

New Technology and the Future of Work in Transportation – Legal Primer

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Common Legal Issues

Common legal issues arising from technological changes can include:

- **Unilaterally imposed employer policies for employee surveillance & resulting discipline – privacy**
- Layoffs
- Impact of collective agreement language concerning technological change or employee surveillance



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Sources of Privacy Protections

- Privacy Legislation
- Limits on management reserved rights
- Other negotiated collective agreement language



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Legislative Context

Jurisdictions with Private Sector Privacy Legislation

- Federal (*Personal Information Protection and Electronic Documents Act*)
- Québec
- British Columbia
- Alberta
- Manitoba

Jurisdictions without Private Sector Privacy Legislation

- New Brunswick
- Newfoundland and Labrador
- Nova Scotia
- Ontario
- Prince Edward Island
- Saskatchewan



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Overview

- Courts and arbitrators generally recognise that employees have a reasonable expectation of privacy in the workplace, albeit not absolute
- Balancing employee privacy & employer management rights:
 - Dangerous workplace – safety sensitive roles?
 - Reasonable objective?
 - Reasonable measure?
 - Less intrusive alternatives?
- Arbitrability
 - Unilateral employer policies are always grievable
 - KVP test applies in discipline cases



PIPEDA – Legal Test

PIPEDA: Section 5(3):

An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

Reasonableness test – *PIPEDA* and equivalent provincial legislation

- (1) The degree of sensitivity of the personal information at issue?
- (2) Is the measure demonstrably necessary to meet a specific need?
- (3) Is it likely to be effective in meeting that need?
- (4) Is the loss of privacy proportionate to the benefit gained?
- (5) Is there a less privacy-intrusive way of achieving the same result?

*OPCC PIPEDA Case Summary #2004-281;
Canadian Pacific Railway Company v. TCRC (Picher) (2010)*



PIPEDA – Legal Test – Steps 1 & 2

Step 1 - The degree of sensitivity of the personal information at issue?

- What is being collected, used or disclosed? Sensitivity and amount.
- Does the measure involve a loss of liberty or personal autonomy? Collection of biometric data? Collection of bodily samples?

Step 2 - Is the measure demonstrably necessary to meet a specific need?

- Identify the purpose of the surveillance.
- Is there a real, specific problem in the workplace or only a hypothetical or potential problem?
- E.g., in the transportation sector, safety is always going to be a legitimate employer objective.



PIPEDA – Legal Test – Steps 3 & 4

Step 3 - Is it likely be effective in meeting that need?

- Is the proposed policy likely to resolve the specific problem identified in Step 1?
- E.g., does it *actually* address the safety-related issue?

Step 4 - Is the loss of privacy proportionate to the benefit gained?

- This requires a “balancing of interests”
- E.g., constant video surveillance may not be proportionate to a goal of increased efficiency/productivity, but may be proportionate to addressing a real safety requirement when balanced against a risk of serious accident.



PIPEDA – Legal Test – Step 5

Step 5 – Is there a less privacy-intrusive way of achieving the same goal?

- Has the employer considered alternatives?
- Would these alternatives accomplish the same purpose?
- Are there methods of limiting the intrusiveness of the proposed measure in its use?



KVP – Discipline Principles

- The employer's rule cannot be inconsistent with the collective agreement.
- The rule cannot be unreasonable – reasonableness test under *PIPEDA*.
- The rule must be clear and unequivocal.
- The rule must be brought to the attention of employees before the company can act on it.
- The employee must be notified of the consequences of failure to abide by the rule.
- A rule must be consistently enforced by the company from the time it is introduced.

Lumber & Sawmill Workers' Union, Local 2537 v KVP Co (1965) (Ont Arb)



Some Transport Sector Examples

- “DriveCam”, “SmartDrive” programs – in-cabin & forward-facing cameras & microphone; continuous recording with information being retained upon a triggering event (e.g., accident)
- Continuous audio and/or video recording – including off-duty
- GPS tracking; onboard device monitoring
- Drug & alcohol testing policies
- Access to driving records



Recommendations

- We generally do not want to endorse and accept the reasonableness of employer policies. Push back.
- If a new policy is proposed or introduced, gather information. Consider the following factors:
 - Has the employer stated a need or purpose?
 - Has the employer demonstrated that need?
 - Does the policy and/or technology really serve that need?
 - Can the employer address its need in some other way?
 - Did the employer consider less intrusive alternatives?
- Bargain employee surveillance protections.
 - Unless there are explicit collective agreement protections, surveillance recordings can generally be used to support discipline. Consider bargaining collective agreement limits on the use of surveillance to justify discipline.