

More on *PIPEDA* and video surveillance

As many of our readers will know, *FOCUS* alerts have recently discussed the impact of the *Personal Information Protection and Electronic Documents Act (PIPEDA)* on video surveillance evidence in a labour relations context. (See "[Employee video surveillance and the new federal privacy legislation](#)".) Now, a judge of the Ontario Superior Court has also considered the impact of the new federal privacy legislation in the context of a medical malpractice lawsuit. The decision provides some indication of how courts and other tribunals may interpret what the Court referred to as "complex and broadly worded" legislation.

The plaintiff in *Ferenczy v. MCI Medical Clinics* (April 14, 2004) started an action against her doctor for negligence in the treatment of a cyst on her wrist. At trial, she testified that she had great difficulty holding a cup in her left hand. At that point, defence counsel sought leave to admit into evidence an eight-minute segment of video surveillance showing the plaintiff holding a Tim Horton's coffee cup continuously in her left hand.

The Court allowed admission of the evidence for the purpose of assessing the plaintiff's credibility, but then the plaintiff's counsel raised the argument that the evidence should not be admitted because it had been gathered in contravention of *PIPEDA*. Counsel asserted that the video surveillance was personal information collected in the course of a commercial activity without the plaintiff's consent and that the collection was, therefore, prohibited by *PIPEDA*.

PIPEDA NO BAR TO ADMISSION OF EVIDENCE

The Court ruled that the probative value of the evidence outweighed its prejudicial effect, and that it should be admitted. Moreover, it held that *PIPEDA* was not relevant to the issue of admissibility:

"[T]he Act does not contain a provision which prohibits the admissibility into evidence of personal information collected or recorded in contravention of the Act. Rather the Act provides that an individual or the Privacy Commissioner may bring a complaint which results in an investigation and report under the Act. ... Consequently, if the collection of surveillance evidence in this case is said to be a violation of the Act, a complaint may be filed pursuant to the Act to commence that process. However, that has no direct impact on the issue of the admissibility of evidence in this trial."

DEFENCE IN CIVIL ACTION NOT A COMMERCIAL PURPOSE

The Court's conclusion above was enough to settle the issue of admissibility. However, it went to discuss how *PIPEDA* applied to the facts of the case. Noting that the Act regulates the collection, use and disclosure of personal information in the course of commercial

the collection, use and disclosure of personal information in the course of commercial activities, the Court rejected the plaintiff's argument that the collection of video surveillance evidence by a paid private investigator without the plaintiff's consent was a breach of the Act.

The Court held that the correct interpretation of *PIPEDA* was to view the private investigator as the agent of the doctor who, the Court stated, was collecting the plaintiff's personal information to defend himself in a lawsuit, and not in the course of commercial activity. As *PIPEDA* does not apply to the collection, use and disclosure of personal information for "personal or domestic purposes", the Court held that it did not apply to the collection of video surveillance evidence in this case.

STARTING CIVIL ACTION IMPLIES CONSENT

The Court held further that, by starting litigation and putting the degree of injury to her hand and its effect on her life in issue, the plaintiff should be seen as having given implied consent to collect and use her personal information for the purpose of testing the truth of her claim. A plaintiff must know that parties to an action will have rights and obligations to prosecute and defend. The Court pointed out that consent is not defined in *PIPEDA*, and there is no indication in the legislation that consent cannot be implied.

VIDEO SURVEILLANCE IN TORT LITIGATION EXEMPT FROM CONSENT REQUIREMENT

Finally, the Court held that, even if its other conclusions were incorrect, it would hold that the statutory exemption from the consent requirement would apply. Paragraph 7(1)(b) of the Act provides that personal information about an individual can be collected without consent if "it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province".

The Court held that this wording applied to the case at hand, and concluded that "laws of Canada or a province" included the common law:

"It seems to me that the application of these provisions is self-evident. In respect of s. 7(1)(b) I see no reason to conclude that the law of Canada or of a Province does not include the common law, including the law of tort. Surely the surveillance conducted here is "related to investigating" the claim made by the plaintiff against the defendant. No doubt the disclosure of the investigator's surveillance efforts or the seeking of consent from the plaintiff would 'compromise the availability or the accuracy of the information'."

Accordingly, the Court held that the surveillance without the plaintiff's consent did not breach *PIPEDA* and that, in any event, the evidence should be admitted because it was relevant and its probative value exceeded its prejudicial effect. In closing, the Court expressed the view that the wording of *PIPEDA* "leaves a lot to be desired in terms of clarity and usefulness", and that it was particularly ill-suited to a litigation context.

In Our View

It should be noted that employers in the provincially-regulated sector – the large majority of employers – may be able to argue that *PIPEDA*'s rules have no application to litigation

employers – may be able to argue that *PIPEDA*'s rules have no application to litigation involving their employees, whether in the courts or in arbitration. This is because *PIPEDA* applies to personal information collected in the course of commercial activities and to the personal information of employees in federally-regulated businesses.

Apart from the question of the application of the Act to employee information, the decision in this case, if followed, will limit some of *PIPEDA*'s more problematic effects in a litigation context. The Court's rulings that evidence may be admitted even though it is collected in breach of *PIPEDA*, that a litigant in the position of the doctor in this case is not acting in the course of commercial activities, that "the laws of Canada or of a province" include the common law, and that persons who initiate litigation have impliedly consented to the collection, use and disclosure of personal information for certain purposes of the litigation are all likely to be welcomed by those trying to gauge the impact of the legislation on the legal process.

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