

Insurance company ordered to pay damages for illicit surveillance and flouting the court's rulings

McCarthy Tétrault LLP
Charles S. Morgan and Julie Elmlinger
Canada
April 30 2008

Employers or insurers looking to conduct video surveillance had better watch out — improperly conducting surveillance can attract stiff penalties in Québec. In February 2008, the Québec Court of Appeal ordered Penncorp Life Insurance Company to pay \$125,000 in punitive damages to the insured, André Veilleux, after Penncorp tried to obtain evidence even though it knew the surveillance would infringe the privacy right of the insured, protected under Section 5 of the Québec Charter of Rights and Freedoms.

Mr. Veilleux, a 54-year-old who had operated a garage from 1982 to 2000, liquidated his business due to illness. He began receiving monthly disability insurance payments from Penncorp in 1998. In April 1999, Penncorp stopped issuing the disability payments. Mr. Veilleux sued Penncorp in 2001 for payment of the benefits. During the trial, Penncorp sought to introduce videocassettes from surveillance operations conducted in May and August 2002.

The Québec Superior Court refused to admit the tapes on the basis that the insurer lacked reasonable grounds to conduct surveillance and ordered Penncorp to pay the monthly disability payments Mr. Veilleux should have received from April 1999 to February 2003. The Court of Appeal upheld this decision in March 2004.

In June 2003, Penncorp hired the same investigation company to conduct another surveillance operation of Mr. Veilleux and his son. Mr. Veilleux and his son sued Penncorp for invasion of privacy in August 2005. In September 2006, the Québec Superior Court ordered Penncorp to pay Mr. Veilleux \$12,500 for moral damages and \$25,000 in punitive damages for invading Mr. Veilleux's right to privacy, as well as flaunting the judiciary. Both Mr. Veilleux and Penncorp appealed the decision. In its February decision, the Québec Court of Appeal upheld the lower court judgment but increased the damages award to \$125,000.

McCarthy Tétrault Notes:

The Court of Appeal had previously ruled in the Bridgestone case that surveillance would not violate the Charter in all instances. In deciding whether to admit surveillance evidence, the court will consider whether:

- the surveillance was rationally justified and obtained through reasonable means;
- the company had a rational justification for conducting the surveillance before making the decision to conduct the surveillance — motives cannot be constructed after the fact;
- any shadowing was necessary and was conducted in the least intrusive manner possible;
- the company took steps to verify the information through less intrusive means before resorting to surveillance; and
- surveillance, carried out in public places, infringed the individual's dignity.

Intentional intrusion occurs when the author of the illicit conduct demonstrates the intention to invade the right of privacy of another or acts knowing that infringement is very likely to occur. In light of the

Veilleux decision, evidence obtained in such circumstances may not be admissible in court. Furthermore, Section 49 of the Charter provides that the victim is entitled to obtain compensation for the moral or material prejudice resulting therefrom and that the court may condemn the author to punitive damages. The plaintiff has to demonstrate that the behaviour of the author is outrageous or unreasonable, not justified, severe and repetitive.

In Mr. Veilleux's case, the surveillance carried out in May 2002 was an illicit infringement of his right to privacy. The surveillance carried out in August 2002 constituted an excessive intrusion because it was carried out after the court had refused Penncorp the right to examine Mr. Veilleux and to request a medical examination. Penncorp took the matter in its own hands and sought justice itself. Penncorp tried to avoid the effects of the court's ruling by conducting surveillance systematically and repetitively over three days, in non-public places. Its financial motivation appeared to be malicious.

The Veilleux decision demonstrates the increasing importance that courts are affording privacy rights in the context of litigation. Insurance companies and employers that might have interpreted the Bridgestone decision as allowing surveillance should carefully consider whether the surveillance is warranted and should exercise prudence when using it.

Source: <http://www.lexology.com/library/detail.aspx?g=6a0854c4-1abc-4de7-89b2-972cf06432f3>