

# The Steward

NEWS AND INFORMATION FOR BCGEU STEWARDS



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## Video surveillance: When can the boss spy on you?



By Svend Robinson  
Staff Representative

Over the past couple of years there have been a number of important arbitral decisions on the issue of employer video surveillance of employees, both on and off the job-site and involving both open and secret surveillance.

This article examines the present state of the law in this area.

Assuming that there is nothing in the collective agreement curtailing the employer's right to introduce video surveillance, arbitrators in deciding whether evidence from such surveillance is admissible will seek to balance two conflicting objectives: protecting the privacy rights of employees on the one hand, and respecting the rights of employers to manage and direct the workplace, and protect against abuses of benefit programs.

The key test for weighing the acceptability of surveillance evidence in B.C., both open and covert, was set out by the

arbitrator in *Doman Forest Products Ltd.* (1990) 13 LAC (4<sup>th</sup>) 275 and refined in subsequent decisions:

- Was it reasonable in all the circumstances to request surveillance? In considering this test, the arbitrator should look at what reasonable alternatives were available to the employer before using video surveillance.
- Was the surveillance conducted in a reasonable manner?

### Open surveillance

The leading B.C. cases on open surveillance are the 2003 decisions in *Pope & Talbot* (2003) 123 LAC (4<sup>th</sup>) 115 and *Unisource* (2003) 121 LAC (4<sup>th</sup>) 437. Both decisions allowed for the use of open surveillance cameras, in one case to deter theft, and in the other to monitor production. In *Unisource* the arbitrator asked, "Was the surveillance a

Continued on page 2

### Special edition:

## Privacy in the workplace

A wide variety of issues arise out of an employee's right to privacy. Can an employer videotape at work, or at home or on sick leave?

Can the employer read your e-mail or check your history of internet use?

Can an employee's locker, backpack or purse be searched?

Can an employee be forced to be examined by an employer-chosen doctor?

If an employee has to disclose confidential medical records are there any protections for that employees' privacy in the medical records?

There are two provincial

privacy acts. The *Freedom of Information and Protection of Privacy Act* (FOIPA) applies to ministries of the government and agencies, commissions and boards of government.

The other Act that applies to the private sector is the *Personal Information Protection Act* (PIPA).

Both Acts define personal information as information about an identifiable individual.

These Acts govern the collection, use and disclosure of personal information. While our collective agreements give us the right to review our personal files, these Acts give us another option for obtaining records held by employers containing your personal information.

The Acts set out the procedure for obtaining your records

Continued on page 2

Continued from page 1

reasonable exercise of management rights in all the circumstances of the case?"

In *Pope and Talbot* the arbitrator agreed that there is a lower threshold for open than for secret surveillance, saying that "a meaningful threshold does exist". He ordered the employer to stop 24 hour monitoring of the worksite, which was too intrusive, and instead restricted monitoring to 20 minutes at shift changes and several brief periods of five minute monitoring.

*Unisource* makes it clear that where the employer has legitimate grounds to deter theft or other wrongdoing at the workplace, open video surveillance will be acceptable.

On the issue of general open surveillance, many arbitrators have agreed with the words of Arbitrator Ellis in the *EICO* decision, (1979) 23 LAC (2d) 14, in rejecting the employer's open video surveillance of the production floor:

"The device at hand is not only personally repugnant to the employees, but it has such an inhibiting effect as to prevent the employees from performing their work with confidence and ease. Every employee has occasion to pause in the course of his work to take a 'breather', to scratch his head, to yawn, or otherwise be

himself without affecting his work. An employee, with reason, would hesitate at all times to so behave, if his every action is being recorded on TV."

### Covert surveillance

With respect to covert or hidden surveillance, the test for the employer is much tougher than for open surveillance. The burden is on the employer to demonstrate that:

- there is a substantial problem;
- there is a strong possibility that surveillance will be effective;
- there is no reasonable alter-

native to secret surveillance. [*St. Mary's Hospital* (1997) 64 LAC (4<sup>th</sup>) 382 (Larson); *Unisource*.]

It will be easier to meet this test where a single individual is targeted, as opposed to the entire workforce.

As Arbitrator Picher stated in *Canadian Pacific Limited* (1996) 59 LAC (4<sup>th</sup>): "The employer's interest does not justify resorting to random videotape surveillance in the form of an electronic web, cast like a net, to see what it might catch. Surveillance is an extraordinary step which can only be resorted to where there is, beforehand,

Continued on page 3

Continued from page 1

## Privacy in the workplace

and also sets out a number of exceptions to your right to disclosure of your personal information. For example, employers can refuse to disclose information if it is subject to solicitor client privilege. Disclosure can be refused if it is an unreasonable invasion of a third party's personal privacy (*FOIPA*) or the disclosure would reveal personal information about another individual (*PIPA*).

If a public body refuses to disclose information a complaint

can be filed with the Office of the Information and Privacy Commissioner.

The Office of the Information and Privacy Commissioner (OIPC) is independent from government and monitors and enforces British Columbia's FOIPPA.

The Information and Privacy Commissioner is David Loukidelis.

The web site address for the Privacy Commissioner is [www.oipcbc.org](http://www.oipcbc.org).

## The STEWARD

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CEP 467 - COPE 378

reasonable and probable cause to justify it.”

For example, in the case where an employer suspects an employee of cheating on eligibility for sickness or LTD benefits, if there are reasonable grounds to believe that the employee is dishonest then secret video surveillance off-site may be acceptable.

But there cannot simply be “speculative spying”, in the words of Arbitrator Foley. Arbitrator Blasina ruled in *Re Steels Industrial Products* that “...great circumspection is called for when an employer seeks to electronically monitor the activity of an employee off the job...albeit during otherwise working hours.”

Arbitrator Bryan Williams ruled inadmissible videotape evidence of an employee accused of abusing sick leave, stating, “In suspicious circumstances surrounding the medical condition of the grievor, the employer has every right to conduct a full investigation but only as a last step should it choose the intrusive alternative of invading the employee’s privacy by conducting surveillance.” He said that the employer should have used other methods before employing a private investigator to conduct secret surveillance. *Re Alberta Wheat Pool* (1995) 48 LAC (4<sup>th</sup>) 332.

The most recent reported decision on this subject was the Award of Arbitrator Blasina in *EBCO Metal Finishing Ltd.* [2004] B.C.C.A.A.A. No. 260. In this very comprehensive decision, the arbitrator reviews earlier cases and summarizes the current state of the law.

Arbitrator Blasina declared inadmissible secret videotaped evidence, holding that the

employer had other reasonable options available which were not considered. He stated that “the onus is upon the employer to justify undertaking surveillance by showing that it was uniquely necessary in order to ascertain the truth”. In rejecting the evidence, he also found that the employer was in breach of the *PIPA*.

Both privacy acts deal with the situation of the employer conducting surveillance. In the *PIPA* there are two key sections covering secret surveillance: S.12 allows the employer to collect information “about an individual” without consent if the collection is “reasonable for an investigation”. “Investigation” is defined as including an investigation related to a “breach of an agreement.”

S.13(2) bars the collection of “employee personal information” without consent unless it is authorized by s. 12 or “the collection is reasonable for the purposes of ...managing or terminating an employment relationship.”

“Employee personal information” is defined as “personal information about an individual that is collected, used or disclosed solely for the purposes reasonably required to establish, manage or terminate an employment relationship between the organization and that individual, but does not include personal information



that is not about an individual’s employment.” Therefore *PIPA* does apply to employer-employee relations, and it imposes a “reasonableness” standard on the employer seeking to use video surveillance. The onus is on the employer to meet this burden.

The only other relevant statutory provision is the *Charter of Rights*, which in s. 8 prohibits unreasonable search and seizure. While not directly applicable in the private sector, it does apply to government employees.

Arbitrators in B.C. have, however, ruled that in accordance with the remarks of Justice MacIntyre of the Supreme Court of Canada in *Dolphin Deliveries*, they should be guided in their decisions by the spirit of the *Charter*.

As the arbitrator in *Pope & Talbot* said, “...the values embedded in the *Charter* do appropriately influence the development of our common law and arbitral jurisprudence.”

# Can the employer search your stuff?

By Sarah Stanton,  
Co-op student

Can the employer search your locker, bags or personal effects? Can an employee refuse? This article sets out various factors which will determine the extent to which an employer can reasonably search the belongings of its employees.

An arbitrator will determine the appropriateness of an employer's search policy by carefully balancing individual privacy interests against the employer's interest in securing and protecting its property.

The following factors will be relevant to the determination of whether a particular search was reasonable:

1) The kind of goods the employer's operation produces or manages. An employer can more easily justify searches of employees at a gold mine or museum than a search of employees leaving an office environment.

2) Whether there have been recent thefts or security concerns involving the employer's operations. For example, if bomb threats have been made or if a theft ring has recently been discovered, the employer's searches will more likely be found justified. In all searches, however, the employer must have a legitimate reason to carry out any proposed search.

3) Another factor relevant to determining whether an employer's search policy is reasonable is what items the employer is seeking to search. While the

employer must have a legitimate reason to conduct any search, it will require less justification to search the bags, lunch-boxes, lockers or vehicles of employees than will be required to justify searching their clothing. Arbitrators have been extremely reluctant to



allow employers to 'frisk' the persons of employees.

Purses lie in a somewhat grey area. The right of an employer to inspect an employee's purse is subject to debate and will largely depend on other factors such as the nature of the employer's operation.

For example, in the context of Canada Post employees, an arbitrator refused to allow the employer to search employee's purses. However, in another case involving museum employees, the employer's right to search purses was found to be reasonable on the basis of security concerns.

4) Another key issue is whether the policy of searches has been recently created or whether searches have been

taking place at the employer's operation for some time. If there is a history of past practice, an arbitrator will more likely find that submitting to searches has become a condition of employment.

5) Whether the search policy has been adequately communicated to employees is another important factor. Employees must be made to understand that the individuals searched are not suspected of wrong-doing.

6) The manner in which searches are performed is crucial to a determination of whether the search is appropriate. It is important that the search is conducted in such a way that no employee feels singled out or appears guilty of wrongdoing to other employees. A policy of searching all visitors and staff (including management) will meet this requirement. If only a portion of employees are to be searched, the method for determining who is searched must be appropriately objective, systematic and non-discriminatory (for example searching every tenth employee or requiring employees to draw cards). In one case where the guards conducting the search had the discretion to select particular employees for search, the searches were found to be improper.

The requirement that no individual employee be singled out for search will, however, be displaced in a case where there is a real and substantial suspicion of theft by a particular employee.

Continued on page 5

7) Searches must be carried out in the presence of the employee involved. In a case where the employer searched the unlocked lockers of employees without the employees being present, the searches were found unreasonable.

8) Finally, searches must be carried out in a non-threatening way. For example, in a case where employees were lead into a small guard-house to be searched and where the door was blocked by a second guard, the atmosphere of intimidation created was found to be unreasonable.

An arbitrator investigating the appropriateness of a particular search policy will consider all of the above factors in balancing the interests involved and in determining whether the employer's search policy is reasonable.

In general, where an employer has established a legitimate reason to justify a locker or parcel search, has taken reasonable steps to inform employees, and conducts the search in a systematic and non-discriminatory manner, an arbitrator will likely uphold the reasonableness of the search.

If faced with a new employer search policy, Stewards should consider the above factors in determining whether the proposed policy is reasonable.

If particular employees are singled out or if the searches are carried out at the complete discretion of guards, the search may be unreasonable. In addition, if searches of clothing or purses are being carried out, Stewards should contact the area office so that the union can consider whether a challenge should be made to the new search policy.

Finally, disciplinary action

may result from failure to submit to a reasonable search when requested to do so.

Just as the fairness of an employer's search will depend on the factors listed above, the reasonableness of an employee's refusal to agree to a search will also depend on these factors.

Where the employer is

instituting a search policy without any reason or where the policy is being used to unreasonably target specific employees, an employee may be justified in refusing to submit to the search.

The most advisable course of action in most cases is to obey now and grieve later.

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# Employer use of medical records

By Ken Curry,  
Staff Representative

Sometimes employers are legitimately entitled to an employee's confidential medical records.

Depending on the circumstances, restrictions can be put on who on the employer's side gets to see the records.

The BC Court of Appeal recently reviewed the circumstances in which restrictions are properly placed on the use of medical records.

In that case, an employee went home sick and claimed STIIP. The employer refused to pay. The union then had to prove that she was entitled to STIIP.

We proved the entitlement to sick pay by an expert report from the grievor's psychologist. The employer then demanded the clinical notes of the psychologist that were the basis of the psychologist's opinion. In these circumstances we were obliged to turn over the notes but sought restrictions on who could see the clinical notes.

The employer said there should be no restrictions on who could see the notes and the union said that we should

only have to turn over the portions of the notes that were relevant to the reason why the grievor could not work and that only the employer's lawyer and an expert retained by the employer could see the notes.

Continued on page 6





The arbitrator agreed with the restrictions suggested by the union, (BCGEU Arb # 501C).

The arbitrator took into account the nature of the records. They were clinical notes made in a therapeutic counselling sessions over a 10 year period. They were extremely sensitive as part of the sessions dealt with traumatic events in the grievor's past.

The arbitrator reasoned that it would be wrong for the

grievor to return to the workplace knowing that her supervisor or manager had read intimate details from her counselling records. The arbitrator was obliged to balance the strong privacy interests of the grievor with the employer's right to a fair hearing. He held that in this case the appropriate balance was to limit the disclosure to the employer's

lawyer and an expert retained by the employer.

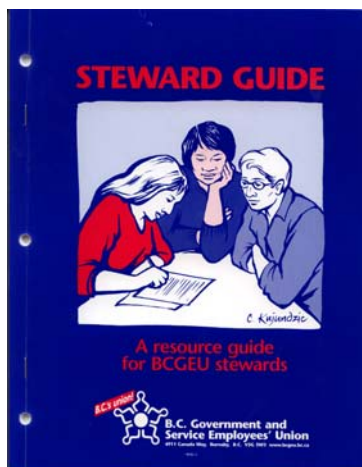
The employer then appealed the arbitrator's decision to the Court of Appeal. The employer changed its position from the one they took in arbitration. First, the employer agreed that the union was entitled to blackout the portions of the record that were not relevant to the claim. As well the employer said that only two persons were

required to review the records: one from the Public Service Agency and one from the Ministry.

The Court of Appeal modified the arbitrator's order to allow the two individuals identified by the employer to review the records. The Court reasoned that where there is a large institutional employer a limited disclosure to two employer representatives who have no direct contact with the grievor was a sufficient protection of the strong privacy interests in the sensitive records.

These kinds of restrictions will not apply to non-sensitive medical records. For example, if the records concerned a broken arm, a claim for restrictions would likely not be ordered by an arbitrator.

If the records are particularly sensitive (such as arising out of a counselling relationship dealing with difficult psychological issues) and the employer is not a large institutional employer then a strong case can be made for the very limited restrictions originally imposed by the arbitrator i.e. disclosure only to the employer's lawyer and any expert retained by the employer.

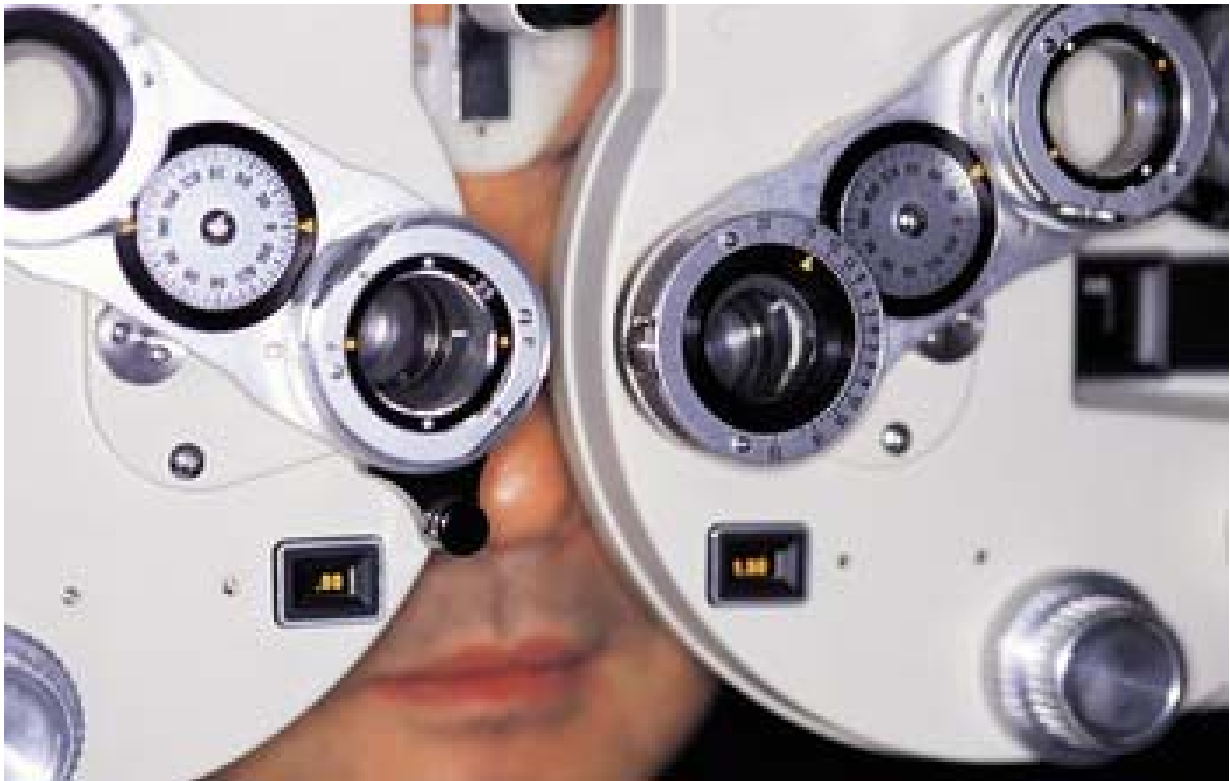


## **Popular Steward Guide gets an update and a reprint**

The best resource for some 4,000 BCGEU members who serve as shop stewards every year is about to get updated prior to a reprint.

The resource guide helps stewards become workplace leaders and contains useful information about the union, the role of a steward, and the grievance process.

Content is now being updated, and new photos will be featured. The changes should be complete right after the union's triennial convention later in June. It should be off the press and available for distribution in July.



# When can the employer force you to a medical examination?

By Ken Curry,  
Staff Representative

In general, there are three situations when employers are permitted to ask for medical information on their employees: to ensure that an employee can safely work after an extended absence, where the employee is seeking accommodation and to prove eligibility for sick leave.

Arbitrators have established a number of rules concerning the employer seeking medical information. An employer must act reasonably and in good faith.

Employers are entitled to information about the disability, not its cause. Usually there is no right to a diagnosis. Normally, it is possible to determine an employee's ability to work safely or an employee's

limitations without a diagnosis.

If a medical certificate is provided to the employer and the employer is not satisfied, the employer must clearly and promptly state their concerns. Employers sometimes want to rush to force an employee to a medical examination by a doctor chosen by the employer. But an employer must attempt to obtain the information first by asking the employee's doctor more questions.

A case discussing this issue is *Overwaitea Food Group v United Food and Commercial Workers Union Local 1518* (October 15, 2003), BCCAAA # 311 (QL) (Burke): "An employee of Save On Foods was seeking accommodation for her arthritis. She supplied the employer with a number of medical opinions

setting out her disability. The employer sought an order from the arbitrator that the grievor be examined by a physician appointed by the employer.

The arbitrator reasoned: "Fairness as a principle of natural justice is not without consideration of other rights such as privacy rights. Indeed, certain privileges override the fairness principle for reasons valued by the administration of justice. These include solicitor-client privilege; and other confidential communications which satisfy certain requirements. (See *Slavutych v. Baker* (1975), 55 D.L.R. (3d) 224 (S.C.C.)). In this case, the Employer has argued the Grievor in effect has waived any

Continued on page 8

privacy rights by submitting this case to hearing. While I am cognizant of this point, I think it critical there be a weighing of the interests or values involved. This is not a simple request for clinical records. (See *Government of the Province of B.C. (Ministry of Forests) and Professional Employees Association (Re Otto Slavik preliminary issue)*, [2001] B.C.C.A.A. No. 438, October 17, 2001, Burke). The medical examination of an individual by a doctor chosen by another is a significant intrusion into the privacy rights of an employee. Accordingly, sensitivity to this must be preserved in the jurisprudence. Even in many of the cases cited by the Employer, there is a recognition of a balancing of interests and that such an order is not appropriate in every case.

While I agree that the medical status of the Grievor is relevant to the proceedings, the matter in this case concerns the accommodation of the Grievor because of the medical disabili-

ty. In this case, the Union argues the issue is accommodation. Whether or not the Employer is challenging the Grievor's ability to return to work, the extent and nature of her disability and its affect on the accommodation issue is disputed. The medical evidence in particular as it pertains to the commute is pertinent. I find however, a balancing of the interests mandates a further inquiry from the Grievor's physician rather than an order the Grievor submit to a medical examination by a doctor chosen by the Employer. This latter request should not be granted lightly as is evident from the analysis above. In the *UBC* case there was considerable controversy surrounding the disputed medical report. The union itself was not prepared to rely on it. That is not the case here. The Employer complains of insufficient and inconclusive information. It may as a result seek additional information.

In the current circumstances,

the appropriate route to follow at this time is for the Employer to direct particular questions to the Grievor's physician to answer and assist its understanding of the medical evidence. It may seek clarification and additional information from the treating physicians. The Union has indicated it will facilitate the process and I expect it to do so in a timely fashion considering the hearing dates in this matter.

I find accordingly the request for an order is premature. I am not satisfied at this time that the examination sought by the Employer is necessary to ensure a fair hearing. The Employer's application is dismissed on this basis with the directions as set out above."

Generally, before employers can have an examination by an employer-chosen doctor, they must establish that the additional information being sought is not available by asking questions of the employee's doctor.

## Your right to privacy

In spite of explicit opposition from tens of thousands of constituents, the BC government signed a contract with MAXIMUS, Inc. only days after the release of the Privacy Commissioner's extremely cautionary report.

The MAXIMUS deal to administer British Columbia's personal health care information took effect April 1, 2005. With the FBI now entitled to investigate British Columbians without their knowledge or consent, and also without the knowledge or consent of our provincial and federal authorities, individuals are left with little recourse in terms of safeguarding their privacy.

### Call to Action

The Right to Privacy Campaign assists individuals who wish to confirm the contents and accuracy of their personal information. Under BC's *Freedom of Information Act*, individuals are entitled to request and receive a complete record of all personal information under the government's possession and control.

Find out exactly what information the government has about you, and whether it is accurate and up-to-date. Just go to [www.righttoprivacycampaign.com](http://www.righttoprivacycampaign.com) for details.



# Can the employer search your e-mail?

By Ken Curry,  
Staff Representative

A number of arbitration decisions have dealt with this issue. In most of the cases the employer had an existing policy prohibiting inappropriate use. In many of the cases the employer searches the e-mail of an employee after receiving a complaint. In this scenario arbitrators typically have rejected a privacy defence.

A sample from the arbitrations is *Treasury Board 116 LAC 4<sup>th</sup> 418* where two correctional officers were terminated for sending pornographic material over the e-mail at Kent Institution.

The arbitrator said:

"The grievors invoked s. 8 of the *Canadian Charter of Rights and Freedoms* and argued that the employer's action violated their right to privacy.

The grievors must first establish that, in the circumstances, they had a reasonable expectation of privacy: *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393.

In *Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996), the plaintiff was terminated for sending unprofessional messages about his supervisor on the defendant's e-mail system. The employer had given assurances to its employees, including the plaintiff, of confidentiality and privilege and assurances that e-mails could not be intercepted and used as grounds for termination. The plaintiff claimed that his termination was a violation of his right to privacy and a violation of public policy which gave rise to a wrongful discharge action. The Court held there was no reasonable expectation of privacy in e-mail communications, notwithstanding assurances that they would not be intercepted by the employer.

In *Re Camosun College and C.U.P.E., Loc. 2081* (Metcalfe), unreported, November 15, 1999 (Germaine) [page 433], an employee was dismissed for sending an e-mail, highly critical of his employer and co-workers, to a union "chatline" over the employer's compu-



ter system. The union claimed confidentiality and privilege. At para. 21 of his decision, the arbitrator said any reasonably well-informed e-mail user would know that messages could be monitored and the originator of e-mail has no control over the circulation of the message. In these circumstances, the arbitrator concluded there was no right to privacy and no confidentiality attached to the message.

In view of the employer's policy against the use of the e-mail system for unacceptable purposes and a clear log-on warning that the system is monitored in accordance with such policies, it is difficult to see how, in these circumstances, the grievors can claim a privacy interest. Moreover, the employer's investigation was driven by a complaint on which it was bound to act. This is not a case of random surveillance. Nor is it comparable to urinalysis or personal property searches. These are e-mail communications over which the grievors lost control once they pressed "Send". There are some 1,600 users on the CSC network.

There has been no intrusion on the person or personal effects. The employer acted on a complaint, which it was legally obligated to do, and discovered that the grievors were using the employer's network for activities which can only be described as highly offensive. There is, in these circumstances, no reasonable expectation of privacy."

The arbitrator upheld the terminations.



# Court ruling on contracting out of Medical Services Plan to be appealed

By Ken Curry,  
Staff Representative

Many of you will now be familiar with this American legislation that may reach across the border. The *USA Patriot Act* can compel American corporations to secretly turn over records in their control to the FBI. It is secret because the FBI can get a disclosure order from a special closed court and the *Act* makes it illegal for an American corporation to disclose that they have turned over records pursuant to a *Patriot Act* order.

This legislation became of particular interest to the BCGEU when the Liberal government decided to contract out the administration and operation of the Medical Service Plan to a subsidiary of an American corporation.

The *Freedom of Information and Protection of Privacy Act (FOIPA)* says that government must protect personal information in its custody by making

reasonable security arrangements against such risks as unauthorized access, collection, use or disclosure.

Contracting out the operation and administration of the MSP plan to an American corporation that is subject to the *USA Patriot Act* that could have the end result of disclosure of medical records to the FBI appears to be inconsistent with the *FOIPA* obligations to ensure reasonable security arrangements.

The BCGEU sought an Order in BC Supreme Court and filed a complaint with the Privacy Commissioner concerning the contracting out that could lead to this massive disclosure of highly sensitive records.

After we initiated these actions amendments were made to *FOIPA* and the contract with the US corporation to tighten up the security of the personal information. In BC Supreme Court, the Judge was satisfied that in light of the



contractual and legislative amendments the requirements under *FOIPA* regarding protection of personal information had been satisfied.

The union also argued the contracting out the administration and operation of the Medical Service Plan was contrary to the requirements under the *Canada Health Act* for public administration.

The BCGEU is appealing this decision to the Court of Appeal.

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## NOTES

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