

Employee Privacy: A Critical Examination of the *Doman* Decision

FEATURE ARTICLE

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1 Revised Statutes of Canada 1985, App. II, No. 44, Schedule B, Part I.

2 Revised Statutes of Canada 1985, c. P-21.

3 British Columbia, Manitoba and Saskatchewan each have a statute making an invasion of privacy actionable. See the Privacy Act in each province: Revised Statutes of British Columbia 1996, Chapter 373, Section 1 ; Re-enacted Statutes of Manitoba 1988, c. P125; Revised Statutes of Saskatchewan 1978, c. P-24.

4 Some studies have shown that as a result of higher stress levels, there is a higher incidence of health problems among monitored employees. See K. DeTienne and R.D. Flint, "The Boss's Eyes and Ears: A Case Study of Electronic Employee Monitoring and the Privacy for Consumers and Workers Act" (1996) 12 The Labor Lawyer 93.

Privacy is among the most valued rights in western society. In Canada, this right is protected by the Charter of Rights and Freedoms¹ ("Charter"), the federal Privacy Act,² and provincial privacy legislation.³ Like all other rights in our society, however, the right to privacy is subject to a delicate balance between competing individual and societal interests.

It is with this in mind that the issue of employee privacy rights should be considered. In the last twenty years, the right of employee privacy has been hotly debated in labour law as a result of mandatory drug testing, electronic surveillance, employee searches and other intrusions into employee privacy. Such developments have resulted in the inevitable clash of views on privacy in the employment relationship. Employers justify privacy intrusions on the basis of security, protection of property, and prevention of fraud. Unions, on the other hand, argue that privacy intrusions result in health risks⁴ and deprive employees of dignity and integrity. Unions also stress that employees may be involved in activities outside the workplace which are beyond the legitimate interests of the employer.⁵ Employees expect freedom from surveillance unless employers have legitimate reasons for conducting surveillance and there are no other practical ways to obtain the sought information.

In a labour relationship, unions have the opportunity to authorize and restrict intrusions on employee privacy through collective bargaining. For example, a collective agreement may contain a provision setting out the conditions under which an employer can demand that an employee submit to a drug test. Where the protection of a privacy right is not considered in the collective agreement, these rights are subject to the residual rights doctrine.⁶ In such cases, arbitrators are usually called upon to determine whether the employer's actions were reasonable by balancing the interests of employees and employers.

How are arbitrators in British Columbia balancing privacy interests in the employment relationship? With respect to "off-site" surveillance of employees, the jurisprudence has yet to produce a clear standard. Specifically, the arbitral cases

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addressing the admissibility of videotape evidence capturing off-site employee activities have not balanced employer rights against privacy concerns in a consistent manner. The “founding” and most influential case in this area is *Re Doman Forest Products Limited, New Westminster Division* (“*Doman*”).⁷ In *Doman*, Arbitrator Vickers excluded reliable *viva voce* and videotape evidence which strongly suggested that the grievor was abusing sick leave benefits, not on technical rules of admissibility, but rather because the grievor’s privacy was invaded. It is this decision which has created much of the existing confusion pertaining to the employee’s right to privacy away from the workplace.⁸

This article takes a critical look at the *Doman* decision and asks whether it is consistent with other privacy jurisprudence, or if it has unreasonably expanded the scope of employee privacy to the detriment of employers. Because of the lack of certainty in the jurisprudence in this area, a critical examination of the *Doman* decision may be useful in determining whether a shift away from the standards articulated in *Doman* are necessary or desirable.

The *Doman* Decision

In *Doman*, the grievor was a long-serving employee with an extensive record of absenteeism between 1984 and 1989.⁹ On Friday, October 20, 1989, the last day of the grievor’s vacation, he called the company to say that he would be sick on the subsequent Monday. The company superintendent who took the call asked the grievor how he knew what his condition would be in advance. The grievor replied that he would call back on Monday if he was sick. That same day, a decision was made by the company to monitor the employee if he did not report for work on Monday. The grievor called in sick Monday morning, indicating that he could hardly get out of bed. This prompted the company to dispatch two investigators to conduct a surveillance of the employee’s activities. The investigators observed and videotaped the grievor directing work on a construction site. He was also observed performing various construction tasks. Consequently, the grievor was discharged for fraud.

At arbitration, the employer was permitted to call evidence depicting the circumstances under which the video surveillance was conducted. This included the employee’s sick leave record, the fact that he had made a false Workers’ Compensation Board (“WCB”) claim four years earlier, and the suspicious nature of the telephone call that the grievor made to the company. The union objected to the admissibility of the videotape

5 Most writers for employee privacy agree that the right is not absolute and can be intruded upon under certain conditions.

6 This doctrine stands for the proposition that, where a collective agreement is silent on a matter, the employer retains the right to implement any action or policy.

7 (Preliminary Award) (1990), 13 Labour Arbitration Cases (4th) 275; (Award) summarized 21 Canadian Labour Arbitration Summaries 479.

8 See J. Ford, “The Right To Privacy in Employment: a Management Perspective” (1991) 1 Labour Arbitration Yearbook 95; A. Barss, “Search and Surveillance in the Workplace: The Employee’s Perspective” (1992) 2 Labour Arbitration Yearbook 181; B. Bilson, “Search and Surveillance in the Workplace: An Arbitrator’s Perspective” (1992) 2 Labour Arbitration Yearbook 143; L. Shouldice, “Employee Surveillance” (May 1994) 1 Employment and Labour Law Reporter 17.

9 It is noted that Arbitrator Vickers concluded that there was nothing unusual about the employee’s pattern of non-attendance. However, some critics disagree, calling his absenteeism record “horrendous.”

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evidence and the observations of the investigators on the grounds that the grievor's right to privacy had been violated. The union relied upon section 8 of the Charter which guarantees "the right to be secure against unreasonable search or seizure." While the union conceded that the Charter did not apply to private party disputes, it relied upon the principles put forward by Supreme Court Justice McIntyre in *R.W.D.S.U., Loc. 580 v. Dolphin Delivery Ltd.* ("Dolphin").¹⁰ Specifically, it urged the arbitrator to apply the common law in light of the values enshrined in the Charter. Vickers agreed that as an adjudicator, he was called upon to acknowledge fundamental Charter values when adjudicating a private dispute. He went on to consider *R. v. Duarte*¹¹ and noted that the Supreme Court of Canada strongly affirmed the concept of individual privacy. As a result, Vickers drew a parallel between the vulnerability of individuals to intrusion by the state and the powerlessness of an employee in relation to an employer.

Although the collective agreement did not expressly contain a right to privacy,¹² Vickers stated that it was impossible to read the agreement outside the value system imposed by the Charter and the British Columbia Privacy Act. In his assessment, a balance had to be struck between the right of the employer to investigate a potential abuse of sick leave and the right of the grievor to be left alone. According to Vickers, there were three questions that had to be considered to achieve this balance and these are referred to in this article as the *Doman* test:

- Was it reasonable in all the circumstances to request a surveillance?
- Was the surveillance conducted in a reasonable manner?
- Were there other alternatives open to the company to obtain the evidence it sought?

Vickers held that the surveillance was an unreasonable invasion of the grievor's privacy and therefore, both the videotape evidence and the investigators' *viva voce* evidence were inadmissible. As a result, the dismissal was unwarranted and the grievor was reinstated with back pay.¹³ Vickers gave several reasons for the failure of the first branch of the *Doman* test. First, at the time the surveillance was ordered, the company had insufficient evidence to warrant the initiation of surveillance. Vickers stated that it was the responsibility of the company official who received the grievor's Friday phone call to have asked him further questions if the call was perceived as suspicious. According to Vickers, before surveillance is resorted to, the employer, at minimum, is required to put some threshold questions to the employee regarding the nature of the illness, her ability to perform work, and whether she anticipates doing anything other than resting at home. As well, Vickers noted that because the grievor was a long-serving employee with no disciplinary record, the company had an obligation to confront him with its concerns before taking further action. Additionally, Vickers noted that the employer had taken into account a previous incident in which the grievor had fraudulently claimed WCB benefits (which were denied based on surveillance evidence). This had occurred four years prior to the incident in question and did not, in the arbitrator's view, provide grounds to conduct further surveillance.

10 [1986] 2 Supreme Court Reports 573, 33 Dominion Law Reports (4th) 174.

11 [1990] 1 Supreme Court Reports 30, 65 Dominion Law Reports (4th) 240. This is considered one of the leading cases on section 8 of the Charter. It dealt with the question of surreptitious electronic surveillance on an individual by a state agency.

12 In most privacy intrusion cases, the collective agreement provides little or no assistance. Where the collective agreement contains provisions dealing with privacy, they must of course, be heeded. See C.L. Rigg, "The Right to Privacy in Employment: An Arbitrator's Viewpoint" (1991) 1 Labour Arbitration Yearbook 85.

13 It is noted that only fifty per cent back pay was ordered. As the period between the suspension and the final award was close to one year, the result was therefore equivalent to a six month suspension.

Doctrinal Consistency

Is the decision in *Doman* regarding employee privacy rights, and the conditions under which an employer may invade that privacy, consistent with existing doctrines? Are the standards which Vickers creates for employers reasonable? In answering these questions, the main sources used by Vickers in arriving at his decision in *Doman* will be considered: arbitral jurisprudence, decisions under the British Columbia Privacy Act, and Charter cases dealing with privacy.

Arbitral Jurisprudence

The three-step test set out in *Doman* to determine whether there has been an invasion of the employee's privacy is similar to tests put forward in other arbitral privacy decisions.¹⁴ Therefore, in comparing the result in *Doman* to other arbitral cases, it is useful to examine how other arbitrators have answered the following questions:

(i) when is it reasonable for the employer to invade the employee's privacy; (ii) is the invasion of privacy conducted reasonably; and (iii) under what circumstances are there no other means by which the employer can obtain the sought information. It is important to note that the privacy interests which arbitrators have to consider are different depending upon the degree of intrusion resulting from the employer's actions. The type of off-site surveillance conducted in *Doman* is considered a serious potential invasion of privacy as it involved the employer delving into the employee's personal life away from the workplace. On the other hand, the posting of a security guard at the workplace entrance to monitor employees as they enter and leave would be considered a potentially minor privacy intrusion. As the applicable standards vary from one privacy context to another, the situations considered here are those which are regarded as being potentially serious privacy intrusions.

1) Employee Search Cases

Employee search cases involve situations in which the employer subjects employees or their personal belongings to physical searches on the work site. In such cases, employers are interested in protecting company property and deterring employee theft. Employees, on the other hand, are concerned with being subjected to random searches which do not respect their integrity.

The leading arbitral case concerning employee searches in British Columbia is *Re Lornex Mining Corp. and U.S.W. ("Lornex")*.¹⁵ *Lornex* dealt with union grievances arising out of the employer's policy that all lunch boxes were subject to being searched when employees left company property. The arbitrator considered the relevant case law and stated that the invasion of privacy in this context was reasonable. This was due to a recognition that an employer has a legitimate right to protect company property and may institute search policies to enforce this right.¹⁶ Thus, it would appear the first part of the *Doman* test (whether it was reasonable in the circumstances to invade the employee's privacy) was passed.

However, the arbitrator found that the invasion of privacy was not conducted

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14 J. Ford, "The Right To Privacy in Employment: a Management Perspective" (1991) 1 Labour Arbitration Yearbook 95.

15 (1983) 14 Labour Arbitration Cases (3d) 169.

16 This same reasoning was used in *Royal Oak Mines Inc. and Canadian Association of Smelter & Allied Workers Local #4* [1992], British Columbia Decisions Labour Arbitration 475-01.

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reasonably and therefore the search policy was ultimately deemed to be an unreasonable privacy intrusion. Specifically, the arbitrator found the search policy to be unreasonable because the searches were conducted randomly by security guards who had no objective criteria to determine who would be searched. Further, the arbitrator held that employees who were not under suspicion had a right not to be singled out in an arbitrary manner. Therefore, had there been objective reasons for searching a particular employee, it appears that the employee searches would have been reasonable.

What are the differences between the invasion of privacy conducted in *Doman* and in *Lornex*? In *Doman*, the employer intruded into the employee's private life away from work, while in *Lornex*, the employer was more concerned with the employees' on-site activities.¹⁷ This difference has significance. It is clear that an employer, in most cases, can more easily justify an interest in the activities of his employees at the workplace as opposed to off-site. Beyond this, however, the cases are not that different. In both cases, the employer took action to prevent deception and loss of company property. It can be argued that *Doman* is similar to *Lornex* in the sense that the action taken by the employer was the only reasonable means by which employee fraud could be detected.

The main principle flowing from *Lornex* seems to be that employers should not be free to intrude upon the privacy of employees at a whim. Employers should have reasonable suspicion that an employee is engaged in a fraudulent activity before his privacy can justifiably be invaded. However, despite the fact that the surveillance in *Doman* was conducted based on objective evidence, it was still held to be unreasonable. Therefore, *Doman* seems to establish that an invasion of an employee's privacy will only be justified where the employer has conclusive proof of the employee's fraud and no other alternatives exist for obtaining the sought information. This standard of reasonableness is higher than that established for employers in British Columbia employee search cases.

2) Employee Drug Testing Cases

In drug testing cases, employers demand that employees submit to drug tests in order to ensure the safety of the employee and her co-workers. Additionally, employers use such tests to determine whether an employee is fit to perform a particular task.¹⁸ However, such testing can reveal more about an employee than an employer is entitled to know. For example, a drug test may reveal that an employee is pregnant or is taking prescription drugs for a medical condition unrelated to the employee's work.

Among the recent arbitral decisions dealing with drug testing and privacy rights is *Esso Petroleum Canada Ioco Refinery, A Division of Imperial Oil Ltd. and C.E.P.U., Local 614 ("Esso")*.¹⁹ In *Esso*, the British Columbia Arbitration Board considered whether a company policy requiring random urine and breath tests for drugs and alcohol, mandatory periodic blood tests, and mandatory employee self disclosure regarding substance abuse constituted an unacceptable invasion of the employees' privacy. In a thorough review of the jurisprudence, the Board distilled a two-step test: (i) is there justification or adequate cause for the tests; and (ii) are there other reasonable ways in which the problem in the work place could be addressed.

17 However, it is noted that on-site searches can reveal information about the employee's off-site activities.

18 D. Ibister, "Justifying Employee Drug Testing: Privacy Rights Versus Business Interests" 5 *Dalhousie Journal of Legal Studies* 255-270.

19 [1995] British Columbia Decisions, Labour Reports 100-01.

In applying these tests, the Board determined that the majority of the employer's policy was unacceptable as it affected the dignity and privacy of individual employees.²⁰ However, the Board upheld certain aspects of the drug and alcohol policy which allowed tests to be conducted when the employer had reasonable cause and after significant work accidents.

What is reasonable cause in this context? While the Board in *Esso* did not elaborate on this issue, one answer can be found in a non-British Columbia arbitral case: *Fiberglas Canada Inc. and A.C.T.W.U.* ("*Fiberglas*").²¹ In *Fiberglas*, the arbitrator found that the employer had reasonable cause to demand mandatory random drug tests of employees who had completed a drug dependency program. The arbitrator also noted that the drug tests were important tools used to control the abuse of drugs.

The standard of reasonableness required of employers in *Doman*, however, is much higher than that required of employers in drug testing cases. In *Doman*, the employee had an extensive absentee record and was known to have made a fraudulent WCB claim. The employee was also absent under highly suspicious circumstances and was known to be working on another construction site while in the service of the employer. Nonetheless, this compelling evidence did not meet the *Doman* standard established by Vickers. The *Doman* standard of reasonableness, therefore, appears to be inconsistent with the standard articulated in drug testing cases.

Privacy Act Jurisprudence

In *Doman*, Vickers stated that although there was no provision in the collective agreement ensuring the right to privacy, it was impossible to read the agreement outside the principles contained in *inter alia* the British Columbia Privacy Act. In order to effectively critique the *Doman* decision, therefore, it is necessary to examine the statement of law contained in the Act. It is argued here that, when compared with the principles put forward in the Act and the related case law, the standards created by *Doman* are unreasonably stringent in their application to employers.

Sections 1 through 3 of the Act establish the factors to be examined when determining whether there has been an invasion of privacy: (i) whether the violation of privacy was willful and without claim of right; (ii) whether there was a reasonable degree of privacy to which the litigant was entitled, due regard being given to the lawful interests of others; and (iii) the relationship between the parties.

The first factor under the Act is that a person willfully and without claim of right violates the privacy of another. The fact that the video surveillance in *Doman* was willful is indisputable. Unfortunately, the case law does not tell us what constitutes a "claim of right." Although various arguments can be generated here, let us assume that this criterion is satisfied.

The second factor to be considered under the Act is whether the litigant is entitled to a reasonable degree of privacy, due regard being given to the lawful interests of others. What constitutes a "reasonable degree of privacy" is not articulated in the Act and must be inferred from the case law. *Insurance Company of British Columbia v. Somosh*

20 By definition, mandatory drug testing affects privacy. The real issue is whether it is warranted. For this discussion see E. O'scapella "Drug Testing and Privacy: 'Are You Now, Or Have You Ever Been, a Member of the Communist Party?'; McCarthyism, Early 1950s: 'Are You Now, Or Have You Ever Been, a User of Illicit Drugs?'; McCarthyism, 1990s" (May 1994) 2 Canadian Labour Law Journal 325.

21 (1989) 5 Labour Arbitration Cases (4th) 302.

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(*Somosh*)²² dealt with a claim by an insurance company to recover money that it had paid to the defendant. The insurer hired a private investigator to telephone the defendant's place of employment and inquire about his earnings and personal habits. The defendant counter-claimed for invasion of privacy. The Court found that these inquiries violated the defendant's privacy as they went beyond the plaintiff's legitimate interests and the nature of the dispute in which the two parties were involved.

In *Davis v. McArthur* (*"Davis"*),²³ a married woman hired the defendant, a private investigator, to monitor her husband whom she suspected of having an affair. The court found that the defendant's surveillance of the plaintiff did not constitute a violation of privacy. First, the defendant was acting as an agent for the wife who had a legitimate interest in her husband's activities. Further, the defendant's behaviour did not attract public attention and was not offensive.

Considering the principles flowing from these cases, it is difficult to conclude that the second factor under the Privacy Act was satisfied in *Doman*. First, an employee who is defrauding his employer or engaging in highly suspicious activities should not be entitled to a reasonable degree of privacy while engaging in those activities. Second, the nature of the surveillance conducted in *Doman* did not exceed the legitimate interests of the employer. Given the nature of the relationship between the parties and the possibility of fraud on the part of the employee, the employer possessed a legitimate interest in knowing what the grievor was doing on the day in question. Further, the employer in *Doman* sought only to know whether the grievor was being deceitful. In conducting the surveillance, the employer did not attempt to ascertain anything beyond what the grievor was doing while claiming to be sick.

The final factor under the Act is whether the privacy of the individual was violated as a result of the "nature, incidence, or occasion of the act or conduct," due regard being given to the relationship between the parties. With regard to the "nature of the conduct" the court in *Davis* found that the behaviour of the defendant did not attract public attention and was not carried out in an offensive manner. The same can be said for the surveillance conducted in *Doman* in which the grievor did not become aware of the surveillance until arbitration. The Act also considers the relationship between the parties. Although the courts have not interpreted the significance of specific relationships between plaintiff and defendant, it can be inferred from the case law that a closer relationship will make the claim of invasion of privacy more difficult to succeed.

Specifically, the husband-wife relationship in *Davis* was sufficient to give the wife a legitimate interest in the affairs of her husband; this is contrasted with *Somosh* where the insurance company was deemed to not have a legitimate interest in the personal habits of the defendant.

What is the significance of the employment relationship? Clearly, a substantive answer to this question is beyond the scope of this paper. However, a few general points can be made. Unlike his counterpart fifty years ago, today's employee does not sell himself to his employer; only his labour is sold. However, it is inappropriate to characterize

22 (1983) 51 British Columbia Law Reports at 344 (British Columbia Supreme Court).

23 (1971), 17 Dominion Law Reports (3d) 760, [1971] 2 Western Weekly Reports 142 (British Columbia Court of Appeal). In *Davis*, the defendant used various means of tracking the plaintiff including attaching an electronic device to his car to ascertain his whereabouts.

this relationship as purely contractual. On the contrary, common law dictates that the employment relationship involves the exercise of reasonable skill, loyalty and good faith on the part of the employee and the provision of compensation and a reasonably safe working environment by the employer. Furthermore, in many contemporary employment relationships, employers arrange for the payment of sickness benefits or other forms of insurance or indemnities when an employee is ill or injured. An employer clearly has a legitimate interest in maintaining the integrity of the system of employee protection from those who would advance fraudulent claims.²⁴ For these reasons, the position taken here is that the employment relationship may be among the more “special” relationships in which a breach of privacy is not as easily found.

The Charter and the Right to Privacy

In *Dolphin*, the Supreme Court of Canada stated that the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. As a result, in *Doman*, Vickers attempts to bring the values of the Charter directly into the assessment process in which the privacy interest of the employee is weighed against the surveillance procedure set up by the employer. The values Vickers refers to are those captured in section 8 of the Charter which states that “everyone has the right to be secure against unreasonable search or seizure.”²⁵ In *Hunter v. Southam Inc.*,²⁶ Supreme Court Justice Dickson states that Section 8 is intended to provide a broader protection of the individual’s right to privacy than could be found in traditional common law doctrines.²⁷ Dickson, however, makes it clear in *Hunter v. Southam* that the guarantee of security afforded by section 8 only protects a “reasonable” expectation of privacy.²⁸ In *Doman*, Vickers makes reference to Dickson’s judgment and states:

Electronic surveillance by the state is a breach of an individual’s right to privacy and will only be countenanced by application of the standard of reasonableness enunciated in *Hunter v. Southam*. I must now relate those values to the realm of a private dispute between an employer and an employee whose relationship is governed by the terms of the collective agreement.²⁹

What is the standard of reasonableness to which Vickers refers? The general thrust of the Supreme Court on privacy matters is effectively captured in the following extract from *Hunter v. Southam*:

To associate [the point at which the interests of the state prevail] with an applicant’s reasonable belief that relevant evidence may be uncovered by the search, would be to define the proper standard as the possibility of finding evidence. This is a very low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude. It would tip the balance strongly in favour of the state and limit the right of the individual to resist to only the most egregious intrusions. I do not believe this is a proper standard for securing the right to be free from unreasonable search and seizure.³⁰

Dickson suggests that the line should be drawn as follows: “[t]he state’s interest in detecting and preventing crime begins to prevail over the individual’s interest in being left alone at the point where credibly based probability replaces suspicion.”³¹

Supreme Court Justice Dickson states that Section 8 is intended to provide a broader protection of the individual’s right to privacy than could be found in traditional common law doctrines.

24 *Re Canadian Pacific Ltd. and Brotherhood of Maintenance of Way Employees*, (1996) 59 Labour Arbitration Cases (4th) 111, Canada (Picher).

25 Section 8 of the Charter also includes protection from video surveillance. See *R. v. Wong*, [1990] 3 Supreme Court Reports 36, 60 Canadian Criminal Cases (3d), 460.

26 [1984] 2 Supreme Court Reports 145, 11 Dominion Law Reports (4th) 641 (hereinafter cited to Dominion Law Reports).

27 See above at page 650.

28 See above at page 652.

29 See note 7 at 279.

30 See note 26 at 167.

31 See note 26 at 167.

Several observations can be made. First, the judges who have interpreted section 8 of the Charter recognize that it is necessary to balance the interests of the individual and the state. This balance is achieved by focusing on whether the interest claimed by the state is important enough to justify sweeping away the protection under the Charter. To be of sufficient importance, the agents of the state must show reasonable grounds in order to justifiably infringe upon a private person's constitutional rights. Second, these cases must be considered against the backdrop of *state* intrusion into the private lives of individuals. It is highly debatable whether the concern regarding an invasion of privacy by *individuals* would be viewed as an equally significant threat. The view taken in this article is that in *Hunter v. Southam*, the Supreme Court was articulating the standard of reasonableness which had to be met by the state rather than by private parties. The realities and potential power imbalances involved in the employment relationship are quite different than in the state-citizen relationship. Therefore, to apply a strict Charter standard to the employment relationship is improper.

Third, in the Charter cases, like in the arbitral and British Columbia Privacy Act jurisprudence, we are confronted with the ambiguities surrounding the term "reasonable." Although *Hunter v. Southam* gives some guidelines as to how judges should apply this standard, specific criteria are not provided and the decision maker is left with a significant amount of discretion. The view taken here is that when one considers the importance of the right to privacy, the requirement of "credibly based probability" and the employment context in general, it follows that the situation confronted by the employer in *Doman* provided reasonable grounds upon which to infringe an employee's privacy.

Subsequent Arbitral Surveillance Jurisprudence

Have the standards articulated in *Doman* shifted with respect to subsequent off-site surveillance jurisprudence? As there have not been many decisions in this area and those that do exist have shown considerable variations, a definitive conclusion cannot yet be reached. Furthermore, because the decisions in this area are particularly fact driven, it is difficult to compare the standards applied in each case. However, it appears that the most recent decisions, while endorsing the analysis used in *Doman*, do tend to achieve a reasonable balance between employer interests in preventing fraud and employee privacy concerns.

The first case to deviate from the standard imposed in *Doman* was *Re Steels Industrial Products and Teamsters Union* ("*Steels*"),³² the facts of which were very similar to *Doman*. In *Steels*, Arbitrator Blasnia concluded that (i) because of the employee's history of untruthfulness it was reasonable for the employer to have conducted the surveillance and (ii) the surveillance did not harass or cause nuisance to the grievor and was therefore conducted in a reasonable manner.

The more stringent *Doman* standards resurfaced in the next case to consider the issue of the admissibility of video surveillance evidence: *Re Alberta Wheat Pool and Grain*

32 (1991), 24 Labour Arbitration Cases (4th) 259.

Workers' Union, Local 333 ("Alberta Wheat Pool").³³ In this case, Arbitrator Williams held that the videotape evidence provided by a private investigator was inadmissible because the employer failed on the first step of the *Doman* test. In *Alberta Wheat Pool*, the grievor had a long history of absenteeism due to illness and injury over a thirty-three year period. Due to suspicious circumstances and rumours that the grievor was building a house while on long-term disability, the employer retained a private investigator to videotape the grievor's activities. The videotape confirmed that the employee was engaged in building a home. According to Williams, although the employer's suspicions were justified, the surveillance itself was not because the decision to conduct the surveillance was made the same day that the employer heard the rumour.

The most recent cases, however, have produced a different result than *Alberta Wheat Pool*. In *Greater Vancouver Regional District and G.V.R.D.E.U.* ("G.V.R.D.")³⁴ Arbitrator McPhillips applied the *Doman* test to an off-site surveillance situation and concluded that the surveillance evidence was admissible. The employer's suspicions that the employee was abusing sick leave benefits were based upon a supervisor's direct observations of the employee's suspicious behaviour and medical opinions indicating a lack of basis for the illness.

In *Pacific Press Ltd. and Vancouver Printing Pressmen Assistants and Offset Worker's Union, Loc. 25* ("Pacific Press"),³⁵ Arbitrator Devine found that the employer's decision to conduct off-site surveillance of an employee was reasonable. This was due to the employee's long record of absenteeism and evidence which indicated that the employee was running a hang-gliding business while claiming sick leave benefits. The surveillance evidence, however, was ultimately rejected because Devine determined that the surveillance was not conducted in a reasonable manner. The facts indicated that the private investigators contacted the employee and asked for a hang-gliding lesson. Therefore, the proactive nature of the investigators' surveillance invalidated the surveillance evidence.

Do these latter two cases indicate a shift from the strict standards imposed in *Doman* and later in *Alberta Wheat Pool*? Again, as these decisions are particularly fact driven, a certain conclusion is difficult to reach. However, it appears that, while approving of the analysis used in *Doman*, the most recent cases seem to hold employers to a more reasonable standard in determining whether the breach of an employee's privacy is justifiable.³⁶

Conclusions

It is clear that employers may only invade the privacy of their employees when it is reasonable to do so: when the invasion is conducted reasonably and when there are no less intrusive means for the employer to obtain the information that it seeks.

Reasonableness is a common theme that runs through the privacy jurisprudence including Charter, arbitral and Privacy Act cases.

The case law interpreting the Charter provides the standard of reasonableness for the state. In *Hunter v. Southam*, the Supreme Court held that the state's interest starts to prevail over the individual's interest when credibly based probability replaces suspicion.

Reasonableness is a common theme that runs through the privacy jurisprudence including Charter, arbitral and Privacy Act cases.

33 (1995), 48 Labour Arbitration Cases (4th) 332.

34 (1996), 59 Labour Arbitration Cases (4th) 45.

35 (1997), 64 Labour Arbitration Cases (4th) 1.

36 *Re Canadian Pacific Ltd. and Brotherhood of Maintenance of Way Employees*, (1996) 59 Labour Arbitration Cases (4th) 111, Canada (*Picher*) is a recent non-B.C. off-site surveillance which makes extensive reference to *Doman*. Despite factual similarities to the *Doman* case, arbitrator *Picher* also seems to apply the more reasonable standard found in the recent B.C. jurisprudence.

The view taken here is that the actions of the employer in *Doman* were reasonable when considered within a contextual framework (i.e. the employment relationship is different from a state intrusion into the lives of citizens).³⁷

What does the Privacy Act add to the definition of reasonableness? First, the Act and the case law seem to focus heavily on preventing individuals from invading the privacy of another when they have no legitimate reason to do so. The second main principle is that the manner in which the individual's privacy is intruded upon must also be reasonable. These seem like fair principles which protect an individual from random privacy intrusions, yet at the same time, recognize that others may sometimes have legitimate reasons to invade a person's privacy.

Finally, arbitral jurisprudence has also established principles of reasonableness. In both the employee search cases and the drug testing cases, the arbitrators are concerned with overly broad employer policies which allow for arbitrary and unjustified invasions of the employee's privacy. In both contexts, however, arbitrators recognize the right of an employer to conduct searches or request tests of an individual employee when she has legitimate reasons to suspect that employee. In the context of drug testing, for example, an employer is deemed to have reasonable grounds to request an employee to submit to random drug tests when the employee is known to have suffered from a drug problem.³⁸

The ultimate finding in *Doman*, however, seems inconsistent with these principles. The standard of reasonableness imposed upon the employer is more onerous than the standard articulated in the cited authorities. It requires employers to have an unreasonably high level of proof and a lack of other possible alternatives before conducting off-site surveillance. The result is that the employee's right to privacy has been unnecessarily and unfairly enhanced by the *Doman* decision.

In order to determine where the balance should lie between employer and employee interests, a number of factors are relevant. First, the collective agreement should be considered. If the parties turn their minds to the conditions under which privacy can be invaded, then clearly this is the governing standard within their particular employment relationship. As has been noted, however, privacy concerns are not often addressed within a collective agreement, leaving the arbitrator to balance the opposing interests of the employer and the employee. A fair way to accomplish this task is to apply the *Doman* analysis but with the more reasonable standards found in *G.V.R.D.* and *Pacific Press*:

1. Was it reasonable, in all of the circumstances, to request a surveillance?

It is clear that a standard of reasonableness is necessary to determine when the right of privacy can be intruded upon. The various standards considered seem to suggest a common sense approach: does the employer have credible evidence upon which to justify a decision to intrude upon the employee's privacy? Mere suspicion will not suffice. On the other hand, the employer should not be required to produce "the smoking gun." The view taken here is that the employee's relevant prior incidents of

³⁷ It is acknowledged that without specific and objective criteria, this argument is based primarily on opinion. Still, I reach my ultimate conclusion considering the general guidelines set out by the Charter jurisprudence.

³⁸ See note #21.

misconduct coupled with his highly suspicious behavior gave the employer reasonable grounds upon which to conduct an investigation.

2. Are there any reasonable alternatives open to the employer?

It seems fair that it is only justifiable for an employer to invade an employee's privacy when there are no other *reasonable* alternatives. Such a requirement recognizes the importance that society places on the right of privacy. In *Doman*, it does not appear that there were other reasonable alternatives open to the employer. Even had the employer confronted the grievor before initiating the surveillance, it seems likely that the employee would have been untruthful, considering his past misconduct. Additionally, when *Doman* was told by his supervisor that it was ridiculous to predict his illness in advance, he gave no response other than to say that he would call back if he was sick. Therefore, it is arguable that the employer in *Doman* had good reason to believe that a direct confrontation would be fruitless and might jeopardize an attempt to discern the truth. On the other hand, if an employer is confronted with a situation in which she has no evidence other than rumors that an employee is abusing sick leave benefits, she would not have reasonable grounds to conduct a surveillance. Instead, the employer would be obliged to confront the suspected employee with the rumours or perhaps consult the doctor who provided the medical slip.

3. Was the surveillance conducted in a reasonable manner?

It is also important that the dignity of employees be protected. An investigation by the employer should not invade the employee's privacy beyond the level required nor harass or cause a nuisance to the employee. For example, it would be unreasonable for an investigator to commit a crime in order to videotape an employee. This seems to be a fair way to protect the employee's right to privacy while also recognizing the employer's legitimate interest in preventing and deterring fraudulent activities.

In summary, while the language of this test is almost identical to the one set out by Vickers in *Doman*, the standards applied are substantially different. This test requires employers to meet a more reasonable standard before proceeding to undertake employee surveillance. It reflects the concept that while society values privacy, it does not demand that privacy be an absolute right. An individual's privacy can be justifiably invaded when it is reasonable to do so. This article suggests that the *Doman* case extends the scope of privacy rights beyond the standard articulated in arbitral, Privacy Act and Charter jurisprudence. While the test used in *Doman* appears appropriate, it seems that the manner in which it is applied by Vickers has the effect of subjecting employers to unreasonably onerous standards. The most recent arbitral cases seem to indicate a shift from the rigid *Doman* standard of reasonableness. The position taken here is that such a shift is both necessary and desirable. However, considering that *Doman* continues to be a leading case in the employee privacy area, it remains to be seen if this movement in the jurisprudence away from *Doman* will continue.