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Right of Privacy in the workplace not absolute

In British Columbia, the *Privacy Act ("Act")* enacted in 1968 was the first in the country. It created a statutory tort or civil right of action for an invasion of privacy when the common law did not. Section 1 of the Act reads:

> ***Violation of Privacy Actionable***
> **1** (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

However, the right of privacy is not absolute, as sections 1(2) and 1(3), together, create a scheme that protects only a certain degree of privacy. These provisions establish a two-step process to successfully advance a claim under the *Act.*

Under the first step, a person must establish that the claim of privacy is "reasonable in the circumstances" (s.1(2)). The Act does not define privacy. Instead, the Courts have adopted their own definition that it is, "(t)he right to be let alone, the right of a person to be free from unwarranted publicity"[1].

The Court has identified four types of privacy interests to be protected[2]:

1. Intrusion upon a person's seclusion or solitude, or into his private affairs;
2. Public disclosure of embarrassing private facts about the person;
3. Publicity which places the plaintiff in a false light in the public eye;
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Perhaps the most important "circumstance" in determining whether the claim to privacy is reasonable, is the nature of the person's location at the relevant time[3]. For instance, a person has a more reasonable expectation of privacy in their bedroom, than they do on the sidewalk. In the workplace, there may be a similar difference between an employee's break area and their work area. However, while the location is significant, it does not override any other circumstances. The courts have found a reasonable expectation of privacy despite being in a public location[4].

Under the second step of the test, the Court must consider the "nature, incidence and occasion of the act" and the "relationship between the parties" to determine whether the infringing act is a violation of that privacy.

A specific requirement is that a violation be done "wilfully" and without claim of right[5]. The word "wilfully" is narrowly interpreted to mean that the person must not only have intended to do the alleged act, but also that the person knew or should have known that their act would violate the victim's privacy[6]. The term "claim of right" means that there must be at least an honest belief in the existence of a state of facts which, if it actually existed, would at law justify or excuse the act done[7].

The *Act* further circumscribes the scope of "violation" in section 2(2), by deeming specific acts as not violations, which include[8]: acts done with consent; acts incidental to defending one's person or property; acts authorized by law, court process or court order; and publications that are of public interest or are fair comment on a matter of public interest.

Although the Act creates a potential liability to employers for breach of privacy, the statutory scheme has established several potential defences. Further, and quite notably, the Act does not necessarily preclude relying on evidence collected in breach of the Act. The Court has stated that video surveillance of an employee, whether it breached the Act or not, *may* be used in evidence of the employee's termination[9]. Similarly, the Privacy Commissioner, in *University of British Columbia* (Re), 2007 CanLII 42407 (BC IPC) in dealing with the counterpart privacy legislation, the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), restricted her order so as not to preclude evidence gathered by the employer, using a spyware to surveil an employee, from being used in the arbitration of the employee's dismissal[10].

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[1] *Davis v. McArthur, 17 D.L.R. (3d) 760 (CA),* paras. 7-8

[2] *Heckert v. 5470 Investments Ltd.*, 2008 BCSC 1298, para. 73. These four categories were also described as solitude, intimacy, anonymity and reserve by the author in A Preliminary Exploration of Workplace Privacy Issues In Canada, Vance Lockton and Richard S. Rosenberg, April 10, 2006, http://www.cs.ubc.ca/~lockton/workplace.pdf, at pg. 6.

[3] *Silber et al. v. British Columbia Television Broadcasting System Ltd. et al.*, 25 D.L.R. (4th) 345, para. 18

[4] *Heckert*, *supra.,* para. 81

[5] Section 1 of the Act.

[6] *Hollinsworth v. BCTV* 1998 CanLII 6527 (BC CA), (1998), 59 B.C.L.R. (3d) 121 (C.A.), at para. 29

[7] *Hollinsworth, supra.,* at para. 13, see also *Davis v. McArthur*, 10 D.L.R. (3d) (BCSC) (overturned on other grounds)

[8] Section 2(2) and (3) of the Act.

[9] *Richardson v. Davis Wire Industries Ltd.*, 1997 CanLII 4221 (BC SC) at para. 48

[10] *University of British Columbia* (Re), 2007 CanLII 42407 (BC IPC)