



## Legal Corner

By  
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# *Federal court upholds surveillance cameras in the workplace*

A recent decision of the Federal Court of Canada strengthens employers' rights to conduct video surveillance in the workplace [Eastmond ats. Canadian Pacific Railway and Privacy Commissioner of Canada, 2004 FC 852 (June, 2004)].

### Facts of the case

The worker, a member of the Canadian Auto Workers, complained to the Privacy Commissioner of Canada that video cameras installed by CP Rail in a Toronto work yard, violated workers' privacy rights protected under the Federal Government's Personal Information Protection and Electronic Documents Act (PIPEDA). The worker argued that there was no legitimate basis for the cameras (i.e. security) and furthermore, that the cameras could be used to monitor worker performance and behaviour.

In response, CP Rail maintained that the cameras were intended to reduce vandalism, deter theft and protect employees, thereby reducing CP Rail's potential liability for property damage and employee security.

### Decision of Privacy Commissioner

The Privacy Commissioner set up a four-part test to determine whether use of the cameras was reasonable in the circumstances:

1. Is the measure demonstrably necessary to meet a specific need?
2. Is it effective in meeting that need?
3. Is the loss of privacy proportional to the benefit gained?
4. Had less privacy-invasive means of achieving the benefit gained been explored?

In this case, the Privacy Commissioner answered each of those questions "no." Specifically:

1. While there had been a few acts of vandalism and theft, this did not appear to be a widespread problem. As for employee security, the union was not aware of any specific incident of employees feeling vulnerable. Finally, CP Rail's risk of liability for property damage was not clear.

2. Although there had been no incidents of vandalism, theft or injury to employees since the video cameras were installed, in the absence of statistics to show a demonstrable need, it was difficult to argue that there had been a definite deterrent. It could be argued that simple warning signs had deterred would-be vandals.

3. Even though the cameras produced a poor resolution picture making it difficult for identification purposes, and were positioned in areas where there was no reasonable expectation of privacy, it was possible (although difficult) to identify an individual. In addition, the cameras would give rise to the perception among employees that they were being watched, which would adversely affect employee morale.

4. CP Rail failed to evaluate alternatives such as better lighting in the affected areas.

CP Rail refused to apply the Privacy Commissioner's recommendations and the matter was heard by the Federal Court of Canada.

### Decision of Federal Court

The Federal Court adopted the Privacy Commissioner's four-part test but reached the opposite conclusion:

1. Yes. There was a reasonable purpose for the videotaping. The surveillance was not secretive and would be used only to investigate a reported incident, not to review employee performance. Regardless of the few

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incidents reported, the primary purpose of the cameras was to deter future theft and vandalism.

2. Yes. Cameras are an effective means of deterring theft and vandalism and go hand-in-hand with warning signs. It is not possible to speculate (as the Privacy Commissioner had done) that “warnings at the gate alone might provide adequate deterrence.”

3. Yes. The benefit gained outweighed the loss of privacy for a number of reasons: First, the cameras were trained on areas where employees had a low expectation of privacy. Second, taped images would not be reviewed routinely, but rather only in response to a reported incident. Third, if not related to a report incident, tapes would be destroyed after a specified period of time (96 hours).

4. Yes. CP Rail did look at alternatives to cameras, including security guards on site and additional fencing, and determined (reasonably so) that they were too expensive or disruptive to operations.

The court also held that this was precisely the kind of case where it would have been impractical and impossible to obtain prior “consent” of those being videotaped. Particularly because the taped images would be used to investigate incidents of illegality, the notion of consent made no sense and would compromise the very investigation.

Although each workplace situation should be reviewed with counsel prior to commencing surveillance, this recent case strengthens employers' rights to conduct video surveillance in the workplace.

For more information on surveillance in the workplace, you may contact a member of the Sherrard Kuzz LLP legal team.

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