Labour & Employment Law: *Workplace Investigations: Be Careful What you Wish For*

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Part I Introduction – Context

The Canadian Bar Association has asked this panel to do a "practical examination" of legal issues in workplace. A practical examination relieves the speaker from having to provide a scholarly paper outlining definitive boundaries established in the jurisprudence. Regardless, the jurisprudence has not established definitive boundaries but instead has identified areas of competing rights which are resolved by a contextual analysis in an attempt to balance such competing interests.

Part II Right to Representation During an Investigation

An employee does not have the right to counsel when being interviewed by an employer. However, it is possible that the employee may be entitled to the assistance of a union representative during the investigative process. This right is generally the result of the relevant governing labour relations statutes containing a provision prohibiting the employer from interfering with the representation of employees by a union. In addition, Collective Agreements frequently contain a clause addressing the requirement for union representation. When the clause is addressed in the Collective Agreement, generally, it is the process by which the parties have agreed to address the employee right to not have the representation of the union interfered with by the employer.

The jurisprudence generally relies on the \textit{Weingarten} rule arising from \textit{National Labour Relations Board v. J. Weingarten} (1975), 420 U.S. 251 (USSC), which case has frequently been applied in Canadian jurisprudence. One assessment and application of the \textit{Weingarten} rule is:

\begin{quotation}
"1. The employee has a right to union assistance in speaking with employers as soon as there is a union formed pursuant to the legislation;

2. The right exists when the discussion might have repercussions on other employees' working conditions;"
\end{quotation}
3. such repercussions can be said to exist although not exclusively during the course of discussions concerning disciplinary problems;

4. the right exists under the legislation itself whether or not the collective agreement deals with the method in which it is to be exercised;

5. if the employers refusal goes to the right itself to union assistance and not to a particular method in which the intervention is to be carried out it has denied the employee a right recognized under the legislation."

Emballage Domtar Ltée (1983), 6 CLRBR 1

Part III Right of an Employee to Refuse to Answer Questions versus the Right of the Employer to Demand Answers

While for criminal proceedings a person has the right to choose whether to provide information that may be used against him or her in criminal proceedings, the situation is less clear in the workplace. If an employer in carrying out an investigation, questions an employee as to the events under review and the employee refuses to answer the questions, the issue becomes one of whether or not that employee is insubordinate.

Some jurisprudence holds that, "the obligation to give an explanation" is an opportunity and not a duty. These cases usually look at the issue from the perspective of an arbitrable hearing and whether such conduct is relevant in assessing the findings of fact and credibility.

Two of the primary cases on this point are:


- *Re Coquitlam (District) and CUPE Local 386* (1977), 14 L.A.C. (2nd) 263.

In contrast, in *British Columbia Ferry and Marine Workers Union v. B.C. Ferry Services Inc. et al.* (2008), D.C.S.C. 1464, Madam Justice Wedge reviewed an arbitrator's decision dealing with
the refusal of two crew members to refuse to answer questions arising out of the 2006 sinking of the B.C. Ferry Queen of the North when it ran aground. In light of an ongoing criminal investigation, the two crew members refused to answer. The arbitration process upheld the employer suspension of the employees for such refusal and Madam Justice Wedge likewise upheld the refusal. The main line of thinking that supported the obligation to answer the questions was that set out in the decision of Tober Enterprises Ltd. and UFCW Local 1518, [1990] 7 C.L.R.B.R. (2nd) 148 where the board stated at 156:

"On the other hand, where an employee deliberately attempts to deceive his employer by a false or misleading explanation, the employee's conduct is clearly blameworthy and threatens the basis of the employment relationship. The employee's behavior is equally blameworthy where he knowingly allows his silence to damage the legitimate business interest of the employer. Absent these kind of circumstances, however, an employee's decision to remain silent when accused of wrongful conduct by his employer does not form a proper basis for the imposition of discipline."

[Emphasis added]

In the B.C. Ferry case, there was an inquiry being carried out, which inquiry obligated the employer to provide a report on the sinking. As a result, the arbitrator as upheld by Madam Justice Wedge, concluded that there was, "a larger public interest at stake". The employer was required to complete and release a full report of the accident which obligation outweighed the right of the employees to not answer.

Part IV Union Duty of Fair Representation

A union has an obligation to fairly represent employees with respect to their rights under a Collective Agreement which creates collateral issues in respect of employer investigations – namely:

- If the investigation involves a conflict among two or more members of the bargaining unit, the union itself must take steps to not be in a conflict with its members. As such, it may be necessary to assign different persons to represent
the employees and to establish privacy boundaries.

- At some point in the investigation process, the union may take the position that it will only advance the interests of one of the two members in conflict.

"The Union, as the bargaining agent for a unit of employees which includes both Greenway and Diotay, is party to a collective agreement with their employer. It will inevitably be faced with decisions relating to the administration of that collective agreement which involve choices and sometimes those choices will result in the Union having to favour one member over another. However, those choices, when made in good faith and in a non-discriminatory manner ought not to result in the Union being placed in a perilous position regarding its duty to fairly represent its members." [Emphasis added]

In addition, the duty of fair representation placed upon unions is also contingent upon the employees' co-operation with the union, which co-operation is subject to a standard of reasonableness. As such, the employee may be expected to disclose information to the union to allow the union to properly represent that employee.

**Part V Privileged Information**

Generally speaking, discussions between an employee and his or her union representative are privileged communications on the same basis as communications between a lawyer and his or her client. Labour relations communications between a managerial person and labour relations personnel on the employer side may likewise be privileged. In *Telecommunications Workers Union v. Telus* (2011), 203 L.A.C. (4th) 154, Arbitrator Beattie set out a five point guideline as to when such privileged discussions may or may not occur as follows:
1. Labour relations communications are not per se, recognized as having a class privilege.

2. It is important for both unions and employers to know that, communications made regarding strategy and planning for grievance arbitration, whether existing or contemplated, will normally be protected from disclosure.

3. Even where the first three Wigmore tests have been met, there may be circumstances (such as in Zhang) in which the fourth Wigmore test will be considered as overriding the first three tests in order to ensure a fair hearing. "(I)f a court considering a claim for privilege determines that a particular document or class of documents must be produced to get at the truth and prevent an unjust verdict, it must permit production to the extent required to avoid that result" [M. (A.) v. Ryan, Supreme Court of Canada, above].

4. It may be appropriate, depending on the circumstances, to draw an analogy between communications involving a union representative (e.g. shop steward) and a grievor with communications between a labour relations department and other departments of an employer, notably a health department.

5. The key distinction to be made is between communications which are factual in nature and those which are strategic or planning communications. According to Arbitrator Bruce in B.C. v. BCGSEU (Fotheringham) above, these determinations are to be made on the basis of "common sense and good judgment". No doubt difficulties will arise from individuals differing to some extent in "common sense and good judgment"!" [Emphasis added]

Part VI Human Rights and the Obligation to Investigate as a Result of the Obligation to Accommodate

When an issue of a legislated human rights forms part of the background to an employer investigation in the workplace, the employer will have an obligation to carry out that investigation in that:

"Employer and others governed by human rights legislation are now required in all cases to accommodate the characteristics of
affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics. … [Emphasis added]

… whether that hardship takes the form of impossibility, serious risk or excessive cost. In this case, there are at least two ways in which the Superintendent could show that a standard that permits no accommodation is reasonably necessary. First, he could show that no one with the particular disability could ever meet the desired objective of reasonable highway safety.

The second type of accommodation would be to conduct individual assessments … [Emphasis added]

If the Superintendent in this case could not establish either of these propositions, then he failed to discharge the onus upon him of establishing that a blanket exclusion of persons with Mr. Grismer's condition is reasonably necessary to meet the goal of reasonable highway safety."

"**25** In *Meiorin* (at D/278), the Court referred to two inquiries which might usefully be considered with respect to accommodation: (1) the procedure adopted to assess the issue of accommodation; and (2) the substantive content of a particular offer of accommodation. What circumstances of the particular case. [Emphasis added]

**26** In *Conte v. Rogers Cablesystems Ltd.* (10 November 1999), the Canadian Human Rights Tribunal, applying *Meiorin*, referred (at para. 77) to the employer's responsibility to initiate the process of accommodation and stated, "[a]t the very least, the employer is required to engage in an examination of the employee's current medical condition, the prognosis for recovery and the employee's capabilities for alternative work." [Emphasis added]
Collaterally, the employee has an obligation to co-operate in that:

"The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation … To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus, in determining whether the duty of accommodation has been fulfilled, the conduct of the complainant must be considered."

(Emphasis added)


Part VII  Personal Searches of an Employee

Searching of employee lunch pails, purses, lockers, clothes, vehicles and toolboxes represent many of the original topics of legal jurisprudence for employer investigations in the workplace. Much of the jurisprudence in this area is pre-statutory privacy rights, but in essence, the jurisprudence respected privacy expectations of the employee being investigated. Frequently, the method of respecting privacy was pursuant to the application of the legal principles of trespass and/or assault. In general, the jurisprudence determined that to be entitled to search an employee, it was necessary that the employer establish that there was "A real and substantial suspicion of wrong doing" or the Collective Agreement provided for searches by the employer. If the employee does not co-operate, the employer may be required to seek the assistance of the police. In addition, the manner of the search must be "fair and reasonable."

As such, frequently the employer has to have information or evidence of significant misconduct on an ongoing basis such as theft or particular evidence to suspect a particular employee is participating in theft. In addition, if the search is of a lunch pail versus the search of a purse or
private materials in a locker, there is a higher standard placed upon the employer with respect to its right to do the search and the process that it chooses to follow.

**Part VIII  Electronic Surveillance**

There are numerous forms of electronic monitoring of employees. Some formats of workplace investigations for electronic monitoring of employees are video surveillance, call management systems of the telephone, computer monitoring, card keys, electronic mail and/or voicemail. Such monitoring can also address conduct of the employee in the workplace, conduct of the employee away from the work and conduct which may or may not be work related. The matrix of resulting issues for workplace investigations is substantial. In addition, the relevant statutory framework for workplace investigations varies between the provinces and the federal jurisdictions. The legal statutory frameworks also vary between private workplace investigations and public sector employment workplace investigations. Frequently, the topics are addressed from the perspective of expectation of privacy, obtaining employee consent to invasion of their privacy, collection of information, use of information and disclosure of such information. For the purposes of "workplace investigations" the most common areas for legal analysis are:

- Video surveillance in the workplace.

- Video surveillance away from the workplace.

- Review of email communications.

**Part IX  Video Surveillance Outside of the Workplace**

Arbitrable jurisprudence for those situations where there are no statutory guidelines has settled on a three point analysis to balance between the employee's right to privacy and an employer's utilization of video cameras to investigate an employee. The normal three point analysis is:
"(i) Was it reasonable, in all the circumstances, to request surveillance?

(ii) Was the surveillance conducted in a reasonable manner?

(iii) Were other alternatives open to the company to obtain the evidence it sought?"


The three point analysis is sometimes reduced to a two point analysis – namely:

"1. Was it reasonable, in all of the circumstances, to undertake surveillance of the employee's off-duty activity?

2. Was the surveillance conducted in a reasonable way, which is not unduly intrusive and which corresponds fairly with acquiring information pertinent to the employer's legitimate interests?"


When subject to privacy legislation analysis, the legislative guidelines determine the contextual framework. In the decision of _Ross v. Roland Transport Ltd._ (2003), C.L.A.D. No. 237, an arbitrator in applying _PIPEDA_ utilized the three point test of _Domain, supra._

**Part X  Video Surveillance at Work**

If video surveillance is done under the jurisdiction of _PIPEDA_, a four point test is used, namely:

"(1) Is the measure demonstrably necessary to meet a specific need?

(2) Is it likely to be effective in meeting that need?

(3) Is the loss of privacy proportional to the benefit gained?"
(4) Is there a less privacy-invasive way of achieving the same end?"

Frequently, video surveillance is used for safety, prevention of theft and/or prevention of vandalism. In addressing such issues and whether it involves invasion of employee privacy, the Federal Court reviewed a decision under PIPEDA and stated:

"The collection of personal information is not surreptitious – warning signs are displaced. The collection of personal information is not continuous – it is brief, capturing only a person's image when that person is within the footprint of the camera. The collection is not limited to CP employees – it captures the images of contractors, visitors, suppliers and trespassers. The collection is not to measure a CP employee's work performance and while it is true a camera may occasionally capture a CP employee at work outside the shops, CP could not use those images to measure that employee's productivity because such a use of the information would be a use for a purpose other than that which prompted its collection as a security measure.

…

The Privacy Commission was of the view a person whose images might be recorded had a low expectation of privacy because the cameras were located to capture personal information in locations which were public places. I share his assessment. Generally, such a view accords with the thrust of the cases decided by the Supreme Court of Canada in section 8 Charter cases where an analysis of a reasonable expectation of privacy is weighed.

On this point, it must be remembered the recordings are never viewed unless an incident requiring an investigation occurs. This factor, coupled with my findings of how and what the cameras capture, lead me to conclude the loss of privacy is proportional to the benefit gained from their collection."

*Eastman v. C.P.R.*, 2004 FC 852.

**Part XI Email Monitoring**

Employee use of employer computers for personal reasons is substantial. Frequently, employees use the employer's internet network and/or they may use employer computer to access their own
personal hotmail accounts. Improper use of the employer information system such as harassment or the communication of pornographic material is misconduct involving abuse of employer property.

A different issue becomes one of the employer investigations into employee use of emails for communications. The first step is to determine if the employee had any expectations of privacy. An employer policy on the use of the employer's systems is clearly helpful in establishing a reasonable expectation of privacy. Complications as to whether or not there is privacy and/or whether or not the employer should have access to employee communications are:


- The employer's ability to access private employee communications which communications by the employee are harassment of other employees. (Privacy Commissioner of Canada, "Annual Report to Parliament 2000-2001", online: Office of the Privacy Commissioner of Canada http://www.pricom.gc.ca/information/ar/02_04_09_01_e.asp).

- The utilization of the employer computer for the employee to access his or her personal hotmail account for communication of a personal nature which may or may not disclosure misconduct at work. (*Lethbridge College v. Lethbridge College Faculty Assn.* (2007), [2007] A.G.A.A. No. 67).

In all these cases, the Review Tribunal looked at the expectation of privacy by the employee who utilized the system and the nature of the alleged misconduct causing an investigation in order to determine whether the process used by the employer was or was not in violation of the employee's expectation to privacy.
Part XII  Impact of Delay

If an employer delays investigation and/or delays the implementation of discipline in response to misconduct, it is possible that the disciplinary response will be reversed at arbitration. In general, arbitrators look at the length of delay, the reasons for the delay and the impact of the delay with respect to the allegations in order to determine if the discipline should be reversed. The rationale for this approach consists of:

- A conclusion that this is a general principle of arbitrable law.
- A conclusion that fair procedure requires this principle.
- That the reliability of evidence is suspect.

The impact of delay is generally more prejudicial when the topics being investigated are topics that are routine in nature and it is common sense that people's recollection with respect to the particulars diminishes significantly when there is delay.

Relevant cases are:


Part XIII Remedies

From the perspective of assessing the impact of inappropriate investigative processes, the question becomes what is the remedy? The responses have been varied – namely:

- If the evidence is relevant it is admissible regardless of the appropriateness of the procedure followed to obtain the evidence.

- The assessment as to whether or not the evidence will be admissible is normally an assessment as to the prejudice incurred. An example is the omission of having a union rep in attendance when the Collective Agreement calls for a union rep to be in attendance:


- If there is a conclusion that there has been a substantial breach of an employee right (such as the employee right to union representation), the discipline may or may not be void. It is necessary to do an assessment of the prejudice that occurred due to the breach. An alternative remedy such as damages may be provided as the remedy for a violation of the right to union representation.

  *Alberta Union of Provincial Employees and Her Majesty the Queen in Right of Alberta* (2010), ABCA 216.

- An assessment is made to determine if the breach of the employee's rights created prejudice and if not, the evidence is admissible.
• The inappropriate investigative process is used as a mitigating circumstance in assessing penalty and/or the weight placed on the evidence.

• A cease and desist is given on a go-forward basis.