

SURVEILLANCE: HOW TO STOP THE TABLOID DEFENCE

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I. Introduction

Surveillance evidence has the potential to be highly prejudicial to a plaintiff's personal injury case. Setting aside cases of obvious fraud, courts have held that, given the prejudicial nature of surveillance evidence, fairness dictates that a plaintiff should be given an opportunity to review and explain her actions as depicted on the video. In order to maximize the plaintiff's opportunity to explain the video, counsel for the plaintiff should pursue a policy of early discovery of as many of the particulars of the surveillance as possible. Counsel should use the Rules of Court and existing caselaw to obtain particulars — dates, times, actions depicted on video — before examinations for discovery. Memories fade over time, so if a plaintiff is first confronted with surveillance evidence at trial, she will be at a great disadvantage to remember and explain her actions. Counsel should challenge the admissibility of surveillance videos at trial and consider calling expert evidence to assist the court in drawing inferences or conclusions from what is depicted on the videos.

II. Discovery of documents

A. At a minimum, the Defendant must disclose and properly describe surveillance evidence in its Affidavit of Documents

There is no reason for a Plaintiff to be caught off-guard by surveillance evidence. The Rules of Court require disclose of all such evidence. Rule 31.02 requires the Defendant to disclose the existence of surveillance evidence, even if privilege is claimed:

31.02 Scope of Documentary Discovery

Disclosure

(1) Every document which relates to a matter in issue in an action and which is or has been in the possession or control of a party or which the party believes to be in the possession, custody or control of some person not a party, shall be disclosed as provided in this rule, whether or not privilege is claimed in respect of that document.

Rules 31.03 (4) and (5) obligate the defendant to identify and describe all surveillance evidence in his or her Affidavit of Documents. If the Defendant does not claim privilege, then he or she must provide a copy of the surveillance evidence upon request. If the Defendant claims privilege, then he or she must describe the surveillance in Schedule B of the Affidavit of Documents:

31.03 (4) The Affidavit of Documents shall contain

(a) a list and description of all documents which relate to a matter in issue in the action and which are in the possession or control of the party and for which he claims no privilege,

(b) a list and description of all documents which relate to a matter in issue in the action and which are in the possession or control of the party and for which he claims privilege and the grounds for such claim,

(5) The Affidavit of Documents shall provide a description sufficient for identification of each document, or, in the case of bundles of documents of the same nature, of each bundle.

While Rule 31.01(5) requires the Defendant to “provide a description sufficient for identification”, there has been disagreement over what is required for the Defendant to meet its obligations under this rule. The New Brunswick Court of Appeal has provided guidance on this issue.

In *Main v. Goodine*, [1997] N.B.J. No. 370 (C.A.), the Defendant claimed privilege over surveillance tapes and described them simply as “accompanying video tapes” in Schedule B of the Affidavit of Documents. The Court of Appeal held that this description did not comply with Rule 31.03(5). **The description must include at least the name of the person who made the videotape and the date, time and place at which each video was made:**

10 The description of the surveillance video tapes in the affidavit does not, however, comply with the provisions of *Rule 31.03(5)*, which provides:

The Affidavit of Documents shall provide a description sufficient for identification of each document, or, in the case of bundles of documents of the same nature, of each bundle.

11 Each video tape is a document and the present description of each as an "accompanying video tape", is insufficient. The respondents shall serve an amended affidavit of documents within 10

days hereof with a "description sufficient for identification" of each video tape. Such description should include at least the name of the person who made the video tape, the date, time and place at which each video tape, or any segment thereof, was made.

The Court of Appeal's reference to "at least", at paragraph 11, appears to leave the door open for Plaintiffs to request more particulars about the surveillance, than were mentioned by the Court of Appeal. In particular, Plaintiffs counsel should seek to require the Defendant to include a description of the activities on the video in Schedule B, in addition to the name of the investigator and the dates, places and times the video was taken.

B. Insist on an executed Affidavit of Documents

Before proceeding to oral discovery, plaintiffs counsel should insist on an executed Affidavit of Documents. This serves two purposes. First, an executed Affidavit is the only way to be certain if surveillance exists. Second, requiring the Defendant to serve an executed Affidavit of Documents will trigger Rule 31.07, which creates an ongoing duty for the Defendant to disclose any future documents, including notice of the existence of privileged surveillance evidence:

31.07 Documents or Errors Subsequently Discovered

Where, after filing and serving his Affidavit of Documents, a party acquires possession or control of a document relating to a matter in issue in the action, or he discovers that his Affidavit of Documents is inaccurate or incomplete, he shall forthwith disclose the additional documents and specify the extent to which his Affidavit of Documents requires qualification.

C. Consider challenging the defendant's claim of litigation privilege

While it may be possible to get further particulars about privileged surveillance using the discovery process, it is always better to have a copy of the actual video. Defendants have broad authority to properly claim privilege over surveillance evidence that was prepared with the dominant purpose of actual or anticipated litigation: *General Accident Assurance v. Chrusz* (1999), 45 OR (3d) 321 (CA); However, the Defendant may waive or lose privilege over surveillance evidence in the following circumstances:

1. by providing it to a defence expert: *Browne v. Lavery*, [2002] O.J. No. 564;
2. by disclosing it to a co-defendant: *Tremblay v. Daum* (1994) (Ont. Gen. Div.) and *Columbos v. Carroll* (1985) (Ont. H.C.J.); and
3. by providing it to a third-party (e.g.,) the Insurance Crime Prevention

III. Examinations for Discovery

A. *Examine the Defendant to get further particulars about the privileged surveillance*

Examinations for discovery are an opportunity for you to learn further particulars about surveillance evidence. The defendant has an obligation to provide these particulars. Rule 32.06 provides that a person being examined for discovery shall answer, to the best of his knowledge, information and belief, any proper question relating to any matter at issue in the action.

To my knowledge, the Courts of New Brunswick have not rendered a decision on how much information the Defendant must disclose about privileged surveillance videos, at examinations for discovery. This issue, however, has been considered by the Ontario Court of Appeal in *Ceci v. Bonk*, [1992] 7 O.R. (3d) 381(C.A.) and very recently by the Prince Edward Court of Appeal in *Llewellyn v. Carter*, [2008] PEIAD 12.

In *Ceci v. Bonk*, *supra*, under the Ontario Rules of Court, the Plaintiff was entitled to discover the Defendant before being discovered. The Defendant refused to appear for discovery because he did not to disclose particulars about privileged surveillance evidence. Counsel for the Defendant argued that such disclosure would eliminate the usefulness of the privileged surveillance video and could enable the Plaintiff to tailor his evidence. For a unanimous court, Carthy J.A. ordered the Defendant to appear for examination and to answer questions about the privileged surveillance evidence. At paragraph 9, Carthy J.A. discusses the rationale for requiring such disclosure:

9 In my view, the discovery rules must be read in a manner to discourage tactics and encourage full and timely disclosure. Tactical manoeuvres lead to confrontation. Disclosure leads sensible people to assess their position in the litigation and to accommodate. In cases such as this, there will be very few litigants who successfully maintain a dishonest stance simply because they have been exposed to the other party's evidence in advance of giving answers. It is more likely that the process of discovery will make it difficult for a litigant to conceal untruth and that a plaintiff will back away voluntarily from claims that are exposed as invalid, limiting further expense in the litigation. I have been speaking of the conceptual direction of the rules and how exceptions, such as here sought, must feed the general thrust. Some might argue that

the opportunity should be made available to undermine the entire case of an opponent on discovery by exposing one important untruth. My response is that this is still available within the rules by serving the first appointment. To that extent, the rules may lag behind a comprehensive disclosure principle, but the general thrust of disclosure is evident and the exceptions must be consistent.

In *Llewellyn v. Carter*, *supra*, Counsel for the Plaintiff asked the Defendant for particulars about the privileged surveillance evidence cited in Schedule B of the Affidavit of Documents. Counsel for the Defendant instructed the defendant to not answer. The motions judge agreed with Counsel for the Defendant and held that the Defendant was not required to answer the questions; however, the Court of Appeal overturned this decision and ordered the Defendant to provide particulars about the surveillance, including “the dates, time and precise location of any surveillance conducted on the activities of the appellant, the particular of the activities and observations as well as the names and addresses of the persons who conducted the surveillance.”

Both *Llewellyn v. Carter*, *supra* and *Ceci v. Bonk*, *supra*, distinguished document discovery from informational discovery, a concept that was first applied to surveillance evidence in *Sacrey v. Berdan*, [1986] O.J. No. 2575:

11. Subrules 31.06(1) to (3) enable a party to obtain on examination for discovery much of the information contained in a document which is protected from production or discovery on the ground of privilege. Pursuant to these subrules the examining party is entitled to be told of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue, the substance of their expected evidence, and, unless an undertaking is given not to call an expert as a witness at trial, the names and addresses of experts, engaged by or on behalf of the party examined, together with the findings, opinions and conclusions of the expert..

...
17. The whole range of informational discovery is governed by r. 31.06(1), which constitutes a very broad rule as to its scope. It permits "any proper question relating to any matter in issue in the action ..." The plaintiff's injuries are a "matter in issue" in this case. Therefore, any information "relating" or relevant to the plaintiff's injuries known by the defendant is properly within the scope of informational

discovery. Indeed, the paradigm of such information is what the plaintiff was observed to do by a witness undertaking surreptitious surveillance of the plaintiff. Such information is necessary to enable plaintiff's counsel to know the case he has to meet and to avoid surprise at trial. It may also assist plaintiff's counsel in lowering, or increasing, his expectations of the worth of the plaintiff's injuries and may promote settlement of her case.

See also: *Bradbury v. Traise*, [1986] O.J. No. 2594 (Dist. Ct.) *Weiss v. Machado* (1988), O.R. (2d) 201 (H.C.J.); *Nolan v. Grant*, [1986]; *Patterson v. Wilkinson*, [1988]; *Maggio v. Lopes*, [1988]; and *Walker v. Woodstock*, [2001] O.J. No. 157 (Div. Ct.).

Once a defendant has been questioned on the particulars of surveillance evidence, Rule 32.09(1)(b) creates a duty for the him or her to provide the plaintiff with updates on any future surveillance.

B. Prepare the Plaintiff, by reviewing the time, dates, locations and actions of surveillance

Upon obtaining particulars of the surveillance (dates, locations and activities filmed), this information should be thoroughly reviewed with the plaintiff, the sooner the better. The policy of early discovery, early review, is meant to maximize the opportunity for the plaintiff's to have recall about the activities in question. Surveillance evidence is a snapshot in time and can easily be taken out of context. Given the prejudicial nature of surveillance, it is only fair that the plaintiff be able to explain his or her actions.

C. Order of Discovery Examinations / Interrogatories

In other jurisdictions (i.e., Ontario and Prince Edward Island), the Rules of Court afford the plaintiff the right to discover the defendant first. This provides the plaintiff the opportunity to discover the particulars of the privileged surveillance evidence before being examined. The opportunity to discover the defendant first is not be available, as of right, in New Brunswick. Rule 33.05 provides that the defendant shall examine first, except upon consent of the parties or by leave of the court.

One solution would be to seek an order for the Defendant to put further particulars in Schedule B of its Affidavit of Documents. As discussed earlier, the New Brunswick Court of Appeal left the door open for such requests in *Main v. Goodine*, *supra*; however, the most practical approach would be to issue interrogatories, before examinations for discovery, asking the defendant to provide the particulars of the activities depicted on the videos.

D. Questioning the Defendant about surveillance evidence

1. Privileged Surveillance

With privileged surveillance evidence, the goal is to get as much information as possible. Focus on getting the dates, times, locations and description of activities filmed. Both the Ontario and PEI Courts of Appeal have ordered defendants to disclose this type of information.

2. When you have the video

Once you have the video, the focus of your discovery should be on all the collateral documents and records that were created in the preparation of the video. In particular, you should ask for the investigator's notes, field notes, and reports. Ask if and how the video was edited. Ask for confirmation of the total hours of "unfilmed" surveillance.

IV. AT TRIAL

A. *Using Surveillance as substantive evidence*

Surveillance evidence may only be used as substantive evidence (i.e., for the truth of its contents) if (1) it has been previously disclosed in Schedule A of the Affidavit of Documents or (2) the Defendant has properly abandoned its claim of privilege over the surveillance.

Rule 31.09 provides that a party may only use privileged evidence for impeachment purposes, unless it **properly abandons its claim of privilege** on or before motions day, by providing notice and a copy of the document to the other party:

31.09 Effect of Failure to Abandon Claim of Privilege

Where a party

- (a) has claimed privilege with respect to a document,
- (b) has not abandoned that claim on or before the Motions Day on which the proceeding is set down for trial, by
 - (i) giving to all parties notice in writing of the abandonment, and
 - (ii) serving a copy of the document on each party or by producing it for inspection, without request,he may not use the document at trial except to contradict a witness or by leave of the court.

Plaintiffs counsel should oppose any attempts by the defendant to use surveillance evidence as substantive evidence when the defendant failed to properly waive privilege in accordance with Rule 31.09. While there is no case on point in New Brunswick, courts in Ontario have strictly enforced their Rule 30.09, which is substantially similar to New Brunswick's Rule 31.09: *Youssef v. Cross* (1991), 80 D.L.R. (4th) 314 (Ont. Gen. Div.); *Giroux v. LaFrance*, (1993), 19

C.P.C. (3d) 12 (Ont. Gen. Div.).

The rationale for a strict enforcement of Rule 31.09 is to encourage production of documents and to discourage “trial by ambush”. Justice Granger discusses this at paragraph 10 of *Youssef v. Cross*, *supra*:

10 Accordingly, if the video is to be used to impeach the evidence of the plaintiff, it need not be produced but if the video is to be used as substantive evidence the privilege must be waived and the video produced in order to comply with the rules of civil procedure. Admittedly the defendant is faced with a dilemma as production of the video might detract from the effect of the impeachment process. The present rules of civil procedure, are designed to facilitate production of documents including videos, if they are to be used as real evidence, in order to avoid what has commonly been referred to as "trial by ambush". It seems to me that if the videos are to be used as substantive evidence, the privilege must be waived and production made prior to trial. The use of the videos by Dr. Girvin to form an opinion that the plaintiff is a malingerer, demonstrates the unfairness resulting from the failure to produce the video as Dr. Clifford, a psychiatrist retained by the plaintiff, was not aware of the videos until he was called as a witness by the plaintiff.

In *Clark v. O'Brien* 146 N.S.R. (2d)135 (C.A.) the Nova Scotia Court of Appeal declined to follow the strict approach from *Youssef v. Cross* and *Giroux v. LaFrance* on the basis that Nova Scotia’s Rule 31.15, which is unique to Nova Scotia and specifically permits the use of privileged information at trial regardless of whether it was properly disclosed. Neither New Brunswick, nor Ontario has an equivalent to Nova Scotia’s Rule 31.15.

B. Use of surveillance for impeachment

If the Defendant maintains privilege over the surveillance, then he or she is permitted to use it to impeach the plaintiff’s testimony. In order to introduce impeachment evidence, the Defendant must first comply with the Rule in *Brown v. Dunn*. The Rule in *Brown v. Dunn* prohibits a party from calling impeachment evidence unless he or she has laid a proper foundation. The Defendant must put the substance of the evidence to the Plaintiff and give him or her an opportunity to explain it. A key issue is the amount of detail about the surveillance the defendant must provide to the plaintiff in order to comply with the Rule in *Brown v. Dunn*.

In *Machado v. Bertlet* (1986), 57 O.R. (2d) 207 (Ont. H.C.J.) Justice Ewaschuk held that while the surveillance video need not be shown to the plaintiff during cross-examination, it was incumbent on defence counsel to put to the witness the fact that films had been taken and to have

particularized the films' contents so as to afford the plaintiff an opportunity to explain his conduct as it relates to his injuries. Justice Ewaschuk held it was insufficient for the defence counsel to question the plaintiff about the activities depicted in the video in a generalized and superficial way (i.e., the defence counsel had asked the plaintiff if he could run, shovel snow and scrape ice off windshields). He also confirmed that the preferred practice would be to show the tape to the plaintiff, if the video in question was short in duration.

In *Giroux v. LaFrance*, *supra*, Justice Valin held that a witness confronted with surveillance evidence on cross-examination has full opportunity to deny, explain or call evidence to rebut it.

C. Challenging admissibility of surveillance evidence

Counsel for the plaintiff should always consider if there are grounds to challenge the admissibility of the surveillance – it may be possible to show that it is inadmissible for substantive evidence, or for impeachment evidence, or for both. This is the ultimate way of protecting a client from misleading or prejudicial surveillance evidence:

1. Relevance – Is there a discrepancy between the plaintiff's oral evidence and the actions depicted on the video?

Like any evidence, surveillance evidence must be relevant in order to be admissible at trial. For example if the defendant uses surveillance evidence for the sole purpose of impeaching the plaintiff's credibility, then the surveillance must, in fact, be relevant to the Plaintiff's credibility. This sounds obvious, but if there is no discrepancy between the plaintiff's oral evidence and the actions depicted on the video, then the video is not relevant to credibility and should be given no weight by the trial judge for impeachment purposes: *Landolfi v. Fargione* (2006), 79 O.R. (3d) 767 (C.A.).

In *Lis v. Lombard* (2006), 39 C.C.L.I (4th)108 (Ont. S.C.J.) the Defendant sought to introduce surveillance video for the sole purpose of impeaching the Plaintiff's credibility in cross-examination. The judge held a voir dire to determine the admissibility of the surveillance evidence. The Defendant argued the Plaintiff's actions depicted on the videos was inconsistent with her oral evidence. Upon reviewing the videos, Justice Bryant held that the actions depicted on the videos did not contradict the plaintiff's oral evidence:

21 A prior inconsistent statement or inconsistent/contradictory conduct is a well-recognized basis of impeachment. The plaintiff's evidence at her examination for discovery and at trial is consistent concerning who did the shopping. The activity depicted on the videotape is consistent with her evidence given at trial concerning shopping on her days off. I find that the proffered surveillance videotape does not contradict Mrs. Lis's answers made at discoveries or her evidence at trial. I find that the surveillance videotape is not admissible because it is not relevant to the

credibility of the witness Mrs. Lis as to whether or not she suffers chronic pain as a result of the accident.

In other situations it may be that the actions depicted on the video are not relevant to the issue before the court. For example, in *Beiler v. Alpina Insurance Co.*, [1994] O.I.C.D. No. 16 (O.I.C), the arbitrator held that video surveillance of a plaintiff performing light household duties was not probative as to whether the plaintiff could perform heavy household duties. This decision was rendered in the context of an accident benefits claim.

2. Is the video accurate and fair?

Video evidence is only admissible at trial if it accurately and fairly presents the information it purports to convey: *R v. Schaffner* (1988), 86 N.S.R. (2d) 342 (C.A.); *Ball v. Vincent*, [1993] O.J. No. 3289 (Gen. Div.). With respect to accuracy, it is important to consider the quality of the images and whether the plaintiff is clearly identifiable on the video.

Courts have allowed modifications or enhancements to the video, as long as they do not distort the substantial accuracy of the video. On the other hand, selective filming or video editing done to avoid showing images unfavorable to the defence can result in unfair and inaccurate evidence, which courts may deem inadmissible: *Ball v. Vincent, supra*.

In *Mitchell v. Trainor* (1993), 123 N.S.R. (2d) 36 (S.C.), Justice MacDonald discusses the problems with fairness in relation to surveillance evidence:

In *Smith v. Avis Transport of Canada Limited and Harvie* (1979), 35 N.S.R. (2d) 652, at page 673:

My general reaction is that evidence of this kind must be received with definite reservations. It must be remembered that the tape was taken by persons who were paid to gather evidence tending to discredit the plaintiff and who have more than an immediate interest in obtaining that kind of result. It should also be remembered that evidence of this kind is subject to a high degree of manipulation. By this I do not suggest that the tape shown to me was in any way altered and I accept the evidence that it was not. The more obvious possibility is that a tape may be edited by the person who operates the camera...

35 I respect Justice Burchell's opinion and agree that such evidence must be accepted with caution. The reason being that this type of witness, since he is paid to produce his evidence, is therefore likely

to slant his evidence in favour of his sponsor. This, of course, must be balanced by the fact that many witnesses have an interest in the outcome of the case, very often a monetary interest. The fact is, credibility is a factor that is always before the court whether it be for veracity or for accuracy; and whether it be one of the parties or a paid witness.

D. Interpret the Surveillance for the Court

In cases where surveillance evidence will be used for substantive evidence, consider calling experts to interpret actions depicted on the video in light of the plaintiff's conditions, impairments, limitations, abilities and prognosis. For example, medical experts may be able to discuss such things as nature of pain (good days and bad days) and the effect of medication on activity tolerance and performance. An expert in activity or task analysis (occupational therapist) could provide opinion on how the actions or tasks depicted on the video translate or don't translate to the plaintiff's ability to perform complex occupations not shown on the tape, such as ability to work.

V. Using PIPEDA to challenge privilege

PIPEDA is the *Personal Information Protection and Electronic Documents Act*. It is a Federal Act, but applies in provinces that have not enacted substantially similar legislation, including New Brunswick. The purpose of the Act as stated in Section 3 is as follows:

PART 1 PROTECTION OF PERSONAL INFORMATION IN THE PRIVATE SECTOR

Purpose

3. The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for the purposes that a reasonable person would consider appropriate in the circumstances.

As private sector businesses, insurance companies are subject to Part 1 of PIPEDA. While it is beyond the scope of this paper to provide a detailed overview of PIPEDA, it is worth noting that at least one court has interpreted it in the context of surveillance evidence.

In *Ferency v. MCI Medical Clinics* 70 O.R. (3d) 277 (Ont. S.C.J) Justice Dawson held that a plaintiff could not use PIPEDA to exclude surveillance evidence from trial. The plaintiff sought to

exclude surveillance evidence at trial on the basis that it was taken in contravention of the plaintiff PIPEDA rights. In denying the plaintiff's position, the court held that PIPEDA did not contain provisions which prohibited admissibility into evidence of personal information collected or recorded in contravention of PIPEDA. The Evidence was relevant and the probative value of the evidence exceeded its prejudicial effect. Section 4(2)(b) of PIPEDA, which permitted persons to collect personal information for personal or domestic purposes, applied to the defendant's hiring of private investigation firm. By prosecuting a civil action, the plaintiff impliedly consented to have the defendant collect the most reliable information available in defence of the action.

On the other hand, some plaintiff's counsel have taken the position that PIPEDA creates a duty for the insurer to disclose any "personal information" it has regarding a plaintiff, including surveillance evidence. There is an interesting case on this issue that is currently before the courts in New Brunswick.

State Farm v. Privacy Commissioner of Canada, [2008] CarswellNB 78 (C.A.), involved a dispute between State Farm and the Privacy Commissioner. The hearing and appeal were limited to the issue of the proper forum for arguing the merits of the case (Court of Queens Bench vs. Federal Court). However, the case involved an investigation by the Privacy Commissioner regarding surveillance videos taken in the context of motor vehicle litigation. The Privacy Commissioner was responding to a PIPEDA complaint filed a plaintiff involved in litigation with State Farm. State Farm had taken surveillance video of the plaintiff, but refused the plaintiff's requests for copies of the video. The plaintiff sought production of the video pursuant to PIPEDA. In the context of its investigation, the Office of Privacy Commissioner demanded that State Farm provide it with copies of the surveillance videos. State Farm refused to do so, in part, relying on the recent Supreme Court of Canada decision in *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, [2008] SCC 44.

In *Blood Tribe, supra*, the Supreme Court of Canada held that PIPEDA does not empower the Privacy Commissioner to compel production of solicitor-client records from an unwilling respondent. *State Farm, supra*, is slightly different from *Blood Tribe, supra*, in that it involves litigation privilege (rather than solicitor-client privilege); however, based on the reasoning in *Blood Tribe, supra*, the result should be the same. In speaking with counsel for State Farm, I understand the Office of the Privacy Commissioner is reviewing its position in light of *Blood Tribe, supra*, and the case may still be headed to Federal Court for a decision on the merits.

VI. Conclusion

There is no reason for counsel to be caught off-guard by surveillance evidence. Diligent counsel can use the discovery process to obtain particulars about privileged surveillance. A properly prepared plaintiff will be able to recall and explain his or her actions and therefore he or she will be less likely to suffer unfair credibility problems at discovery or trial.