Legal and social issues raised by the private policing of injured workers

Katherine Lippel

Professor of Law
Faculté de science politique et de droit
L'Université du Québec à Montréal

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Introduction

In a survey study that appeared in 2001[2], researchers in Ontario learned that 56% of injured workers with litigious claims and 29% of all injured workers surveyed felt they were being punished because of their work injury. This sentiment is echoed in interviews and studies by health care professionals in other Canadian jurisdictions. Yet injured workers who receive workers' compensation benefits have no less the right to benefits than do tort law plaintiffs who have the right to seek redress from the wrongdoer. Injured workers in all Canadian jurisdictions are precluded from suing the employer and colleagues even in those cases where injury is clearly attributable to employer negligence[3]. The only recourse available to these workers is that provided by workers' compensation legislation. It is thus sad to acknowledge that the program designed to improve worker and employer relations by removing litigation from the courts has served to make workers feel punished.

In interviews with injured workers we were often told that they feel they are treated like criminals, that they felt like “bandits”. One of the reasons given for this relates to the activity of private detective agencies hired to covertly surveille the worker. Stigmatisation

[1] Thanks to Beatrice Sassoli for her research assistance and to the Social Science and Humanities Research Council of Canada for its financial support. Thanks particularly to l'Union des travailleurs et travailleuses accidentés de Montréal (UTTAM), l'Association des travailleurs et travailleuses accidentés du Québec, (ATTAQ), the Office of the Worker Advisor, various lawyers and legal clinics in Quebec and Ontario and to the injured workers and their care givers who accepted to share information with us. Thanks also to the Law Commission of Canada, Dennis Cooley and Kelly Mahoney for sharing research results that were helpful in the development of this paper

[2] The injured workers' participatory research project, Making the System Better, Toronto, 2001, p. 10

[3] ***Béliveau St-Jacques*** v. ***Fédération des employées et employés de services publics inc,*** [1996] 2 S.C.R. 345. In several provinces this prohibition extends to suits brought against all employers covered by the Act. See ***Kovach*** v. ***British Columbia (W.C.B.)*** [2000] 1 S.C.R. 55; ***Lindsay*** v. ***Saskatchewan (W.C.B.)*** [2000] 1 S.C.R. 59.

of injured workers is often the result of derogatory comments about them in the media and by politicians. The stereotypic image applied to all welfare recipients, that associated with welfare fraud, is often stretched to include injured workers receiving compensation benefits, so that pejorative comments from co-workers and the media contribute to the already negative self image of disabled workers who have lost much of their self esteem because of their injury.

Stigmatisation of beneficiaries of these programmes is not good for their health[4], and even from an economic perspective one would think that strategies that were conducive to negative self-image of workers would also increase costs of compensation paid to workers because resulting disability would also lead to compensation. As we shall see, this is not necessarily the case, even in those cases where the compensation board (or the employer) is found to have abused their right to evaluate (or contest) the legitimacy of a claim.

This study examines the nature and extent of private surveillance of injured workers in several provinces, both in order to describe the phenomenon and to circumscribe legal issues it raises. In particular, we are interested in determining whether the legal framework generally governing these issues is applied in the same way when the subject of surveillance is an injured worker rather than an insurance claimant. Previous research[5] has led us to hypothesise that historical victim blaming and stigmatisation of

[4] G.Lea, "Secondary Traumatization of Work-Related Rehabilitation Clients", (1996) 22 The Canadian Practitioner 5; D. Mendelson, «The Expert Deposes but the Court Disposes: the Concept of Malingering and the Function of Medical Expertise», (1995) 18:4 International Journal of Law and Psychiatry 425; T.J. Ison, “The Therapeutic Significance of Compensation Structures», (1986) 64 Canadian Bar Review 605; W. Wilkinson, «Therapeutic Jurisprudence and Workers' Compensation», (1994) 30 Arizona Attorney 28; J. Reid, C. Ewan and E. Lowy, «Pilgrimage of Pain: The Illness Experiences of Women with Repetition Strain Injury and the Search for Credibility», (1991) 32:5 Soc. Sci. Med 601.

[5] K. Lippel, "Therapeutic and Anti-therapeutic Consequences of Workers' Compensation Systems", (1999) 22:5-6 International Journal of Law and Psychiatry 521.

injured workers, in the context of mass adjudication[6] by state agencies, may lead to a looser application of fundamental rights and freedoms legislation when injured workers claiming compensation are the subject of the surveillance.

Methodology for the study included traditional legal analysis as well as focus group interviews of lawyers, union and community group members who represent injured workers before the administrative tribunals, and individual interviews with workers and health care professionals. The paper is part of a broader study on the therapeutic and anti-therapeutic consequences of workers' compensation legislation in Canada.

The first part of this paper describes the role played by private surveillance services hired to follow and sometimes videotape workers' compensation claimants without their knowledge; the second part examines some of the legal issues raised by these practices. Although examples are drawn from various Canadian provinces, the legal analysis focuses more particularly on Ontario and Quebec.

Part 1:Use of private policing of injured workers

1.1 Why police injured workers?

Workers are followed in order to obtain evidence allowing the client of the surveillance firm, the employer or the workers' compensation board, to contest or deny compensation benefits. Sometimes the activity is designed to obtain evidence for use in administrative tribunal or arbitration hearings; at other times it is simply used as a bargaining tool in order to encourage a worker to accept a settlement or to drop his claim.

[6] For an interesting discussion of issues specific to mass adjudication systems in a Canadian context see J.M. Evans, "Problems in Mass Adjudication: The Courts' Contribution", (1990) XL: 3 U of T. Law Journal, 606; P. Issalys, "Le droit administratif et la décision collective", (1990) XL: 3 U of T. Law Journal, 611, and J.D'A. Vaillant, "Problèmes que posent les décisions collectives", (1990) XL:3 U of T. Law Journal, 621-629.

Analysis of case law shows that most instances in which video-surveillance reports are put into evidence involve one of two issues. In the occasional case, workers are suspected of working while receiving benefits for total disability, or while receiving other forms of benefits that would not be payable if they were known to be working. These cases more closely resemble what could be described as quasi-criminal activity, where the worker is receiving benefits in circumstances tantamount to fraud, and they are relatively rare[7].

In the majority of cases we found, the video-surveillance aimed to show that the worker's physical or psychiatric condition was less serious than he or she had lead the Board or the employer to believe. The party seeking to deny benefits or to sanction the worker hoped to show by video-surveillance evidence that the worker could drive a car, lift her child, remove groceries from a car, wait for a bus while standing, bend his elbow or walk without a limp. In one case, the purpose of the surveillance was simply to demonstrate that a severely injured worker who was also compensated for profound depression had, at least on one occasion, left the security of her home and that she was not seen on the videotape to be cowering or crying.

The official reasons to employ private surveillance firms to follow injured workers are thus to detect individual cases of dishonesty, either flagrant violation of the law or exaggeration of degree of disability .

Aside from the overt rationale for following injured workers, it is clear, at least in some jurisdictions, that workers' compensation boards see private surveillance to be a good

[7] See, for one of the rare examples in the case law, *Lapointe* v. *C.A.L.P.*, [1995] C.A.L.P. 1319, (C.A.Q.). This case describes clearly fraudulent behaviour but is often used as a precedent in cases where the dishonesty of the worker is far from established.

management practice to incite all workers to behave. As a recent judgement of the Quebec superior court put it:

> «Covert shadowing and surveillance, or their spectre, particularly when practised without warning, constitute a pragmatic method to promote respect for the law.[8]»

The C.S.S.T., the workers' compensation board in Quebec, seems to see covert surveillance as an incentive to all workers to keep out of trouble. In its official magazine it concludes an article on covert surveillance on its behalf in these terms:

> "The lesson to be learned? Honesty is the best way to avoid becoming the "star" of a video for which, in any case, there is no chance of winning an Oscar…[9]"

There is some feeling that compensation boards or employers don't want their workers to be too comfortable while they are receiving workers' compensation benefits. To make the experience unpleasant is to contribute to the reduction in future claims. It is less clear that those workers who abstain from claiming because of such tactics are in any way unworthy claimants. Good evidence exists both in Canada[10] and in the U.S.[11] that many workers do not claim benefits when they have a legitimate right to do so.

This is not a new phenomenon. In 1994 the Ontario Medical Association was preoccupied with pressures placed on physicians both by workers and their employers:

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[8] Our translation. The original quote is «La filature et la surveillance, ou leur spectre, surtout si elles sont pratiquées à l'improviste, constituent un moyen pragmatique d'inciter au respect de la loi», ***Duguay*** v. ***Plante et le Tribunal du travail***, (July 16th 2001), Montreal, 500-05-064211-012, D.T.E. 2001 T-1023, (C.S.Q.).

[9] Our translation. The original quote is "Leçon à tirer? L'honnêteté est le meilleur moyen de ne pas devenir la "vedette" d'une vidéo pour laquelle, de toute façon, il n'y a aucune chance de remporter un Oscar…"J. Quirion, "Ê Etre filmé à son insu dans une «drôle» de vidéo", [1997] Prévention au Travail at 32.

[10] H. Shannon and G. Lowe, "How Many Injured Workers Do Not File Claims for Workers' Compensation Benefits?", [2002] 42 American Journal of Industrial Medicine 467.

[11] See for instance L. Davis, H. Wellman H, L. Punnett , "Surveillance of work-related carpal tunnel syndrome in Massachusetts 1992-1997: A report from the Massachusetts sentinel event notification system for occupational risks (SENSOR)", [2001] 39 Am J Ind Med 58; T. Morse, C. Dillon, N. Warren, "Reporting of Work-related Musculoskeletal Disorder (MSD) to Workers' Compensation", [2000] 10(3) ***New Solutions***:281-29.

> "Physicians are often placed in a difficult position in terms of reporting workplace injuries. It is not uncommon for a physician to be pressured, by workers and employers, to refrain from reporting WCB-compensable workplace injuries.
>
> At present, physicians cannot report to the Board without the consent of the patient because of the legal obligation of confidentiality imposed on the physician.
>
> On the other hand, if a physician is of the opinion that a patient who presents has suffered a WCB-compensable workplace injury and the physician knowingly bills the Ontario health Insurance Plan ("OHIP") instead of the Workers' Compensation Board for the treatment, then the physician may be in violation of the ***Health Insurance Act***. " (sic)[12].

The threat of severe policing of injured workers has undoubtedly a dampening effect on some potential claimants. When injured workers abstain from claiming workers' compensation benefits, costs are transferred from employers, who fund the workers' compensation boards, either to private insurers, when salary insurance is available or directly to the worker and his or her family. Medical costs, and economic support, if the worker is eligible for employment insurance or welfare, are transferred to the public purse.

1.2 Who polices injured workers?

In many of the cases in which private surveillance personnel gathered videotape evidence of an injured worker's activities, the mandate to gather the information was given by the employer, often for the purpose of building a case against the worker who the employer wished to discipline. Most case law regarding these situations was developed in the context of arbitration hearings, although there are some decisions by specialised compensation tribunals that address the issues surrounding evidence gathered by private surveillance firms at the behest of employers.

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[12] Ontario Medical Association Submission to the Standing Committee on Resources Development Regarding Bill 165 *An Act to Amend the Workers' Compensation Act and the Occupational Health and Safety Act*, September 8, 1994, p. 4.

In some provinces video-surveillance is initiated primarily by the employer or the employer's lawyer, who are wary of the legitimacy of the worker's claim, or who question the degree of disability described by the worker. For instance, in Ontario, although policy allows the WSIB (the Workers' Safety and Insurance Board, the workers' compensation board of Ontario) to use video-surveillance if the director of the Special Investigations Branch (SIB) authorises it in a specific case[13], in practice, until recently few cases of video-surveillance were ascribed to the board, either by representatives we interviewed or in the case law.

Compensation boards in Quebec and British Columbia[14] do have regular recourse to private detective agencies mandated to spy on day to day activities of injured workers. Specific legal issues will be raised when these public agencies mandate private surveillance agencies to follow and clandestinely videotape injured workers. From information available, those boards that did use evidence before the courts that had been obtained through covert surveillance usually relied on outside agents rather than their own staff.

In Quebec there are a significant number of such mandates delivered every year. After peaking at 1683 cases in 1998, the number of cases in which the C.S.S.T. ordered video-surveillance of a worker dropped to 813 in 2000 and then rose by 13% to 920 in 2001. During the four year period between 1998 and 2001, the average number of cases of surveillance ordered by the C.S.S.T. was 1141 On average 646/1141 or 56% were contracted out to private firms[15]. At least in Quebec, it is possible that both the employer and the C.S.S.T. have each contract with a different private investigator to watch the

[13] WSIB policy on Surveillance, Offences and Penalties, document number 11-02-06, September 1st 1997.
[14] Information obtained during interviews with workers, their representatives and health care professionals. See also Quebec case law in this article.

same worker[16]. No figures are available as to the number of contracts given to private firms by employers, but a Quebec lawyer specialized in representing injured workers told us that videotape evidence was sufficiently frequent to justify the purchase of a videotape player for the law firm.

Although the general motivation in hiring an investigator is always to check up on the worker's behaviour, at least two sets of circumstances lead to the decision to target a specific worker. In some cases, the workers' compensation board has received specific, sometimes anonymous, tips regarding fraudulent behaviour on the part of the worker[17]. Some compensation boards even have web-sites inviting anonymous denunciations, a type of snitch line analogous to Crime Stoppers or other public services designed to catch criminals[18]. Private contractors are thus hired by the board to follow up on an anonymous tip.

The Board may also target a worker for other reasons. Among the reasons stated in the case law are difficulties in contacting the worker by phone, lack of co-operation in rehabilitation and return to work attempts[19]. Information provided in interviews with injured workers and their representatives added or perhaps qualified this list. If relations with the compensation board were conflict ridden, surveillance was more likely to ensue. Workers told us they felt that surveillance in specific cases was sometimes used as

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[15] Information compiled by an injured workers' defence group, l'ATTAQ, from information provided by the C.S.S.T. to the official opposition of the Quebec National Assembly.

[16] See for instance *Cournoyer* v. *Cie Martin-Brower Du Canada*, C.L.P. 159969-63-0105, 25th of February 2002. Interviews allowed us to identify other cases in which the worker was followed by agents of both the CSST and the employer.

[17] See for instance Decision No. 2021-01, W.S.I.A.T., Januaray 29th 2002 (Ontario); *Lefebvre et Infirmières Plus enr. (fermé) et C.S.S.T.*, C.L.P. 109869-72-9902, March 5th 2001(Quebec).

[18] Such a line was set up by the Workers' Safety and Insurance Board in Ontario see http://www.wsib.on.ca/wsib/wsibsite.nsf/public/EmployersFraudNoncomplianceZeroTolerance, consulted January 23rd 2003. For British Columbia: http://www.worksafebc.com/report_fraud/default.aspm consulted January 23rd 2003. No such invitation is available at the C.S.S.T. website.

[19] See for instance *Duguay* v. *Plante et le Tribunal du travail,* (July 16th 2001), Montreal, 500-05-064211-012, D.T.E. 2001 T-1023, (C.S.Q.)

punishment or revenge for having stood up to the claims agent. In many cases discussed, surveillance commenced after the worker had complained about the attitude of the caseworker or the tardiness of his cheque or after an argument with compensation board personnel.

Advocates also cited examples in which surveillance was initiated by the Board because the claim was a particularly costly one given the gravity of the injury. It was understood that videotape evidence could be an investment to reduce the eventual cost of the claim. Two of the cases studied illustrated this point, in the sense that the workers subject to surveillance were without question severely disabled because of a work accident. In one case, a worker had been electrocuted and had suffered severe burns to his body and severe sensory difficulties as well as documented severe depression.

In another, the compensation board itself had recognised over 68% permanent disability and had undertaken surveillance of a profoundly depressed worker who had suffered an acute injury which severely limited the use of his left hand. He had told his case worker he couldn't move it at all. Surveillance evidence where he is seen to be moving his hand was obtained and used to convict him under penal provisions of the workers' compensation Act. The C.S.S.T. then tried to use this evidence as proof that he was capable of working, despite a vast amount of medical evidence to the contrary. The worker was in constant severe pain for which morphine was regularly prescribed. The C.S.S.T. contended he could work as a security guard, but the C.L.P. in spite of video evidence that he could move his arm, and in light of the medical evidence (which the penal court had refused to consider) concluded that the worker was totally disabled because of his injury[20].

[20] ***Champagne v. Arcadian inc. & C.S.S.T.***, C.L.P. 113018-71-9903, November 23rd, 2000, Margaret Cuddihy.

Literature and case law describing use of covert surveillance on behalf of private insurance companies shows that targeted claimants have usually been receiving benefits for a long time and are often claiming for long-term permanent disability for disease that is difficult to document on the basis of objective medical tests[21]. In contrast, in the cases we studied involving injured workers it was not infrequent to find examples of surveillance instituted very rapidly after the initial claim, because an individual's back injury had taken more than eight weeks to heal or because they had refused temporary reassignment to light duties[22].

1.3 How are injured workers policed?

As we shall see in the second part of this paper, fairly clear legal constraints are designed to limit covert surveillance, or at least to limit the admissibility of evidence gathered in defiance of predetermined rules. In this section we will simply describe some of the situations we have been made aware of either through case law or through literature analysis and interviews. As we shall see, while some surveillance practices are respectful of the limitations imposed by the courts in the application of privacy law, others are manifestly beyond the pale. It must be understood that although surveillance tapes obtained in violation of the right to privacy may be held to be inadmissible, the exclusion of evidence does not undo the damage caused to the worker because of the violation of his or her privacy. Videotapes are also used on occasion to «encourage» the worker to settle or drop his compensation claim (or quit his job). Many of these tapes will never be seen by a court, their legitimacy never subjected to quasi-judicial scrutiny, but

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[21] M. Gilbert, *L'assurance collective en milieu de travail*, (Cowansville, Qc: Yvon Blais, 1998) at 206. See for instance *Chaplin* v. S*un Life Assurance Co. of Canada*, [2001] 27 C.C.L.I., (3d), 70 (B.C.S.C); *Lalonde* v. *London Life Insurance Co.*, [2001] 33 C.C.L.I. (3d) 108; *Bouliane* v. *SSQ(service santé du Québec) Mutuelle d'Assurance-Groupe*, [1997] R.R.A. 368 (S.C.Q.); *Charpentier* v. *Compagnie d'Assurance Standard Life*, [1998] R.R.A. 448 (S.C.Q.) and [2001] R.R.A. 573(C.A.Q.); *Bastien* v. *Crown Compagnie d'Assurance Vie*, [1998] R.R.A. 1043; *Bolduc* v. *S.S.Q. Société d'assurance-vie inc.*, [2000] R.R.A. 207.

[22] *Duguay* v. *Plante et le Tribunal du travail*, (July 16th 2001), Montreal, 500-05-064211-012, D.T.E. 2001 T-1023, (C.S.Q.).

in all provinces where we had interview data we were told they were an efficient tool used as a threat to obtain a certain behaviour from the worker.

1.3.1 Legal surveillance

The legal strategies are the ones that are more likely to be the object of judicial or quasi-judicial decisions. Following a worker from the outside of his or her home to other public places, on several days at varying times, without editing the tape, is seen by most courts as potentially legitimate, if the reasons for undertaking the surveillance are appropriate. Filming the claimant in his back yard or on his front steps is not uncommon, and is sometimes held to be legal, sometimes not[23]. Filming the worker picking up his or her children at school, by car or on foot, waiting for a bus, riding a motorcycle or actively working are some of the activities discussed in the case law.

Even when surveillance strategies seem legal, the enthusiasm with which private surveillance firms undertake their mission is sometimes troubling. During the course of our interviews with worker representatives we were provided with copies of three reports by a private surveillance firm, reports submitted to the detective's client, the workers' compensation board. The reports cover a two month period. In the first report the detective praises the board for choosing to target the particular worker, as

> "[the worker's family name] have a very large family out there and they are always into something like this. I can almost guarantee you are correct in questioning this claim".

Over several weeks the detective fails to identify any untoward activity on the part of the worker, and he becomes increasingly frustrated at his failure to find anything suspect.

> "There is more movement from people coming and going than there is for him (sic)…I do not seem to be having a great deal of success with this matter. So far I have spent about 16 of the hours

[23] Compare *Cournoyer* v. *Cie Martin-Brower Du Canada*, C.L.P. 159969-63-0105, 25th of February 2002 with *Bolduc* v. *S.S.Q. Société d'assurance-vie inc.,* [2000] R.R.A. 207.

> you approved watching this guy's place and all I have on him is a couple of trips to the local corner store and one trip to [the local village].

Nevertheless the detective suggests surveillance be continued:

> "…I notice that he heats with wood so he will also have to start looking for the winter's supply of firewood very soon. I am in the area a lot anyway so I will keep an eye (overall) on his place at no charge to you. If he is there or if he is doing something then I will start the clock on your time and stay on him."

1.3.2 Illegal strategies

Among the more outrageous Canadian examples that came to light in the course of our study two manifestly illegal strategies were mentioned on several occasions: filming or taping the worker in his or her home without consent, and entrapment, provoking the worker to do something he or she would not normally do were it not for the behaviour of the investigator. We traced several examples in which the worker was filmed in the intimacy of his own home. In one case where the video was actually submitted to a review board, the worker was filmed making love in his bedroom[24]. In other cases the detective entered the worker's home, which was for sale, pretending to be a prospective buyer[25]. We interviewed a worker whose wife rented rooms out of their home. He discovered, without warning in the middle of a review board hearing, that a private detective had entered their home pretending to rent a room, had filmed him going about his day at home and had clandestinely questioned and audio-taped his wife with regard to distribution of household tasks.

Entrapment is also not uncommon. Injured workers' advocates told us of more than one case in which an investigator slashed the tires of a worker's car to see if he would stoop

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[24] Commission des droits de la personne, ***Filature et surveillance des salariés absents pour raison de santé: conformité à la Charte***, report adopted by resolution of the Commission, COM-440-5.1.1, April 16,1999. p. 2 , example first discussed in L. Laurin, "Les ripoux de la C.S.S.T., [1998] 438 Nouvelles CSN 3.

[25] Laurin, *Ibid*, at 5.

to change his tire. In that example, the community group had been puzzled by the unusual number of workers who had cancelled their appointments because they had flat tires. They understood what was going on when the neighbour of one of the workers informed him that a strange man was seen letting air out of the tire of his car. The practice seems fairly widespread as it was separately documented elsewhere[26]. Another way of entrapping injured workers is to leave money lying near their car door so as to film them bending down to pick it up[27].

Sometimes entrapment takes place when the investigator overtly asks the worker for help. In the parking lot of a local strip mall a pretty woman asked the targeted worker to help her carry a heavy package. He apologised, saying he could not because he had a bad back. She insisted, saying together they could move it safely. He fell for the trap and was filmed. The woman even kissed him and apologised for setting him up, saying she had to earn her living. The arbitrator did not sanction the worker in this case, recognising that he had made an exceptional effort under exceptional circumstances[28]. Cases in other jurisdictions have held to be inadmissible surveillance evidence obtained under conditions in which the grievor was enticed to perform certain acts[29].

In the United States both workers' compensation boards and private insurance firms often hire detectives. In one case the detective befriended an injured worker and invited her to Disneyland where he then filmed her enjoying herself and making gestures she was not medically authorised to make[30]. We've not come across anything quite so outrageous in Canada, but it should be noted that the American woman who had been

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[26] Laurin, *Ibid*, at 4.
[27] *Ibid*.
[28] Rollande Parent and Pierre Saint-Arnaud, "Accidentés du travail - Les images peuvent être trompeuses", Le Devoir, January 20th 2003, at B-6.
[29] ***Pacific Press Ltd. and Vancouver Printing Pressman, Assistant and Offset Workers' Union, Local 25 (Dales Grievance),*** [1997] 64 L.A.C. (4th) 1.

the subject of romantic entrapment was awarded damages under the law governing the tort of bad faith.

Even in those cases where under prevailing privacy law videotape evidence was obtained legally with regard to the injured worker, many examples were provided in which several individuals from the worker's family, including children, were seen in the videotape, sometimes in cases where the worker was not even present. Aside from the questionable legality of such practices, given that the privacy rights of family members can not be presumed to be relinquished simply because there is a claimant in the family, such practices can have particularly damaging consequences. Children and spouses may share in the stress of being followed. Even if they don't, we were told of cases where the workers themselves may feel even more violated and at the same time guilty, when their claim has exposed the whole family to clandestine surveillance.

1.4 Effect of private policing of injured workers

There are many reasons why clandestine surveillance techniques may lead to adverse health consequences for the injured workers subject to surveillance. Workers, their representatives, literature[31] and case law [32] all describe how such strategies lead to or aggravate psychiatric disability, including paranoia.

A psychologist specialised in workers' compensation claims described to us the effect on his patients of clandestine surveillance:

> "Contrary to lay opinion, videotaped surveillance carries little probative value when it comes to injured workers and yet I am personally aware of at least half a dozen cases where injured workers fates have been adversely effected by videotape

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[30] *Unruh v. Truck Insurance Exchange et al.* 498 P. 2d 63 (California 1972).

[31] See generally G.Lea, "Secondary Traumatization of Work-Related Rehabilitation Clients", (1996) 22 The Canadian Practitioner 5.

[32] In Ontario see ***Decision No. 1212 97***, (1997) 44 W.S.I.A.T.R. 129. In Quebec see the evidence discussed in ***Lefebvre et Infirmières Plus enr. (fermé) et C.S.S.T.***, C.L.P. 109869-72-9902, March 5th 2001, compensation for psychotraumatic disability denied.

> surveillance. Of course, when the worker is unaware that he/she is under surveillance there is no adverse effect. Once the worker is aware of having been videotaped (often for weeks) they become withdrawn, agitated, and contrary to their best health, unwilling to undertake the normal duties of daily living, i.e. limited gardening, snow removal, shopping and the like."

Legal representatives from all provinces studied have described the devastating effect on their clients of clandestine surveillance strategies. In the words of one worker representative:

> «It's amazing to me how deeply it hurts people to know that they have been surveilled. Even if the benefits don't get taken away, workers are really cut to the bone by being videotaped.»

Information provided us by a medical expert in another province described the effect of surveillance and harassment on his patient who had suffered a severe traumatic injury including third degree burns to a significant percentage of his body:

> "[The patient] denied serious depressive symptoms at this time stating that he has been more positive and hopeful over the last two weeks. However, he stated that last winter was the worst, when he could only see the negative parts of life. He felt harassed by the Workers Compensation Board who “slashed at the core of my being, treating me as if I were a fraud.” He became hopeless, felt worthless and had suicidal ideation. He stated that he cried a lot but then talked to God, his wife and a very special friend. Over time these symptoms of major depression have lessened."

Another worker representative told us that the representatives themselves sometimes share a feeling of paranoia. In one incident, in which a fire alarm went off in an office building during an interview with a worker who had had several conflicts with the board, the lawyer suggested that he and the worker ignore the fire alarm, fearing it had been set off by an investigator trying to provoke the disabled worker into using the staircase instead of the elevator. The lawyer was giving advice based on his previous experience

with strategies of private investigators who followed other injured workers and tried to entrap them.

A woman who was filmed by a private detective hired by the workers' compensation board (C.S.S.T.) was seen in the video walking down the street with a young child. She learned she had been the subject of surveillance when she received the video in the mail. She describes how the experience made her feel:

> "I felt really bullied. They have no right to come into my private life like that! I feel cornered, like in a mousetrap, treated like an object. Not only am I in pain I'm also spied on. For a week I kept looking around to see if I was being watched. Do we have to stop moving because we're receiving benefits from the C.S.S.T.? They want me to feel guilty because I receive a little cheque, but I didn't choose to have a back injury. If they only knew what I would give to be able to go back to work…"[33]

Over and above the obvious effects on the mental health of the workers under surveillance, it seems clear that the pervasive use of surveillance practices has a clearly negative effect on the physical health of all injured workers who hesitate to undertake movements or activities, even those they're encouraged to do by their health professionals, for fear that someone might be spying on them.

A severely injured worker suffering from both painful physical ailments, significant disfigurement and post-traumatic stress disorder was encouraged by her care givers to try to leave the security of her home, despite her disabling fear. She finally went out and was subsequently confronted by videotape evidence that she was capable of going out.

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[33] Our translation. The original reads as follows: "Je me suis sentie très brimée. Ils n'ont pas le droit d'entrer comme ça dans ma vie privée! Je me sens coincée comme dans une souricière, réduite à l'état d'un objet qu'on utilise. En plus d'avoir mal, je suis épiée. Pendant une semaine, je regardais autour de moi pour voir si j'étais surveillée. Est-ce qu'on doit arrêter de bouger parce qu'on touche des indemnités de la C.S.S.T.? Ils veulent me faire sentir coupable de recevoir un petit chèque, mais je n'ai pas choisi d'avoir mal au dos. S'ils savaient comme je donnerais n'importe quoi pour recommencer à travailler…"Cited by Laurin, supra note 24, at 4.

Workers are encouraged by health care professionals and even by board policy[34] to try to regain a maximum of mobility by attempting movements they fear they are unable to do. If they can't peacefully attempt them without fear of being «caught in the act», they are much less likely to ever attain the therapeutic plateau they could attain if they were left to test their own limits without fear of reprisals. This phenomenon was raised not only by worker representatives and health care professionals we interviewed, but also by adjudicators and judges[35]. Legal specialists in insurance law have also emphasised the potential perverse effect on claimants struggling to overcome their disability while at the same time having to cope with the fear of being tailed to prove they are less disabled than they claim[36].

In some cases the worker's family also suffers adverse health consequences, not only because the increased paranoia of the worker has negative effects on a child or spouse, but also because the family itself is, and feels, spied upon[37]. One representative of an injured worker described to us a case in which the whole family left Canada to get away from the feeling of being constantly under surveillance. They were then subject to surveillance in their new community, the workers' compensation board of the Canadian province having mandated an American detective agency to follow the worker in the United States.

Because of the dramatic nature of videotape evidence, even in those cases where nothing really incriminating appears on the videotape, the impact on decision makers can be disproportionately significant. Several lawyers pointed out that the very existence

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[34] Dr. A. Neveu, ***Pour un meilleur suivi des travailleurs victimes de lésions professionnelles au dos***, Fédération des médecins omnipraticiens du Québec, 2001. Publication supported by the C.S.S.T.
[35] See for instance ***Bolduc*** v. ***S.S.Q. Société d'assurance-vie inc.,*** [2000] R.R.A. 207; ***Charpentier*** v. ***Compagnie d'Assurance Standard Life***, [1998] R.R.A. 448 (S.C. Q.) and (2001) R.R.A. 573 (C.A.Q.).
[36] M. Gilbert, *L'assurance collective en milieu de travail*, (Cowansville, Qc: Yvon Blais, 1998) at 206-207.
[37] The claimant's child was filmed in several of the cases studied. See for instance ***Druken*** v. ***R.G. Fewer and Associates Inc.*** [1998] N.J. o. 312, Nfld Supreme Court. Damages were not granted.

of a videotape, at least in some jurisdictions, leads decision-makers to suspect the claimant, as if the decision makers believe that where there is smoke there is fire. While, as we shall see, policy in Ontario explicitly warns adjudicators to beware of this pitfall, many people interviewed confirmed that the existence of the videotape, almost regardless of content, left the adjudicator with the impression that something fraudulent was going on.

Part 2: The law governing private policing of injured workers

This part addresses the legal issues that arise when covert surveillance, including video-surveillance, is used in the context of workers' compensation. We will first look at the legality of such surveillance techniques, in light of human rights issues, including the right to privacy. General issues raised by the right to privacy will be addressed, followed by considerations specific to the context of administrative law and mass adjudication. Over and above the issue of legality, there is a separate issue as to admissibility of evidence obtained by private investigators who target a person who alleges disability. We will look at several issues regarding such evidence, including admissibility, right to prior notice and examination of the evidence, and issues regarding the weight that should be given to such evidence. Finally we will examine the legal remedies available to workers who have been victims of abuse with regard to recourse to and behaviour of private investigators.

2.1 Legality of the surveillance

In some of the jurisdictions studied, there exists specific provincial legislation governing the right to privacy, while other jurisdictions have no such legislation. All jurisdictions

were subject to section 8 of the ***Canadian Charter of Rights and Freedoms***, insofar as the ***Charter*** was applicable to the specific circumstances.

When reflecting on the legality of the surveillance the methodology chosen may colour the legal issues raised. A case law approach raises primarily privacy law issues, and almost without exception these issues are examined to determine the admissibility of evidence. If the analytical objective is to examine the legality of private surveillance from a policy approach, it is not sufficient to look at arguments raised in the case law, as the social phenomenon of surveillance raises other legal issues that are not necessarily justiciable. It is also important to question whether these surveillance practices are compatible with the right to dignity and equality rights.

2.1.1 The Right to Privacy

In his treatise on the right to privacy[38], Alain-Robert Nadeau shows that while the right to privacy has long been recognised in Civil law, Common law jurisdictions did not historically acknowledge such a right without legislative intervention. The interpretation of the ***Civil Code of Lower Canada*** recognised liability for the violation of privacy, and the ***Civil Code of Quebec***, in force since the 1st of January 1994, explicitly recognises the right to privacy at section 35:

> "Every person has a right to the respect of his reputation and privacy.
>
> No one may invade the privacy of a person without the consent of the person unless authorized by law."

and specifies, at section 36:

> " The following acts, in particular, may be considered as invasions of the privacy of a person:
>
> (1) entering or taking anything in his dwelling;

[38] A.R. Nadeau, ***Vie Privée et droits fondamentaux*** (Cowansville, Qc: Yvon Blais, 2000) at 33-48.

> (2) intentionally intercepting or using his private communications;
>
> (3) appropriating or using his image or voice while he is in private premises;
>
> (4) keeping his private life under observation by any means;
>
> (5) using his name, image, likeness or voice for a purpose other than the legitimate information of the public;
>
> (6) using his correspondence, manuscripts or other personal documents.".

Section 5 of the Quebec ***Charter of Human Rights and Freedoms***[39] explicitly recognises the right to privacy in unequivocal terms:

> "Every person has a right to respect for his private life".

The Supreme Court of Canada has confirmed that the violation of the right to privacy under Quebec law will be sanctioned by granting of moral and, in the case of malice, exemplary damages to the person who is photographed in a public place without her consent, when that photograph, even if uncompromising, is then published without her consent[40]. This case was judged on the basis of the law applicable prior to the coming into force of the ***Civil Code of Quebec***[41], so that premises applied in the ***Aubry*** case can only have been strengthened by the adoption of the far more explicit guarantees contained in the ***Civil Code of Quebec***. In Quebec, it is henceforth clear that the right to privacy extends not only to the private home, but to public places; it binds both the state and private individuals, regardless of the application of section 8 of the ***Canadian Charter of Rights and Freedoms.***

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[39] L.R.Q. c. C-12.
[40] ***Éditions Vice-Versa*** v. ***Aubry***, [1998] 1 R.C.S. 591.
[41] Ibid at paragraph 39.

These legislative and quasi-constitutional guarantees surpass those provided for in other provincial legislation. Other provinces[42] have adopted laws explicitly protecting the right to privacy, but in those that have not, common law does not protect the right to privacy and the traditional view states that only when the violation is directly or indirectly attributable to state action will constitutional guarantees under section 8 of the ***Canadian Charter of Rights and Freedoms*** apply[43].

In practice, private surveillance by workers' compensation boards would be governed both by section 8 of the ***Canadian Charter of Rights and Freedoms*** [44] and, in those provinces with explicit privacy legislation, by provincial legislation as well. This premise is fairly obvious with regard to surveillance by employees of the compensation boards, but it also extends to private security firms hired by the boards. When private security firms are hired by compensation boards, they are mandated by state actors and as such are also obliged to comply with constitutional obligations[45].

When the private surveillance of an injured worker is done at the behest of the employer, the right to privacy in those jurisdictions that do not have specific privacy legislation is

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[42] For example, British Columbia and NewFoundland. See ***Druken*** v. ***R.G. Fewer and Associates Inc.*** [1998] N.J.. 312, Nfld Supreme Court.

[43] In light of section 32 of the Charter, section 8 would not apply according to ***Syndicat des travailleuses et travailleurs de Bridgestone/Firestone de Joliette (CSN)*** v. ***Trudeau***, [1999] R.J.Q. 2229 (C.A.Q.), paragraph 53. There may, however, be an obligation to evaluate admissibility of such evidence according to "Charter values" even if the substantive provisions of the Charter are inapplicable. See ***M. A.*** v. ***Ryan*** [1997] 1 S.C.R. 157. In Alberta and Ontario, where no specific privacy legislation exists, recourse to video-surveillance seems relatively unfettered. See, in Alberta, ***United Food and Commercial Workers, Local 401*** v. ***Medicine Ha***t, [2001] A.G.A.A. No. 68; in Ontario, ***Re Toronto Transit Commission and Amalgamated Transit Union, Local 113 (Fallon)***, [1999] 79 L.A.C. (4th) 85.

[44] ***City of Longueuil*** v. ***Godbout***, [1997] 3 S.C.R. 844; ***Blencoe*** v. ***B.C. (Human Rights Commission)*** [2000] 2. S.C.R. 307 at 332-333; ***Duguay*** v. ***Plante et le Tribunal du travail***, (July 16th 2001), Montreal, 500-05-064211-012, D.T.E. 2001 T-1023, (C.S.Q.).

[45] ***Duguay*** v. ***Plante et le Tribunal du travail***, (July 16th 2001), Montreal, 500-05-064211-012, D.T.E. 2001 T-1023, (C.S.Q.); ***Blencoe*** v. ***B.C. (Human Rights Commission)*** [2000] 2. S.C.R. 307. ***Ville de Mascouche*** v. ***Houle*** [1999] R.J.Q. 1894 (C.A.Q). See also. Pierre Patenaude (ed.), Police, techniques modernes d'enquête ou de surveillance et droit de la preuve, Actes du Colloque, Sherbrooke, 1998 at 10.

limited[46], although when the employer is a municipality or an agent of the state section 8 of the Charter applies[47]. What is clear, is that in those jurisdictions, like Quebec, that do have privacy legislation governing non-governmental actors, the special relationship between an employer and an employee has been used by courts to whittle away, at least in part, the general obligations to respect the worker's privacy. Nevertheless, as Veilleux[48] points out, while the worker's right to privacy within the workplace may be significantly reduced, the worker has a reasonable expectation of privacy outside of the workplace, even more so outside of working hours, and the existence of a master-servant relationship does not justify unfettered invasion of a worker's privacy. The Supreme Court of Canada made this point clearly in the case of ***Godbout***[49], and held that the right to privacy under section 5 of the Quebec ***Charter of Human Rights and Freedoms*** prevented the employer from imposing conditions on the worker's choice of residence.

In a case involving private surveillance of a worker who claimed to be temporarily disabled because of a work accident, the Court of Appeal of Quebec[50], while holding that surveillance by the employer in the case before the court was not done in violation of the right to privacy, confirmed that the employer's right to have his worker followed was limited both by the conditions of the Quebec ***Charter of Human Rights and Freedoms*** and by the explicit recognition of the right to privacy under the ***Civil Code of Quebec***.

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[46] Because of section 32 of the Charter, section 8 would not apply according to ***Syndicat des travailleuses et travailleurs de Bridgestone/Firestone de Joliette (CSN***) v. ***Trudeau***, [1999] R.J.Q. 2229 (C.A.Q.), paragraph 53.

[47] *Ville de Mascouche* v. *Houle*, [1999] R.J.Q. 1894 (C.A.Q).

[48] See generally D. Veilleux, "Le droit à la vie privée-sa portée face à la surveillance de l'employeur" (2000) 60 R. du B. 3.

[49] ***City of Longueuil*** v. ***Godbout***, [1997] 3 S.C.R. 844.

[50] *Syndicat des travailleuses et travailleurs de Bridgestone/Firestone de Joliette (CSN)* v. *Trudeau*, [1999] R.J.Q. 2229.

The Court of Appeal relied on criteria developed by the Quebec Human Rights Commission[51], to circumscribe conditions under which private surveillance could be justified. Section 9.1 of the Quebec ***Charter of Human Rights and Freedoms*** in terms analogous to s. 1 of the Charter of rights and freedoms, allows for infringement of rights under certain restrictive conditions[52]. After underlining that privacy could be violated by the simple act of undercover surveillance, whether or not the subject was videotaped, the Court concluded that the existence of a work contract was not in itself a renunciation by the worker to his or her right to privacy. The court held that such a renunciation must be explicit, and can not be presumed. Nevertheless, the employer could undertake clandestine surveillance outside the workplace without the consent of the worker if certain conditions applied:

1. The decision to target a specific worker must not be arbitrary or random, and the employer must have reasonable grounds to suspect the legitimacy of the worker's behaviour prior to undertaking surveillance; those grounds can not be established ***a posteriori***.

2. The employer of an injured worker has an interest in insuring the loyalty of the worker and the legitimacy of his behaviour, however this in itself does not justify undertaking surveillance unless there exist serious reasons leading to doubt the honesty of the worker.

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[51] Commission des droits de la personne, *Filature et surveillance des salariés absents pour raison de santé: conformité à la Charte*, adopted by resolution of the Commission, COM-440-5.1.1, April 16, 1999.

[52] The Supreme Court of Canada has clearly determined that section 9.1 of the Quebec *Charter of Human Rights and Freedoms* shall be interpreted similarly to section 1 of the Canadian *Charter of Rights and Freedoms,* see ***City of Longueuil*** v. ***Godbout***, [1997] 3 S.C.R. 844.

3. Surveillance must be necessary to control the legitimacy of the claim and the nature of the surveillance must be the least intrusive possible. The court cites with approval an Alberta judgement:

> "In suspicious circumstances surrounding the medical condition of the grievor, the employer has every right to conduct a full investigation but only as a last step should it choose the intrusive alternative of invading the employee's privacy by conducting surveillance.[53]"

4. Surveillance must be done in a way that respects the worker's dignity. The case cited by the Human rights commission in which a worker was filmed in his bedroom was cited by the Court as an example of abuse.

5. In the case in point, the employer had cause to be suspicious because of contradictions in the worker's statements and the means chosen for surveillance were not excessively intrusive because surveillance took place in public places or places that were in public view, surveillance was not continuous, but on three separate days over a three month period, and the conditions of surveillance were not in violation of the worker's dignity.

The Court of Appeal of Quebec has thus accepted to limit the right to privacy, if the conditions described by the Human Rights Commission are shown to have been met. Actual consultation of the examples given by the Human Rights Commission show that the Commission's caveats with regard to admissibility are far more significant than those generally described in the legal literature. For instance, the Commission precludes recourse to video-surveillance if the employer has not exhausted all other means to

[53] Quoting from ***Re Alberta Wheat Pool and Grain Workers' Union, Local 333***, 48 (L.A.C.) (4th) 341, p. 345, arbitration decision by B. Williams.

determine the truth. Other means include obtaining an additional medical opinion, calling the worker in for a discussion about his health. Invading the employee's privacy by conducting surveillance must be demonstrated to be the last step available to get to the truth.[54]

Yet legal literature aimed at practitioners paints with a far broader brush when describing the rights of employers to conduct video-surveillance. Although referring in the footnotes to the Court of Appeal decision in ***Bridgestone/Firestone***, Pedneault, Bernier and Granosik include none of the detailed conditions therein set out when they state that:

> "When an employee's personal activities are incompatible with the alleged disability to perform his work the employer may conduct electronic surveillance of the employee as long as the surveillance takes place in public.[55]"

The legal opinion of the Quebec Human Rights Commission clearly states that the employer or the compensation board must bear the burden of demonstrating that the criteria justifying the violation of the right to privacy as prescribed by section 9.1 of the Quebec ***Charter of Human Rights and Freedoms*** have been met. For the Commission, this means that the decision to undertake surveillance was based on serious circumstancial evidence and not on simple impressions, and that surveillance was a last resort when no other means of verification were available.[56].

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[54] Ibid at 13.

[55] J.F. Pedneault, L. Bernier, L. Granosik, Les droits de la personne et les relations de travail, (Yvon Blais, Cowansville, Qc. 2002) at section 22.050. Our translation, the original states: "Lorsqu'il s'agit d'activités personnelles incompatibles avec la prétendue incapacité de l'employé à effectuer sa prestation de travail l'employeur peut effectuer la surveillance électronique du moment où cette surveillance survient dans les lieux publics." The authors go on to say, at section 22.051, that it would be inappropriate to hide a camera in the employee's home, but beside that type of situation, videotapes will be admitted in arbitration hearings.

[56] Commission des droits de la personne, *Filature et surveillance des salariés absents pour raison de santé: conformité à la Charte*, adopted by resolution of the Commission, COM-440-5.1.1, April 16, 1999.

2.1.2. Special powers for state agencies?

In the opinion of the Commission, state actors like the C.S.S.T. have an even greater obligation to respect the right to privacy than do employers or private insurers, and in its directive on this issue the Commission concludes:

"It would thus be out of the question to invoke the the C.S.S.T.'s responsibility in the application of the *Act Respecting Industrial Accidents and Occupational Diseases* in order to justify diluted rules regarding the right to privacy."[57]

The Supreme Court of Canada has clearly stated the importance of placing limits on the practice of the state to use electronic devices to obtain evidence regarding the behaviour of citizens. In *R.* v. *Wong*, Justice Laforest, speaking for the Court stated:

> "I am firmly of the view that if a free and open society cannot brook the prospect that the agents of the state should, in the absence of judicial authorisation, enjoy the right to record the words of whomever they choose, it is equally inconceivable that the state should have unrestricted discretion to target whomever it wishes for surreptitious video-surveillance. George Orwell in his classic dystopian novel 1984 paints a grim picture of a society whose citizens had every reason to expect that their every movement was subject to electronic video-surveillance. The contrast with the expectations of privacy in a free society such as our own could not be more striking. The notion that the agencies of the state should be at liberty to train hidden cameras on members of society wherever and whenever they wish is fundamentally irreconcilable with what we perceive to be acceptable behaviour on the part of government. As in the case of audio surveillance, to permit unrestricted video-surveillance by agents of the state would seriously diminish the degree of privacy we can reasonably expect to enjoy in a free society.[58]"

The Quebec Human Rights Commission relied on this case in its legal opinion as to the limits that should apply with regard to video-surveillance evidence of injured workers,

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[57] Our translation. The original reads as follows: "Il ne saurait être question, en conséquence, d'invoquer la responsablité de la C.S.S.T. au regard de l'application de la *Loi sur les accidents du travail et les maladies professionnelles*, pour justifier à l'endroit de cet organisme une dilution des normes applicables en matière de droit à la vie privée.", *Ibid* at 10.

[58] [1990] 3 S.C.R. 36, at 47.

particularly when the video-surveillance is done at the behest of the C.S.S.T. and not by the employer[59].

In at least one Quebec case the Court has refused to apply this reasoning when a worker is charged under the penal provisions of workers' compensation legislation. The court distinguishes violations of privacy by the state in the context of regulatory infractions, and concludes that the policing of injured workers is an activity that does not require a vigilant respect of Charter rights and Charter values, given the importance of the C.S.S.T.'s mandate to manage public funds. The idea that any worker may be under surveillance is seen as an incentive to all workers to be honest[60]. Given that the decision regarding the regulatory infraction may be subsequently invoked to support denial of benefits, benefits that insure the subsistence of a worker, it seems surprising that the context of workers' compensation would somehow mitigate the obligation of the state to meticulously respect the criteria set out in section 8 of the Charter.

The idea that workers' compensation legislation required a lower standard of vigilance with regard to Charter rights is troubling. It was first introduced by the Quebec Court of Appeal in a very different legal and factual situation. In ***Lapointe***, the worker was suspected of having fabricated an accident to access compensation. An accomplice who had later denounced the worker had accepted at the behest of the employer to covertly audio-tape a conversation with the worker regarding the fraud[61]. Subsequent cases have relied on the relaxing of Charter rights proposed in ***Lapointe*** to support the admissibility of video-surveillance evidence in cases where the worker's degree of disability was the

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[59] Commission des droits de la personne, *Filature et surveillance des salariés absents pour raison de santé: conformité à la Charte*, adopted by resolution of the Commission, COM-440-5.1.1, April 16, 1999.
[60] ***Duguay*** v. ***Plante et le Tribunal du travail***, (July 16th 2001), Montreal, 500-05-064211-012, D.T.E. 2001 T-1023, (C.S.Q.), see quote supra note 8.
[61] ***Lapointe*** c. ***Commission d'appel en matière de lésions professionnelles*** [1995] C.A.L.P. 1319, p. 1323.

issue[62]. The principles of Wong, applicable to these circumstances according to the Human Rights Commission, seem to have been whittled away in the name of administrative needs of regulatory agencies. It is unclear whether the decisions encourage this type of flexibility to manage disabilit claims would survive scrutiny by the higher courts.

2.2 Private surveillance evidence

Whether or not the evidence obtained by private detectives violates Charter rights, there are still legal issues to be determined with regard to 1) its admissibility, 2) pre-trial access to the evidence, and 3) the weight it should be given.

2.2.1 Admissibility of evidence

In Quebec, three questions will be examined in order to determine the admissibility of the evidence. If the worker's right to privacy has not been violated, issues as to admissibility will be governed by the general rules of evidence. If the worker's right to privacy has been violated, the court will be called upon to determine whether under s. 9.1 of the Quebec ***Charter of Human Rights and Freedoms***, the violation was legitimate according to the criteria set out by the Quebec court of Appeal in ***Bridgestone/Firestone***[63]. Even if the judge concludes that section 9.1 does not justifiy the violation of the right to privacy, the court may still admit the evidence in application of section 2858 of the ***Civil Code of Quebec***, which invites the judge to evaluate admissibility by determining whether the admission of evidence obtained in violation of human rights would bring the administration of justice into disrepute[64]

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[62] *Eppelé* v. *C.L.P. and C.S.S.T. and Santa Cabrini Hospital*, Superior Court, 505-05-004691-983, June 22, 2000

[63] Evidence was thus held to be admissible in *Eppelé* v. *C.L.P. and C.S.S.T. and Santa Cabrini Hospital*, Superior Court, 505-05-004691-983, June 22, 2000.

[64] Syndicat des travailleuses et travailleurs d'abattoir de volaille de St-Jean-Baptiste c. Corriveau, DTE 2001T-206, Quebec Court of Appeal.

In Ontario, where no legislation specifically guarantees the right to privacy[65], case law has determined that admissibility must nevertheless be evaluated with care. Admissibility is dependent on the relevance of the video-tape evidence and proof that it was reasonable to engage in video-surveillance, and that the surveillance was done in a reasonable manner[66].

In one Ontario case, a report prepared by a medical expert who viewed the video without the worker's consent and prior to a decision by the tribunal as to the admissibility of the videotape was itself excluded from evidence, even though the tribunal reserved judgement as to the admissibility of the videotape itself[67].

In Ontario, the Tribunal frowns upon employers providing treating physicians or medical experts with videotaped evidence of the worker's movements and behaviour, and the employer must request permission to transmit such videotapes to medical experts, permission that, in at least one case, was not granted, judgement being reserved pending the hearing of the merits of the case[68].

In Quebec, in order for the videotape to be admitted into evidence, the party responsible for ordering the videotape surveillance must be present at the hearing to give evidence as to the context in which the evidence was obtained, and the investigator must be present to give evidence as to the authenticity of the videotape[69]. This rule is based on the law of evidence, and is not specific to videotapes obtained in ***prima facie*** violation of

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[65] *Poersch* v. *Aetna*, [2000] 19 C.C.L.I. (3d) 92 (O.S.C.).
[66] See for instance *Decision No . 688/87*, [1987] 6 W.C.A.T.R. 198. In grievance arbitration there is some debate as to the extent in which evidence may be excluded. Compare ***Re Labatt Ontario Breweries (Toronto Brewery) and Brewery, General & Professional Workers Union, Local 304***,]1994} 42 L.A.C. (4th) 151; ***Re Toronto Transit Commission and A.T.U., Loc 113 (Collins)***, [1999] 80 L.A.C. (4th) 53, with ***Re Toronto Transit Commission and A.T.U., Loc 113 (Fallon)***, [1999] 79 L.A.C. (4th) 85; ***Kimberly-Clark Inc. and I.W.A. Canada, Loc. 1-92-4***, [1996] 66 L.A.C. (4th) 266.
[67] WCAT Decision 851 97 1, September 29th, 1997.
[68] WSIATR 1273 99 1, July 27th 1999.

the right to privacy. When the right to privacy has also been violated, the burden of proof of the party who wishes to produce the evidence is presumably greater.

In several jurisdictions studied, if the videotape is tainted or inadmissible, reports based on that evidence will also be excluded. In a recent Quebec case the C.L.P., the final appeal tribunal, excluded medical evidence provided after the doctor had viewed a surveillance video at the request of the C.S.S.T. The C.S.S.T. made no attempt to enter the videotape as evidence before the appeal tribunal, and did not provide any evidence surrounding the reasons justifying covert surveillance of the worker. Nor was the detective/cameraman present at the hearing, so there was no evidence as to the context in which the videotape was made. The C.L.P. recognised that the worker was presumed to be in good faith and concluded the existence of the videotape in itself constituted ***prima facie*** evidence that his right to privacy under s. 5 of the Quebec ***Charter of Human Rights and Freedoms*** had been violated. The C.L.P. noted the "nonchalance" of the C.S.S.T. who had mandated the surveillance but failed to appear at the hearing. Lacking evidence that could justify the invasion of the worker's privacy, the C.L.P. excluded the medical report, given that the videotape on which the report was based was held to be tainted in the absence of evidence as to its admissibility[70].

In Quebec, there are cases in which issues governing the right to privacy could have been raised, but where the C.L.P. has admitted video evidence regardless of privacy issues because the worker had obtained an expert opinion from a physician as to the compatibility between gestures performed in the videotape and medical constraints documented by the worker's doctor. The C.L.P. held that by submitting the report of the

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[69] *Habib* et *Cie de la Baie d'Hudson* [2000] C.L.P. 1059 citing *Cadieux c. Service de gaz naturel Laval inc* [1991] R.J.Q. 2490 (C.A.Q.)

[70] *Viau et Rénovations R.Rivard (fermé),* C.L.P. 185176-71-0205, 21st of November, 2002, Francine Juteau.

expert the worker had renounced his right to request the exclusion of the evidence for Charter or privacy reasons[71].

Usually, relevancy will dictate that evidence be admitted, even when it has been obtained in violation of the right to privacy[72]. This is in keeping with the case law regarding grievance arbitration and insurance. While judges tend to want to see the evidence, they will be careful to limit its weight, and will sometimes even grant damages for the violation of privacy rights, while holding the evidence to be admissible[73].

2.2.2 Right to view evidence prior to hearing

Most cases that raised the issue of pre-trial access to video-surveillance evidence granted the right of the party who had been put under surveillance to view and obtain a copy of the evidence prior to trial.

Ontario policy specifically provides that recording evidence destined to be submitted in a hearing must be made available to all parties as early as possible in order to allow them to review the evidence prior to the hearing[74].

This is in sharp contrast to the situation in Quebec where the appeal tribunal has recently denied a worker the right to view a video prior to a hearing even though the worker sought access to the video in order to avoid the expense of having his medical expert witness attend the hearing in person. The employer refused to hand over the

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[71] *Champagne and Arcadian inc. and C.S.S.T.*, C.L.P. 113018-71-9903, 23rd of November 2000, Margaret Cuddihy.

[72] Some cases will only admit the evidence if there were valid grounds for undertaking the surveillance. See *Re Alberta Wheat Pool and Grain Workers' Union Local 333*, [1995] L.A.C. 332.

[73] See for instance an insurance claim: *Bolduc* v. *S.S.Q. Société d'assurance-vie inc.*, [2000] R.R.A. 207. We found no cases granting damages to injured workers in similar circumstances.

[74] WSIB policy on Audio/Visual recordings, document number 11-01-08, June 15th 1999. WSIB policy on Surveillance, document number 11-02-06, September 1st 1997. See *Decision 280 01*, [2001] ONWSIAT 2329.

video prior to the testimony of the worker. In denying the worker's petition to access the video prior to the hearing, the C.L.P. stated:

> "The Commission des lésions professionnelles finds that the non-disclosure of the video does not compromise the worker's right to a fair hearing. The worker is the principle actor in the video and thus the surprise effect will be less important, futhermore the worker will no doubt be able to respond to the video in his own testimony.[75]"

The tribunal held that the argument relating to the increased costs imposed on the worker because of the need to have an expert witness attend the hearing was an economic consideration that could not override the natural justice and procedural equity considerations raised by the employer who maintained, with success, that he had the right to present his evidence as he saw fit.

Quebec law applicable to other claimants provides communication of evidence prior to trial[76], and insurance textbooks insist on the importance of not taking the claimant by surprise[77]. The same is true in other jurisdictions, where opportunity to view videotapes prior to hearing[78], or at least to have counsel view the videotape and receive a written account of what facts were allegedly ascertained in the video[79].

2.2.3 Weight given to evidence by the courts

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[75] *Reis et Industries Maintenance Empire inc.* C.L.P.E. 2002 LP-117,.October 3rd 2002, Me Danièle Gruffy. Our translation, the original states: "La Commission des lésions professionnelles est d'avis que la non-divulgation de la cassette vidéo ne compromet pas, en l'espèce, le droit du travailleur à une défense pleine et entière. Ce dernier étant, en quelque sorte, l'acteur principal du vidéo, l'effet de surprise risque d'être pour lui moins important; de plus, le travailleur pourra certainement y répondre par son propre témoignage."

[76] This seems to be standard practice. See *Léger* v. *Télémédia inc.*, [1995] R.R.A. 179 (S.C. Q.).Failure to communicate such evidence in a timely manner can lead to criticism and even refusal of costs to a victorious defendant, see *Bouliane* v. *SSQ(service santé du Québec) Mutuelle d'Assurance-Groupe*, [1997] R.R.A. 368 (S.C.Q.).

[77] M. Gilbert, *L'assurance collective en milieu de travail*, (Cowansville, Qc: Yvon Blais, 1998) at 207.

[78] *Thorpe* v. *Insurance Corp. of British Columbia*, [2001] 31 C.C.L.I. (3d) 132 (British Columbia Master).

[79] *Xenophontos* v. *AIG Life Insurance Co.*, [2000] 32 C.C.L.I. (3d) 37 (O.S.Q.).

While many decisions of specialised tribunals underline the limited probative value of video-surveillance evidence to determine disability[80], the value of such evidence can be more significant if the film appears to show the worker actually undertaking regular paid employment while receiving benefits[81]. Many decision makers[82], as well as medical experts[83], and in some provinces compensation board policy[84], underline the fact that it is often difficult to extrapolate from evidence that a worker has performed a given task, like lifting her child or mowing the lawn, to determine that he or she is capable of assuming regular gainful employment. Some panels underline the futility of such evidence, letting it be understood that investment in covert surveillance is not necessarily money well spent[85].

If the videotape evidence is selective, if the tape has been cut or does not reflect a full day's activities, some tribunals question its admissibility while others, while admitting the evidence, limit its weight[86]. During the course of our study we were provided with several illustrations of incidents where the video itself had been tampered with[87]. One health care professional who provided us with information added

> "I personally have reviewed three sets of videotaped data, none of which were in my lay view as a psychologist, probative of medical malfeasance. There were no 'home runs'. [Compensation Board]

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[80] The limited probative value of video-tape evidence was underlined in several decisions of the Worker Safety and Insurance Appeal Tribunal of Ontario, and in decisions of its predecessor the Workers Compensation Appeal Tribunal. See for instance: *Decision No . 688/87*, [1987] 6 W.C.A.T.R. 198; *Decision No. 732-93*, January 9th, 1997; *Decision No. 851 97*, WCAT September 15th 1998; *Decision No. 1589 97* WSIAT, 31 March 1999; 2000 ONWSIAT 1609, 2002 ONWSIAT 1267.

[81] *Lefebvre et Infirmières Plus enr. (fermé) et C.S.S.T.*, C.L.P. 109869-72-9902, March 5th 2001; WCAT, Decision No. 1071 96, February 12th 1998.

[82] For an example drawn from insurance law see *Lalonde* v. *London Life Insurance Co.*, [2001] 33 C.C.L.I. (3d) 108.

[83] B. J. Molzen, "Malingering, Videotape Analysis, and the Use of the Independent Medical Examination in Disability Determination, (1999) January-February, The Forensic Examiner 11.

[84] In Ontario see WSIB policy on Audio/Visual recordings, document number 11-01-08, June 15th 1999.

[85] Decision No. 851 97, WCAT September 15th 1998.

[86] 2002 ONWSIAT 1267.

[87] See for instance Rollande Parent and Pierre Saint-Arnaud, "Accidentés du travail - Les images peuvent être trompeuses", Le Devoir, January 20th 2003, at B-6, where evidence was provided that the videotape had been subtly speeded up to make the worker look more lively.

> Medical Advisors, however, seize upon the tapes as evidence of alleged malingering on the basis of selected portions of the videotapes. Of the tapes I reviewed all of them showed evidence of editing, including figures under surveillance curiously moving backwards and in some cases snippets of the tape repeated several times."

Ontario WSIB policy specifically warns against giving too much weight to this type of evidence, as the film does not show rest periods or periods in which the worker is visibly in pain[88]. This point has also been made in the case law of several provinces[89]. If the nature of the worker's illness leads to fluctuations in his ability to perform the tasks of daily living, videotape evidence over only a few days has been held to be of limited value, as it is plausible that the worker was filmed on a good day that did not necessarily reflect his general state of health[90].

Aside from what the videotape actually shows or does not show, information provided in interviews as well as case law[91] shows a further use of videotape evidence, that related to the general credibility of the worker. Even if those activities demonstrated in the videotape are banal, the videotape may be damning to the worker if he or she has been caught exaggerating or lying to the employer or the workers' compensation board. Thus, for example, even if the worker was not doing anything wrong, but simply waiting for a bus, lying about the fact she was capable of waiting for a bus has been used to tarnish her credibility on all issues relevant to her claim. The worker is then more amenable to out of court settlements[92].

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[88] WSIB policy on Audio/Visual recordings, document number 11-01-08, June 15th 1999.
[89] See for instance *Decision No. 1589 97*, W.S.I.A.T., March 31st 1999; ***Champagne v. Arcadian inc. & C.S.S.T.***, C.L.P. 113018-71-9903, November 23rd, 2000, Margaret Cuddihy.
[90] *Decision No. 1589 97 WSIAT*, 31 March 1999. See also WCAT Decision No. 732-93, January 9th, 1997.
[91] ***Decision 280 01***, [2001] ONWSIAT 2329; In insurance law, see for instance ***Chaplin*** v. S***un Life Assurance Co. of Canada***, [2001] 27 C.C.L.I., (3d), 70 (B.C.S.C).
[92] In 2001-2002, in Quebec, 59% of the 21809 appeals to the C.L.P. were dropped or settled out of court. 74% of the files thus closed were closed after negotiations involving a conciliator of the appeal tribunal. See Commission des lésions professionnelles, *Rapport annuel 2001-2002*, Québec, 2002.

2.3 Legal recourse for damages resulting from surveillance

There is no doubt that covert surveillance of injured workers is sometimes damaging both to their physical and mental health. In many cases it is also a violation of their right to privacy and to their right to dignity. In this section we will examine the remedies that may be available to workers injured by covert surveillance procedures. We will first look at compensation available under the workers' compensation legislation and then the law of torts.

2.3.1 Workers' compensation legislation

The primary issue raised by the person seeking compensation for disability attributable to covert surveillance is that regarding the right to compensation for injury caused by the compensation process itself[93]. Disability attributable to the surveillance may include a more prolonged temporary disability and even a more severe degree of permanent disability. Usually the new pathology will result from psychological problems. Access to compensation for psychotraumatic disability caused by the injury is covered under all jurisdictions but, at least in some jurisdictions, it is far more difficult to access compensation when disability is attributed to the claims management process.

In an Ontario case, the worker was granted benefits for psychotraumatic disability, including anxiety with paranoid features, attributed to the employer's surveillance activities. The Tribunal recognised that the surveillance activities had harmed the worker's health, and had also "irrevocably damaged the employer-employee relationship". It confirmed not only the right to benefits but the restriction against work for the accident employer[94]. In Quebec, the majority of the case law refuses to grant

[93] See generally K. Lippel, "Therapeutic and Anti-therapeutic Consequences of Workers' Compensation Systems", (1999) 22:5-6 International Journal of Law and Psychiatry 521.
[94] *Decision No. 1212 97*, (1997) 44 W.S.I.A.T.R. 129.

compensation attributable to what are termed "tracasseries admininstratives" or administrative troubles[95], and many would hold that disability caused by surveillance falls within this category.

2.3.2 Civil liability

Over and above the issue of compensation for disability resulting from surveillance there is some question as to whether damages may be sought for violation of Charter rights. While such a violation by the employer or a colleague would normally not give rise to damages because of the exclusionary provisions contained in all workers' compensation legislation in Canada[96], there may be more leeway with regard to suits claiming damages to the worker's reputation[97]. Law suits for damages inflicted by the behaviour of private surveillance firms may also be a possibility, although most legislation prohibit law suits against all employers covered by the compensation scheme, so that, depending on the province, the right to sue for damages might be curtailed[98] or non-existent if the private detective agency was also an employer under the Act[99].

In insurance law there have been some cases where courts have granted damages against the insurance company for the invasion of the worker's privacy by a private investigator, even in cases where the judge has accepted to hear the evidence because of issues of relevance. In a Quebec case, damages were granted because the claimant

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[95] *Lefebvre et Infirmières Plus enr. (fermé) et C.S.S.T.*, C.L.P. 109869-72-9902, March 5th 2001(Quebec). See generally K. Lippel, *La notion de lésion professionnelle*, 4ième édition, (Yvon Blais, Cowansville, 2002) at 125-138.

[96] *Béliveau St-Jacques* v. *Fédération des employées et employés de services publics inc*, [1996] 2 S.C.R. 345; *Genest* et *Genest* v. *Commission des droits de la personne et des droits de la jeunesse* et *Beaudet*, C.A.Q n^{o} 500-09-004729-976, January 12th 2001.

[97] A few recent Court of Appeal decisions in Quebec have allowed the right to sue in cases in which the worker was claiming damages from the employer for damage to his or her reputation: See *Arthur et al* c. *Williams*, C.A.Q. , 500-09-007443-989, September 23rd 2002; *P.S.B.G.M.* c. *Williams*, C.A.Q. 500-09-007429-988, September 23rd 2002; *Kupelian* c. *Nortel Networks Corp*, C.S.500-05-069071-015, D.T.E. 2002T-377, March 26 2002; *Parent* v. *Rayle*500-09-012323-028, November 21st, 2002.

[98] In Quebec, section 441 of the *Act Respecting Industrial Accidents and Occupational Diseases* would allow for a law suit against third party employer for the balance of the damages.

was on his own property at the time the video was made. Even though the video was found to be admissible, the judge held that the claim for disability insurance did not imply that the claimant renounced his charter rights to privacy[100]. In Newfoundland a lawsuit seeking compensation from the private surveillance firm was refused because of the facts of the specific case, but the Court did not preclude the possibility of a successful damage suit if other facts had been proven[101].

Worker representatives interviewed told us they were currently pursuing claims for damages against workers' compensation boards on the basis of intentional infliction of emotional distress. While there are few Canadian cases granting damages against a compensation board[102], similar claims have been upheld against insurance companies in the U.S. on the basis of the tort of bad faith. In those cases the private insurance companies had shown bad faith in their administration of a worker's claim based on workers' compensation legislation[103].

Conclusion

The pervasive recourse to covert surveillance of injured workers is damaging to the health not only of those workers who are subjected to surveillance but also of those who refrain from attempting any activity, regardless of their doctor's recommendation, for fear of being video-taped by a private detective. Over and above the incentive to refrain from

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[99] ***Kovach*** v. ***British Columbia (W.C.B.),*** [2000] 1 S.C.R. 55; ***Lindsay*** v. ***Saskatchewan (W.C.B.),*** [2000] 1 S.C.R. 59.

[100] *Bolduc* v. *S.S.Q. Société d'assurance-vie inc.,* [2000] R.R.A. 207.

[101] ***Druken*** v. ***R.G. Fewer and Associates Inc.*** [1998] N.J. o. 312, Nfld Supreme Court.

[102] There are some. See for instance ***Butler*** v. ***Newfoundland (W.C.C.)*** [1998] N.J. No. 190.

[103] See for instance Wendell J. Kiser, "Bad Faith Handling of Workers' Compensation Cases: Can It Give Rise to a Separate Tort Action Against Employers, Carriers, or Self-Insureds?", (1987) 23 Tort and Insurance Law Journal 147. See also Marvin Duckworth, «The Tort of Bad Faith arising from Workers' Compensation Matters: A Rumbling Volcano», (1989-90) 39 Drake Law Review 87; M. Lasswell, «Workers' Compensation-Employee's Allegation that Workers' Compensation Insurer Terminated his Benefits in Bad Faith Stated Bad Faith Tort Claim against the Insurer», (1994) 43 Drake Law Review 477; Edward Main, «Bad Faith in the Workers' Compensation Context: A Cause in Search of an Action», (1995)

all activity, there is also the collective stigmatisation of injured workers that is enforced by the idea that Charter rights and the rights to privacy somehow should be applied more leniently when the purpose is to discipline injured workers and ensure that the spectre of covert surveillance promotes respect for the law[104]. Such a spectre would no doubt prevent many reprehensible activities in all walks of life, so it is interesting to note that the practice of video-surveillance in other regulatory contexts does not seem pervasive.

In Quebec, the C.S.S.T. admits that 35% of the video-surveillance done at its behest failed to justify suspension of benefits[105] but the worker's privacy had nonetheless been violated, and in those cases where the worker had been made aware of the surveillance, the mental anguish associated with this type of violation remains unrecognised and uncompensated.

A certain number of issues lead us to hope that the current situation will be called into question by the courts or lawmakers. Equality principles allow us to question the different treatment by the courts of situations which should be analogous. A comparison of recourse to and legal treatment of video-surveillance by insurance companies and by compensation boards or employers appears to show that workers are more rapidly targeted for more banal reasons and with fewer adverse consequences for those responsible for the surveillance.

It is also unclear why some jurisdictions permit video-surveillance of workers in cases where it would be illegal to use the same techniques to catch criminals. When the state

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30 Tulsa L.J. 507; Edward Main, «Removal, Remand, and Review of 'Bad Faith' Workers' Compensation Claims», (1996) 13 T. M. Cooley Law Review 121.

[104] ***Duguay*** v. ***Plante et le Tribunal du travail***, (July 16th 2001), Montreal, 500-05-064211-012, D.T.E. 2001 T-1023, (C.S.Q.).

[105] Laurin, supra note 24 at 4.

itself is mandating the surveillance, rather than the employer, legal issues are quite different because of Charter principles, and care should be taken in order to insure they are treated as such.

Because hundreds of thousands of decisions are made under workers' compensation legislation, some decision makers imply that it is cost effective and thus legitimate to allow more flexibility in determining the power of the state to violate a worker's right to privacy. Yet the consequences of decisions taken on the basis of video-surveillance evidence are often much more serious for an injured worker than those affecting many accused under the ***Criminal Code***. Loss of economic support, stigmatisation and humiliation, in a context in which health and self-esteem are often extremely fragile, are all serious consequences, and it is postulated that workers could claim protection from abusive state action under sections 7 and 8 of the Charter[106].

Although workers relinquished, historically, the right to sue employers for damages, they never relinquished their right to dignity. Pervasive use of video-surveillance to manage workers' compensation claims constitutes in many cases a violation of that right.

[106] *City of Longueuil* v. *Godbout*, [1997] 3 S.C.R. 844; *Blencoe* v. *B.C. (Human Rights Commission)* [2000] 2. S.C.R. 307.

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