



Privacy Law and Video Surveillance: Guidance from the Ontario Courts

David T.S. Fraser

Since the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) came into full effect on January 1, 2004, insurers have been concerned about what impact this legislation might have on their claims handling processes and the ability of claims personnel to order video surveillance of claimants. There has been a fair amount of uncertainty and, while the issues are not entirely resolved, we are beginning to receive some guidance on how the courts will deal with the intersection between privacy rights and litigation.

The Ontario Superior Court of Justice recently issued a decision in the matter of *Ferenzy v. MCI Medical Clinics* (below). In this case, the insurer ordered video surveillance of the claimant, which was used at trial to impeach the claimant’s testimony. An objection was raised by the Plaintiff’s counsel on the basis that the video surveillance was conducted in violation of PIPEDA and should therefore be inadmissible in court. In the absence of the jury, Justice Dawson considered this issue and reached a number of notable conclusions.

PIPEDA applies with respect to personal information that is collected, used or disclosed in the course of “commercial activities.” When the law applies, it requires the knowledge and consent of the individual concerned for the collection, use or disclosure of his or her personal information. There are a number of exceptions to the consent principle contained in Section 7 of the statute.

Justice Dawson concluded that litigation of third-party claims is not “commercial activity” for the purposes of PIPEDA. (Please note that this is likely not the case for a first-party claim, such as under a disability policy or for Section B benefits.) Justice Dawson also concluded that, if PIPEDA applied, the Plaintiff implicitly consented to the collection of personal information via video surveillance by the act of putting forward the claim. Finally, Justice Dawson also concluded that the exception to the consent principle contained in Section 7(1)(b) was applicable.

Lawyers in our privacy and insurance law groups have been recently involved with a number of PIPEDA complaints against insurers initiated by plaintiff’s counsel. While the complaints are not

yet resolved, insurers would be well advised to anticipate that such complaints may become commonplace until these matters are clearly resolved by the Privacy Commissioner or the Federal Court. It is possible that the Privacy Commissioner's conclusions will differ from those of Justice Dawson, further complicating matters for insurers.

The Author

David T.S. Fraser is the Chairman of the Privacy Practice Group at McInnes Cooper. David works with large and small clients to implement compliance programs for the new *Personal Information Protection and Electronic Documents Act* (PIPEDA) and provincial information protection laws. He regularly provides opinions related to Canadian privacy law for both Canadian and US-based clients and is a frequently invited speaker on this topic. David also acts for complainants and respondents in matters referred to the Office of the Privacy Commissioner. David is the principal author of the *Physician's Privacy Manual*. In addition, David is the Vice Chair of the Privacy Law Subsection of the Canadian Bar Association – Nova Scotia.

The McInnes Cooper PIPEDA Team

McInnes Cooper has established a fully-integrated privacy law practice group that draws upon the diverse strengths of the firm from across its many locations. The members of the McInnes Cooper Privacy Law Group regularly assist clients with all aspects of federal and provincial, public and private sector privacy law and freedom of information legislation. Our lawyers have experience providing strategic advice on privacy law compliance and implementing information protection measures for many of Atlantic Canada's largest businesses, institutions and international companies operating in Canada. If you have any questions, please contact any of the following:

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Ferenczy v. MCI Medical Clinics

Between
Denise Ferenczy, plaintiff, and
MCI Medical Clinics and Dr. Gary Weinstein, defendants

[2004] O.J. No. 1775
Court File No. C22438/00

Ontario Superior Court of Justice
Dawson J.

Heard: February 10-13, 16-19, 23-24, 2004.
Judgment: April 14, 2004.
(35 paras.)

Counsel:

John Bruggeman and Andrea DiBatista, for the plaintiff.
William Black and Mahalley Iny, for the defendants.

EVIDENTIAL RULING

¶ 1 **DAWSON J.**— The plaintiff Denise Ferenczy has sued Dr. Gary Weinstein for professional negligence in relation to his diagnosis and treatment of a ganglion cyst located on the inner aspect of her left wrist. The medical procedure in question was performed on February 17, 1999. The trial commenced before me with a Jury at Milton on February 10, 2004.

¶ 2 On the morning of the second day of trial an issue arose during the plaintiff's cross-examination concerning the use that might be made of video surveillance evidence gathered by a private investigator in January 2004 after the coming into force of the Personal Information Protection and Electronic Documents Act S.C. 2000 c. 5. That legislation came into effect in Ontario on January 1, 2004 and is often referred to by the acronym PIPEDA.

¶ 3 Counsel for the plaintiff contends that the taking of the video and its subsequent disclosure to counsel, were in contravention of the Act. It was submitted that its use at trial would further contravene the Act, and that it was inadmissible.

¶ 4 With the jury waiting I heard argument through much of the day and ruled that the video surveillance could be used in the cross-examination of the plaintiff. I stated that my reasons would follow. These are those reasons.

¶ 5 As the defendant claimed privilege for the videotape in his affidavit of documents and did not disclose it for inspection prior to trial, I ruled that the videotape could only be used for impeachment purposes. I provided the jury with a limiting instruction to that effect.

The Development of the Issue at Trial

¶ 6 The plaintiff testified in-chief that as a result of a complication associated with the aspiration of the ganglion cyst she developed severe and ongoing problems with her left wrist, forearm and hand that ultimately led to the loss of her employment. She testified that her injury has adversely affected her employability and income earning capacity on a permanent basis.

¶ 7 In the early stages of her cross-examination the plaintiff indicated that she could not grip a hairbrush with her left hand. She then indicated that it was also very difficult for her to grip a cup with her left hand. She then stated that she would invariably grip a cup in her right as opposed to her left hand.

¶ 8 On the morning of the second day of trial, counsel for the defendant applied in the absence of the jury for leave to use an eight minute clip of video surveillance evidence in his cross-examination of the plaintiff. I was advised that the clip showed the complainant holding a Tim Hortons coffee cup continuously in her left hand, something she had unexpectedly said in her evidence she could not do. Counsel for the defendant advised me that the video was taken in January 2004 and that he had not contemplated using it until the plaintiff made the statements in evidence that I have just described. I was further advised that all counsel had agreed to exchange affidavits of documents in unsigned draft form, and that signed affidavits were only exchanged shortly before trial. In his affidavit of documents the defendant claimed privilege for the videotape in question. It had not been disclosed prior to trial. In these circumstances an issue first arose pursuant to Rule 30.09.

¶ 9 Rule 30.09 provides as follows:

30.09 Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection at least 90 days before the commencement of the trial, the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of the trial judge.

¶ 10 Accepting as I do the submission that the video did not become relevant until the plaintiff testified in an unanticipated fashion at trial, I conclude, (as I believe I stated in Court at the time) that *Jones v. Heidel* (1985), 6 CPC (2d) 318 (Ont. H. C.) and *Machado v. Berlete* (1986), 57 O.R. (2d) 207 (Ont. H.C.), are directly applicable. To similar effect are the decisions in *Giroux v. Lafrance*, [1993] O.J. No. 2358 (Gen. Div.) and *Youssef et al. v. Cross et al.* (1991), 80 D.L.R. (4th) 314 (Ont. Ct. (Gen. Div.)). Applying the reasoning in these cases I concluded that the fair way to deal with the matter was to permit the plaintiff to be cross-examined on the video which would be shown to the Jury, but to restrict the Jury's use of the evidence to assessing the credibility of the plaintiff and not for substantive purposes.

¶ 11 Counsel for the plaintiff then raised the PIPEDA as a bar to the use of the surveillance evidence, which he alleged was collected in contravention of that Act.

¶ 12 As indicated, the Act came into force in Ontario on January 1, 2004, shortly before the collection of the surveillance evidence and the commencement of this trial. Neither counsel could refer me to any decided cases with respect to the point raised. I was provided with an article from the *Lawyers Weekly*, Vol. 23, No. 36, January 30, 2004 by Paul Bigioni titled "How Does New Federal Privacy Act Affect Private Investigators?" I was also provided with some information downloaded from the Internet. On the basis of this material it was apparent that there has been speculation and debate about the impact of the legislation on the litigation process and the role of private investigators.

¶ 13 In the argument before me it was common ground that the video surveillance was conducted by a licenced private investigator who was retained by the Canadian Medical Protective Association (CMPA). The CMPA was described in argument as an organization involved, inter alia, in retaining counsel and providing defence assistance to physicians who are sued for medical malpractice. The private investigator later testified before the jury and confirmed this retainer.

¶ 14 The plaintiff contends that the video surveillance was private information collected in the course of commercial activity without the consent of the plaintiff and that the Act prohibits the collection of such information or its use or distribution.

¶ 15 At the outset I wish to point out that the 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. Thereafter, certain steps described in the legislation may be taken in the Federal Court. 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.

¶ 16 The evidence at issue here is relevant, in my view, and the probative value of the evidence exceeds its prejudicial effect. By prejudicial effect I mean the danger that the evidence will be misused. As stated, I have concluded that a proper limiting instruction is adequate in this case to ensure that the evidence is used for the limited purpose for which I propose to admit it.

¶ 17 This is not a case involving state action and consequently no consideration arises as to the applicability of the Charter of Rights or the exclusion of evidence pursuant to the provisions of the Charter.

¶ 18 Prima facie relevant evidence is admissible, subject to a discretion to exclude where the probative value is outweighed by its prejudicial effect. This is the test in both criminal and civil cases: *R. v. Morris*, [1983] 2 S.C.R. 190, 1 D.L.R. (4th) 385, 48 N.R. 341 7 C.C.C. (3d) 97; and see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd edition at pp. 23-38.

¶ 19 There is also a discretion in a trial judge to exclude evidence that would render a trial unfair. In *R. v. Harrer*, [1995] 3 S.C.R. 562 128 D.L.R. (4th) 98 Justice Laforest concluded that

this historical concern with trial fairness has now been enshrined in s. 11(d) of the Charter. As I have indicated the Charter is not at issue in this case. However, that does not mean that the common law discretion to exclude evidence, to which Justice Laforest was referring as the underpinning of s. 11(d) of the Charter, does not continue to operate in a non-Charter context.

¶ 20 I conclude that the admission of the evidence here in question will not render the trial unfair. The video will be shown to the plaintiff and the jury. The jury will hear any explanation offered by the plaintiff concerning the contents of the video and will determine to what extent, if at all, the surveillance evidence assists them in assessing the complainant's credibility. The plaintiff has sued Dr. Weinstein and made a claim in her pleadings and in her evidence that her left hand has been disabled. The surveillance was undertaken in a public place and relates directly to the alleged disability. The introduction of such evidence has the potential to operate unfavourably to the plaintiff, but not to render the trial unfair.

¶ 21 Strictly speaking what I have said so far is sufficient to dispose of the issue of admissibility in my view. However, I do wish to make comments concerning the applicability of the Act as much emphasis was placed upon it in submissions.

¶ 22 Broadly speaking the Act regulates the collection, use and distribution of personal information collected in the course of commercial activity. "Personal information" is a defined term under s. 2 of the Act. So is a "record", which is defined to include a videotape. Personal information is defined very broadly. There is no doubt that a videotape of the complainant is properly characterized as a record of personal information under these definitions.

¶ 23 Part I of the Act deals with Protection of Personal Information in the Private sector. By section 4 of the Act Part I applies to "every organization in respect of personal information that; (a) the organization collects, uses or discloses in the course of commercial activities." Organization is broadly defined under s. 2 to include an association as well as a person.

¶ 24 Commercial activity is also broadly defined under s. 2 of the Act as follows:

"Commercial Activity" means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.

¶ 25 The plaintiff submits that the private investigator (an organization) retained by the CMPA (an organization) was collecting and making a record (videotape) of the plaintiff's personal information (images) during the course of commercial activity (while being paid), and that as the plaintiff did not consent to the collection and release of the information, the investigator and the CMPA are in contravention of the Act.

¶ 26 For a number of reasons I disagree. I will deal with some specific reasons momentarily, but first I will make a few general comments.

¶ 27 The legislation in question is complex and so broadly worded that a reasonable argument could be made to extend its reach so far as to transform both civil and criminal litigation into something very different than it is today. The arguments advanced on behalf of the plaintiff here

prove that point. On the basis of the plaintiff's argument, Dr. Weinstein might be permitted to take his own video camera and record surveillance evidence in his own defence, but a licenced private investigator could not do so on his behalf if he was being paid to do so.

¶ 28 This argument would extend to an accused in a criminal case. While there are exceptions in the Act that allow law enforcement agencies to investigate and collect information about a suspect or an accused, an accused would arguably be prevented from utilizing a private investigator, or other paid agent, to collect information or conduct surveillance that could be vital to his or her defence.

¶ 29 In the criminal context an accused could perhaps turn to the Charter of Rights and advance arguments that might succeed in preventing the Act from operating in the manner described. However, a defendant against whom serious allegations have been made in a civil suit may not be able to do so.

¶ 30 One way to avoid this result, and I conclude it is the correct interpretation of the Act, is to apply the principles of agency. On this analysis it is the defendant in the civil case who is the person collecting the information for his personal use to defend against the allegations brought by the plaintiff. Those whom he employs, or who are employed on his behalf, are merely his agents. On this analysis s. 4(2)(b) of the Act governs. That section reads as follows:

4(2) This part does not apply to

...

- (b) any individual in respect of personal information that the individual collects, uses or discloses for personal or domestic purposes and does not collect, use or disclose for any other purpose;

The defendant through his representatives was employing and paying an investigator, to collect information for him. It is the defendant's purpose and intended use of the information that one should have regard to in determining the applicability of the Act. On the basis of this analysis I conclude that the defendant is not collecting or recording personal information in the course of commercial activity. He, through his agents, was collecting information to defend himself against the lawsuit brought by the plaintiff. This is a personal purpose in the context of the civil action brought against him by the plaintiff. In my view, this conclusion is consistent with the overall purpose of the Act which is aimed primarily at information collected as a part of commerce. Section 3 of the act reads as follows:

Purpose

3. The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

¶ 31 Closely related to this reasoning is my further conclusion, that in the circumstances here, (where the recording was in a public place), the plaintiff has given implied consent to the

defendant to collect, record and use her personal information insofar as it is related to defending himself against her lawsuit. A plaintiff must know that by commencing action against a defendant, rights and obligations will be accorded to the parties to both prosecute and defend. The complainant has effectively, by commencing this action and through her pleadings, put the degree of injury to her hand and its effect on her life into issue. One who takes such a step surely cannot be heard to say that they do not consent to the gathering of information as to the nature and extent of their injury or the veracity of their claim by the person they have chosen to sue. Consent is not a defined term under the Act, and there is no indication in the Act that consent cannot be implied.

¶ 32 In the event that I am incorrect in my conclusions so far I would then turn to s. 7(1)(b) in relation to the collection and recording of personal information, to s. 7(2)(d) in relation to the use of personal information and to s. 7(3)(c) and (i) in relation to disclosure of personal information. I find that these sections are all applicable in the case at bar. I will set out the sections in order. The sub-headings appear in the Act and I have included them for clarity:

Collection without knowledge or consent

7. (1) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may collect personal information without the knowledge or consent of the individual only if

...

- (b) 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 investigation a breach of an agreement or a contravention of the laws of Canada or a province;

Use without knowledge or consent

7. (2) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may, without the knowledge or consent of the individual, use personal information only if

...

- (d) it was collected under paragraph (1)(a) or (b).

Disclosure without knowledge or consent

7. (3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

...

- (c) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

...

(i) required by law

¶ 33 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 disclosure of the investigators surveillance efforts or the seeking of consent from the plaintiff would "compromise the availability or the accuracy of the information". Once the collection of the information has been found to fall within s. 7(1)(b), then pursuant to s. 7(2)(d) it can be used. Surely, s. 7(3)(c) and (i) are broad enough to cover the disclosure of the information in accordance with the rules of court and at a trial.

¶ 34 Having reached these conclusions, it is nonetheless my view that the wording of the provisions leaves a lot to be desired in terms of clarity and usefulness. This is particularly so in many situations which can be envisaged that are common to and are a part of the fabric of litigation.

¶ 35 For all of the foregoing reasons I conclude the evidence here in question was not collected, recorded, used or disclosed in contravention of the Act. However, as I indicated earlier in these reasons, the evidence is in any event relevant and its probative value exceeds its prejudicial effect. Its admission into evidence would not render the trial unfair and it is, in my view, admissible at trial in any event at trial.

DAWSON J.