crew, one of whom began sending the video to others. It was subsequently posted online and from there it went worldwide, appearing on as many as 800 web sites.¹³⁷

While the vehicle was in public view, accessible to the general public, and could have legally been recorded by anyone in the vicinity, Reid was terminated by the fire department for “conduct unbecoming.” Six other firefighters were reprimanded for distributing the footage and the fire department for which Reid worked was sued. Had Reid been a private citizen, the video or pictures would have been his property. But because he was on duty at the time, the recordings were made in his capacity as a firefighter and not as a member of the public.

[Furthermore] if another vehicle had been involved in the accident or had another death occurred, the video images taken by Reid would have had to be properly preserved as evidence. If any part of the photographic evidence were deleted, changed, or misplaced, Reid could have been charged with “spoliation,” the misappropriation or destruction of evidence. Because spoliation can change the course of a criminal or civil case, the individual deleting such imagery could be sentenced to a term of imprisonment. In cases using spoliation as a defense, the defense attorney can argue that the missing images raise reasonable doubt, preserving his client's innocence. In a civil case, a judge can easily rule against one side for not properly preserving evidence. Other legal implications can be very expensive, as the entire department becomes a target for a lawyer retained by an offended family member.¹³⁸

¹³⁷ Kent Collins, “The Fire Department and Social Media: What's Your Policy?,” *Fire Engineering Magazine* (1 May 2012), online: Fire <<http://www.fireengineering.com/articles/print/volume-165/issue-5/features/the-fire-department-and-social-media-whats-your-policy.html>>.

¹³⁸ *Ibid.* Also see Rabin & Smiley, *supra* note 19, where Officer Jackson was relieved from duty, not for making a recording with his personal GoPro device, but for failure to maintain, preserve and retain the recording in accordance with Florida's Public Records statute. Also see Stephanie Lee, “Facebook murder picture horror inspires bill”, *Times Union* (31 March 2011), online: TimesUnion <<http://www.timesunion.com/local/article/Facebook-murder-picture-horror-inspires-bill-1315710.php>>, where New York EMT Mark Musarella took a picture of a homicide

Similar posts have resulted in the passage of police policies and guidelines regarding the use of social media. For example, the Detroit Police Department issued its guidelines in 2011 after an officer posted photos of a suspect wielding a machete on his Facebook page. That same year, the Albuquerque Police also barred department members from identifying themselves on social media. That order came shortly after an officer, involved in a fatal police shooting, was seen on Facebook describing his job as “human waste disposal.”¹³⁹

A Washington DC Metropolitan Police policy on *Photographs, Video Recordings, and Audio Recordings of Crime Scenes*, passed by the Chief Lanier in 2013, outlines procedures for officers taking photographs, video recordings, and audio recordings while on-duty, or acting in any official capacity at crime scenes, whether or not they are using police-issued or personal equipment. The policy restricts members in taking photographs, video recordings, and audio recordings of crime scenes, victims, and witnesses for only official law enforcement purposes. Further, “unless previously released by the Department, members shall not copy, print, e-mail, display, distribute or in any other manner permit photographs, video recordings or audio recordings related to any [] investigations to be viewed or released for other than official purposes”.¹⁴⁰

A BYOD responsible use policy will have little impact or enforceability if employees are not made aware of it, or the consequences if they do not comply with it. Further guidelines containing important recommendations that would enable organizations to reconcile organizational security concerns with their obligations pursuant to applicable privacy law were issued in 2015 by the Office of the Privacy Commissioner of Canada in a

victim with his cell phone and uploaded it to Facebook. Musarella was fired and charged with a misdemeanor before he pleaded guilty to a reduced charge of “disorderly conduct” and sentenced to 200 hours of community service.

¹³⁹ J D Goodman and Wendy Ruderman, “Police Dept. Sets Rules for Officers’ Use of Social Media”, *New York Times* (28 March 2013), online: NYTimes <<http://www.nytimes.com/2013/03/29/nyregion/new-york-police-dept-issues-guidelines-for-social-media.html>>.

¹⁴⁰ Metropolitan Police, District of Columbia, “Photographs, Video Recordings, and Audio Recordings of Crime Scene”, MPDC Policy SO-13-13, online: MPDC <https://go.mpdconline.com/GO/SO_13_13.pdf>.

joint release with the British Columbia and Alberta Information and Privacy Commissioners.¹⁴¹

VIII. EVIDENTIARY ISSUES

A. Authentication

All the cases dealing with the admissibility of electronic data go to show that such admissibility depends upon (1) their accuracy in truly representing the facts; (2) their fairness and absence of any intention to mislead; and (3) their verification on oath by a person capable of doing so.

However, the admissibility of intercepted conversations raises a number of questions quite apart from the legality of the interception. Privately recorded conversations are more likely to be found inadmissible than those recorded by the state as it is often more difficult for private individuals to show the information is accurate, authentic, and trustworthy. Some of the requirements for admissibility were previously discussed in the section on Criminal Law.

For example, in *R v Andalib-Goortani*,¹⁴² Justice Trotter excluded photographic evidence of a police officer (accused) taken in public by a 3rd party as it lacked authenticity and trustworthiness. While Justice Trotter held that such evidence is not presumptively inadmissible, like similar fact evidence, hearsay, or prior consistent statements, which does not mean it is *automatically* admissible. Instead it is *conditionally* admissible. Certain pre-conditions must be “established” on the basis of “some evidence”.

This proposition, he stated, is demonstrated in *R v Nikolovski* where the Supreme Court considered the admissibility of videotape evidence:

Once it is established that a videotape has not been altered or changed, and it depicts the scene of a crime, then it becomes admissible and relevant evidence.

¹⁴¹ Office of the Information and Privacy Commissioner of Canada et al, “Is a Bring Your Own Device (BYOD) Program the Right Choice for Your Organization?” (Gatineau: OIPC, August 2015), online: OIPC <<https://www.oipc.bc.ca/guidance-documents/1827>>.

¹⁴² *R v Andalib-Goortani*, 2014 ONSC 4690, [2014] OJ No 4499. Also see Dan Grice & Bryan Schwartz, “Social Incrimination: How North American Courts are Embracing Social Network Evidence in Criminal and Civil Trials” (2012) 36:1 Man LJ 221 at 236-249; and Rosemary Pattenden, “Authenticating ‘Things’ in English Law: Principles for Adducing Tangible Evidence in Common Law Jury Trials” (2008) 12:4 Int’l J Evidence & Proof 273.

Not only is the tape (or photograph) real evidence in the sense that that term has been used in earlier cases, but is to a certain extent, testimonial evidence as well.¹⁴³

The party wishing to make use of a photograph bears the burden of authentication. Recent experience shows that digital photographs can be changed to produce false images. Indeed, with the advent of computer software and programs such as Adobe Photoshop “it does not always take skill, experience, or even cognizance to alter a digital photo.”¹⁴⁴

Similarly in *Focus Building Services Ltd. and Construction and General Workers' Union, Local 602*, a British Columbia Industrial Relations Council appeal panel also expressed concern about tape recorded evidence. Where there was no doubt that such recordings could be of assistance in certain cases, particularly in assessing credibility, the party wishing to introduce it must first satisfy the panel of both the accuracy of the recordings and the justification for their admittance.

Authenticity requires as a minimum that the identity of the persons alleged to be taking part in a conversation be established, that the tape recordings are found to be accurate insofar as there are no omissions or deletions and the method used in taping a conversation ensures an accurate representation. The party wishing to introduce the tape recordings must also convince the panel that the probative value of the evidence is more significant than the consequences that taping conversations would have on sound industrial relations.¹⁴⁵

Similarly, in 2013, the English Employment Appeal Tribunal considered the case of *Vaughan v London Borough of Lewisham*, which involved an application to admit into evidence 39 hours of recordings the claimant had made of her interactions with managers and colleagues, to

¹⁴³ *Ibid* at para 26, citing *R v Nikolovski*, [1996] 3 SCR 1197, 141 DLR (4th) 647. Also referencing *R v Penney* [2002] NJ No 70 (QL) at 335 and 342, 163 CCC (3d) 329. Also see *R v George Jack Giroux*, 2013 NWTTC 4, [2013] 2 WWR 130, for audio recordings excluded for lack of authentication even though they were recorded in the Slave Correctional Centre in Yellowknife. However see *R v Bulldog*, 2015 ABCA 251, 326 CCC (3d) 385, where the claim will typically be not that it is something, but that it accurately represents something (a particular event).

¹⁴⁴ Zachariah B Parry, “Digital Manipulation and Photographic Evidence: Defrauding The Courts One Thousand Words At A Time” (2009) 2009:1 U Illinois JL Tech. & Pol’y 175 at 183.

¹⁴⁵ *Focus Building Services Ltd and Construction and General Workers' Union, Local 602*, [1997] CLAD No 126, 1987 CLB 12097, Industrial Relations Council, Appeal of BCLRB No 331/86.

support her claims of discrimination, victimisation and harassment, whistleblower detriment, and unfair dismissal.¹⁴⁶

Ms. Vaughan did not supply copies of the transcripts, nor the tapes and her application to submit the recordings as evidence was rejected on the grounds that she had not shown that they were relevant. On appeal Justice Underhill upheld the decision, stating:

We should say...that the practice of making secret recordings in this way is, to put it no higher, very distasteful; but employees such as the claimant will no doubt say that it is a necessary step in order to expose injustice. Perhaps they are sometimes right, but the respondent has already made it clear that it will rely on the claimant's conduct in making these covert recordings, as illustrative of the way in which her conduct had destroyed any relationship of trust and confidence between her and it.¹⁴⁷

In a separate decision the Employment Appeal Tribunal upheld the costs awarded against the Claimant estimated to be around £87,000, despite the fact she was unemployed and unrepresented before the tribunal.¹⁴⁸

However, even where authentication is not the issue, information that is surreptitiously obtained or misappropriated from a workplace to support a harassment and discrimination grievance (in this case by a compliance officer) – no matter how well-meaning – is likely to be inadmissible regardless of motivation. Self-help measures are not a justification. “Otherwise, it might be considered proper for any aggrieved individual to take and/or surreptitiously reproduce company (or for that matter union) documents in support of any grievance or other righteous cause, thereby undermining any semblance of mutual trust essential to the running of the workplace”¹⁴⁹

From a criminal or regulatory perspective this is not unlike the situation in *R v Law* where evidence of tax evasion located by the police in a safe stolen from the accused's business was found to be inadmissible. A police officer suspecting the accused of tax evasion photocopied documents from the recovered safe and forwarded them to Revenue Canada. Although

¹⁴⁶ *Vaughan v London Borough of Lewisham* (2013), [2013] EWHC 4118 (QB).

¹⁴⁷ *Ibid.*

¹⁴⁸ *Vaughan v London Borough of Lewisham*, Appeal No UKEAT/0533/12/SM, (2013), 2013 WL 2460246.

¹⁴⁹ *Ontario Public Service Employees Union v Ontario (Ministry of Finance)* (Fortin Grievance), [2017] OGSBA No 18 (Luborsky) at para 23, quoting *North Bay Nugget v North Bay Newspaper Guild, Local 30241* [Seguin Grievance], (2005) 82 CLAS 306, 143 LAC (4th) 106 (Ont Arb), at para 33.

admitting the evidence would not affect the fairness of the trial (it being real, discoverable, non-conscripted evidence), and excluding the evidence would compromise the Crown's case, the Supreme Court held the violation outweighed the State's interest in admitting the evidence.

The officer's approach, behaviour and disrespect for regular police procedures combined with his failure to leave responsibility for the investigation to taxation authorities when that option was available rendered his conduct sufficiently serious to exclude the photocopied documents ... The administration of justice would suffer greater disrepute from the admission of the evidence than from its exclusion.¹⁵⁰

IX. CONCLUSION

In 2011 *ABC News* reported that employees are increasingly using digital devices to record conversations in the workplace, and sometimes using the recordings to launch complaints against their employers. While the frequency of secret workplace recordings is unknown, the article suggests that it happens often enough that employers should assume that all meetings with employees are being recorded.¹⁵¹

As such it is to be expected in an era of mass digital communications that many police officers will be increasing their use of digital devices to secretly record conversations in the workplace and/or their interactions with the public, sometimes using such recordings to launch complaints against their employers.

Although Craig MacMillan suggested it may be possible for police officers to make personal interest recordings, where the recordings are covertly or surreptitiously made in the workplace of other officers without a court order, they may not be admissible in any proceedings for a number of reasons ~principally because such recordings may be unethical, it would be breach of confidence and privacy, and/or because it would undermine the spirit of trust and confidence between the parties. It may also be unlawful without a court order. However, with the potential of opposing rulings in the Michel Ledoux case between the civil and criminal courts, I anticipate this is a decision ripe for the Supreme Court of Canada to decide.

Nevertheless there is no guarantee that such recordings would not become public and police employers should have clear policies that such

¹⁵⁰ *R v Law*, 2002 SCC 10 at the headnote, [2002] 1 SCR 227.

¹⁵¹ *Supra* note 8.

practices are prohibited in the police workplace, adopting a similar policy to that of the United States Federal Aviation Administration:

Covert/secret taping, either audio or video, of any conversation or meeting occurring at the workplace or conversation or meetings off-site that deal with workplace issues and matters of official concern are prohibited. Examples of such meetings are promotion interviews, EEO meetings with a counselor or investigator, meetings between a manager and a subordinate, etc. This prohibition applies regardless of any State law which may permit covert/secret tape recording.¹⁵²

Employers understandably want control over the documentation of what occurs in the workplace. In addition employees may not realize it could be against the law. Prevention is the best precaution against such uses in the workplace. Otherwise there is, of course, no way of knowing whether you are being watched at any given moment by the thought police, “[y]ou have to live ~ do live, from habit that becomes instinct ~ in the assumption that every sound you made is overheard, and except in darkness, every movement scrutinized”.¹⁵³

¹⁵² US, Federal Aviation Administration, “Human Resources Policy Manual (HRPM) Volume 4: Employee Relations ER -4.1” (Washington: FAA, 2 March 2011).

¹⁵³ Paraphrasing George Orwell, *Nineteen Eighty-Four*, 1st ed (United Kingdom: Secker & Warburg, 1949).