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## INSURANCE LAW BULLETIN

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### Surveillance Evidence in Personal Injury Actions: What Insurers Should Know

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#### **Introduction:**

Investigation by surveillance is standard practice in the insurance industry and this evidence is regularly accepted by courts and tribunals adjudicating insurance disputes.

Surveillance of an opposing party is typically used at the trial of a personal injury case for the following purposes:

- *substantive* evidence (e.g. - of the opposite party's functional abilities); or
- *impeachment* evidence (e.g. - to undermine the opposite party's credibility)

A defendant must disclose a summary of the surveillance during the discovery process whether or not such surveillance is tendered for substantive or impeachment purposes.

#### **Required Details of Surveillance:**

The defendant in a personal injury accident is obliged to provide details of surveillance including:

1. dates, times and precise locations
2. particulars of the activities and observations made
3. names and addresses of the people that conducted surveillance.

#### **PIPEDA:**

Insurance companies, including first party insurers, should be aware of the impact *PIPEDA* and the *Guidance on Covert Video Surveillance in the Private Sector* might have on the conduct of litigation,

in particular, any restrictions such legislation and guidelines might impose on the ability of insurers to undertake covert video surveillance.

Various questions must be further examined to determine whether the *Act* applies to surveillance. Is the scope of 'commercial activity,' as defined by the *Act* sufficiently broad to include activities related to litigation such as surveillance? Within a litigious context, would it actually be appropriate to first obtain consent of the claimant before undertaking surveillance? Will surveillance, found to have been conducted covertly for the purpose of defending an action, be admissible as evidence in court?<sup>1</sup>

### **Commercial activity:**

Commercial activity is defined at Section 2 of *PIPEDA* to mean "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."

It has been argued by defence practitioners that drafters and legislators did not contemplate either the act of surveillance itself, or the actual litigation in defining the ambit of a commercial activity. Plaintiff counsel, on the other hand, have argued the retention of an investigator reflects a commercial transaction, for the request of a commercial type of activity undertaken by one commercial entity investigative company at the request of another commercial entity the insurance company.<sup>2</sup>

This issue was specifically addressed in the case of *Ferenczy v. MCI Medical Clinics and Dr. Gary Weinstein* 2004 CanLII 12555 (ON S.C.). The plaintiff sued the defendant for medical malpractice. The defendant sought to introduce the videotape to impeach the plaintiff's credibility, while the plaintiff opposed the admissibility of the videotape on the basis that it was collected in breach of *PIPEDA*, as the plaintiff's consent was not obtained. It was held the surveillance was admissible for impeachment. *PIPEDA* does not preclude use in Court of information collected in violation of the Act, instead the remedy is a complaint to privacy commissioner.<sup>3</sup>

### **Issue of consent:**

Generally, *PIPEDA* requires consent of the individual prior to the collection, use and disclosure of personal information, including record of video surveillance. The Office of the Privacy Commissioner of Canada views covert surveillance as an "extremely privacy invasive" form of technology that may only be used in the most limited of cases, and as a tool of last resort, as stated in its guidelines.

It is, nonetheless, recognized under *PIPEDA* that there are circumstances where consent is not required. Paragraph 7(1)(b) allows for the collection of personal information, including covert video surveillance, without the consent or knowledge of the person, where consent would compromise the information and the collection is related to a breach of an agreement or a contravention of the law. Additionally, *Ferenczy* implied once an individual initiates formal action against the defendant, implied consent is considered to have been given to the defendant for the collection and recording of personal information in a public place.

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<sup>1</sup> Zuhar, Monika. "Surveillance Hot or Not". Claims Canada, June 2010.

<sup>2</sup> Uteck, Anne. *Video Surveillance, Evidence and PIPEDA*. Dalhousie Law School Vol. 3 No. 3

<sup>3</sup> Ibid.

### Admissibility test of the video surveillance

It must be recognized, as stated by the Ontario Superior Court in *Ferenczy*, that *PIPEDA* does not prohibit the admissibility into evidence of personal information collected or recorded in contravention of the Act. *PIPEDA* merely provides individuals and the Privacy Commissioner with a right to bring a complaint resulting in an investigation.

### PIPEDA restrictions on covert surveillance

The *OPC Guidance* sets out that the purpose for collecting personal information must be considered appropriate in the circumstances and mere suspicion is insufficient to justify covert surveillance.

Surveillance continues to be a proper investigative technique for insurers under reasonable circumstances. The insurer's obligation of utmost good faith does not prevent it from covert surveillance to ensure an insured is also respecting his/her obligations of utmost good faith under the policy.

However, surveillance should be undertaken in situations where it is warranted and justified, based on the medical and documentary evidence. Without proper factual basis to undertake surveillance, the insurer may be subject to a valid complaint by the OPC, in addition to being in breach of its duty of good faith and of the insurance contract.

### CASELAW:

State Farm Insurance challenged the jurisdiction of the OPC in ***State Farm v. Privacy Commissioner of Canada*** 2010 FC 736, where an insurer was allegedly having surveillance conducted on a plaintiff. The plaintiff made a complaint to the Privacy Commissioner under *PIPEDA*. The insurer sought a ruling as to whether the OPC has jurisdiction over the video surveillance the insurer conducted on the plaintiff.

The Court recognized that commercial business is involved to some degree in nearly all activities, while not necessarily being the dominant character of the activity. Where the commercial character of the transaction is not of primary significance, as in the situation of a private investigator hired by an insurer to collect evidence on an individual to be used at trial on behalf of the insured, it would not fall within the realm of *PIPEDA*.

In ***Landolfe v. Fargione***, the defendant went through a red light and collided with the plaintiff's motor vehicle. The plaintiff claimed that he suffered extensive and permanent injuries, including a mild traumatic brain injury and a debilitating neck injury that resulted in chronic pain affecting his shoulders and back, decreased mobility in his neck, headaches and cognitive impairment. He called three medical experts at trial to provide expert opinion evidence regarding the nature and severity of his injuries. All three experts reported some sort of long-term injury.

The defence also called three medical experts. Two of the experts were of the opinion that the plaintiff was a malingerer. One doctor actually stated that the plaintiff made "an academy award performance". The third doctor was of the opinion that if the plaintiff had sustained any injuries, they would have been mild and short-term.

Defence counsel attempted to introduce three surveillance videotapes in an effort to impeach the plaintiff with regard to his testimony concerning the severity of his injuries. The videos showed the plaintiff engaging in various physical activities. The trial judge refused to allow the surveillance videos to be admitted into evidence. The trial judge stated that in order to be admissible they must be relevant and necessary.

The trial judge held that because the quality of the videos was so poor that facial expressions (such as grimaces of pain) were unclear, the videos did not appear to be continuous or complete, and it was sometimes difficult to ascertain precisely what activities the plaintiff was engaged in.

The Court of Appeal took issue with the test that the trial judge applied. The Court of Appeal held that the test to be applied is:

1. The evidence must be relevant to the credibility of a witness regarding a material matter.
2. The potential value of the evidence proffered outweighs its potential prejudicial effect.

The Court of Appeal was of the view that the tapes were relevant to the plaintiff's credibility since they could undermine the truth of his testimony regarding the severity of his injuries. This was because the video showed the plaintiff engaging in activities that were inconsistent with his assertion that he suffered restricted mobility in his neck. They were also held to be relevant because they could undermine the reliability of the expert witnesses called by the plaintiff since their testimony was based on the plaintiff's self-identified symptoms and limitations.

The appellate court acknowledged that the quality and continuity of the videos was poor, and that many of the activities the plaintiff was involved in did not engage his neck or head and could potentially mislead the jury with respect to the plaintiff's abilities.

However, in this case it was held that it was for the jury to determine what weight, if any, should attach to the evidence of Landolfi and his medical experts through cross-examination on the videos. As a result, the court held that the probative value of the tapes was not trifling and was not outweighed by any prejudicial effect.

The Court of Appeal did make it clear that although it will not lightly interfere with the discretionary decision by a trial judge to exclude potentially prejudicial evidence, the exclusion of the videos in this case was based on the application of the wrong legal test for admissibility and a flawed analysis of their the evidence must be relevant to the credibility of a witness regarding a material matter; the potential value of the evidence proffered outweighs its potential prejudicial effect.

In ***Lis v. Lombard Insurance Company*** the defence submitted surveillance videotape showing the plaintiff shopping for four hours, visiting 4-5 stores, lifting and maneuvering up to six grocery bags and two cases of bottled water. The defendant argued that these activities were inconsistent with the plaintiff's evidence that she has difficulties lifting and bending at work. The defendant argued that there was a contradiction between the plaintiff's physical ability, as demonstrated on the surveillance videotape (lifting a case of 24 bottles of water), and Mrs. Lis's testimony concerning lifting 4-5 t-shirts when doing laundry. Lombard further argued that the plaintiff's activity on the videotape was inconsistent with the information provided to a doctor concerning the intensity of her pain. The Court cited ***Ferenczy v. MCI Medical Clinics*** (2004) 70 O.R. (3d) 277 (S.C.J.) where the plaintiff alleged that the negligence of her surgeon resulted in severe ongoing problems with her left wrist leading to a loss of employment and adversely affecting, on a permanent basis, her ability to earn income and obtain employment. The plaintiff testified that she could not grip a hairbrush or a cup with her left hand and therefore would invariably use her right hand. The Court ruled that the eight-minute clip of the surveillance video showing the plaintiff continuously holding a coffee cup in her left hand was admissible because there was a contradiction between the witness's testimony and the videotape. *Ferenczy* illustrates the use of a surveillance videotape to impeach the credibility of a plaintiff by showing a contradiction between the

plaintiff's evidence on the extent of her injuries and the functions she was able to perform depicted on the videotape.

In this case, the plaintiff, Lis, did not claim that she lost her range of motion or is functionally impaired as a result of injuries suffered from the accident. She did not claim that she is unable to work or grocery shop. The plaintiff did not claim she was unable to perform the tasks that she is recorded performing on the two days. The doctor's observations and examination of the plaintiff and his opinion concerning the plaintiff's physical capabilities corroborated with the plaintiff's testimony that she was capable of working and grocery shopping.

It was held that if the activity depicted on the surveillance videotape does not contradict the plaintiff's evidence and is not inconsistent with the plaintiff's testimony concerning her physical capabilities and type of activity she is capable of performing, then the surveillance evidence may be held to be inadmissible.

In *Guakel v. Thukal*, the defence had conducted surveillance of the plaintiff on two occasions. Both occasions were approximately one year post accident. The first surveillance lasted about half an hour, and showed the plaintiff and her entire family raking leaves in their front yard. The plaintiff clearly raked and swept leaves. As well, she held the bags for her husband to fill with leaves. It is clear from the surveillance that the duration of the raking or sweeping by the plaintiff was never more than 5 minutes at a stretch at which time she would stop or do something else.

The second surveillance was less than a minute and showed the plaintiff carrying a heavy water jug into her house. It was carried close to her body. The defence concluded that as a result of all of the above activities, inconsistencies, work history and lack of disclosure of pre-existing problems that the court should find the plaintiff not believable and should therefore reject her evidence regarding her pain and dysfunction. The Court rejected this argument, and held that surveillance evidence does not necessarily catch the pain a plaintiff suffers - a plaintiff engaging in activity or housework does not mean that he or she is doing so pain-free so as to speak to his or her lack of credibility in asserting injury. This plaintiff stated she would indeed try to do as much as she could and usually suffered with increased pain the days following such events.

### **Conclusion:**

Insurance companies can take steps to minimize any invasion of privacy complaints filed during investigations. These steps may include examining the nature of the allegations and required surveillance evidence to provide an adequate defiance, or ensuring information gathered is relevant to the merits of the claim. Steps such as these may serve to assure individuals that their personal information, even when relating to litigation, is handled in an appropriate way.<sup>4</sup>

*PIPEDA*, as well as the *OPC Guidance*, have yet to be fully considered by the courts and, until that time, remain open to interpretation. In the interim, insurers may take measures to minimize successful complaints in relation to covert surveillance.

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<sup>4</sup> Ibid, 2.

While not a sure-fire way to prevent complaints, the following suggestions do provide some ground against allegations of privacy violations:

- Examine the nature of the allegations and required surveillance evidence to provide an adequate defence.
- Determine the best method of obtaining the surveillance -- daily activities, work habits, social activities to identify which would allow for public access.
- Ensure the private investigator has a good reputation and a proper privacy policy and obtain a copy for your records.
- If the investigator is a member of a provincial association of private investigators determine if there is a specific policy members must abide by and obtain a copy for your records.
- Provide the investigator with direction, for example do not approach the subject under surveillance.
- Ensure surveillance is in a public area.
- Ensure information gathered is relevant to the merits of the claim.
- Handle captured third party information cautiously, as editing may render it inadmissible by a court due to tampering/ manipulation; disclosure of the identity of third parties could potentially lead to exposure of a complaint.
- Insurers should be cautious when considering surveillance where a duty of utmost good faith is owed. There must be a strong and well-founded basis for undertaking surveillance, supported by evidence.
- Destroy surveillance materials as soon as is practicable -- ensure in-house staff and service providers are aware of this policy.
- Policies and claim forms should include language that provides consent for collection, use and disclosure of personal information reasonably necessary to investigate and verify all claims.
- Seek advice from counsel when there is uncertainty as to whether surveillance would be acceptable