

IN THE MATTER OF AN ARBITRATION

BETWEEN:

GREATER VANCOUVER REGIONAL DISTRICT
(the "Employer")

AND:

**GREATER VANCOUVER REGIONAL DISTRICT EMPLOYEES
UNION**
(the "Union")

**WAYNE MCEACHERN GRIEVANCE
PRELIMINARY ISSUES**

ARBITRATION BOARD:	WAYNE MOORE, CHAIR MICHAEL WAGNER, EMPLOYER NOMINEE & PETER BURTON, UNION NOMINEE
COUNSEL for the EMPLOYER:	GREG HEYWOOD
COUNSEL for the UNION:	CRAIG BAVIS
DATE of HEARING:	SEPTEMBER 13, 2005
PLACE of HEARING:	VANCOUVER, B.C.

DATE of INITIAL RULINGS: OCTOBER 4, 2005
DATES of SUBMISSIONS: NOVEMBER 14, 16 & 22,2005
DATE of FINAL AWARD: SEPTEMBER 7, 2006

Introduction

This is a discharge case where the causes relied upon by the Employer relate to allegations of fraud and otherwise inappropriate conduct in the making of a Workers Compensation claim and the use of an Employer credit card. The Employer applies for an order pursuant to s. 95 (1.1)(c) of the *Workers Compensation Act* RSBC 1996 c.492, as amended, (“WCA”) permitting it to use the Workers Compensation Board’s (“WCB”) disclosure file for the preparation and presentation of its case in this proceeding. Specifically, it seeks permission to submit video of Wayne McEachern (the “Grievor”) taken surreptitiously by the WCB and forming part its of file. The only other potentially anticipated use of the file is its provision to a medical expert for the purpose of obtaining expert evidence if the WCB doctor who has already reviewed the video and provided his opinion to the WCB is not available to testify.

The parties agreed to address these issues at a preliminary hearing on September 13, 2005. Extensive submissions supported by even more extensive case briefs were presented. At the conclusion of the hearing the Board advised counsel that in light of the travel schedules of its members and the rapidly approaching scheduled dates for the hearing of the grievance on the merits it may be necessary to issue a ‘bottom line’ decision with reasons to follow. No objection was taken with respect to this manner of proceeding.

On October 4, 2005 the Board issued the following rulings in a letter to counsel:

The board has now had an opportunity to meet to consider the preliminary application heard on September 13, 2005. As was anticipated in our meeting with counsel we are not able to provide full written reasons for our conclusion and still allow counsel sufficient time to prepare for the hearing on the merits scheduled for November 14th through 18th, 2005.

Accordingly, we have decided to issue a “bottom line” decision and will provide written reasons as soon as we are able.

The board has decided to allow the Employer’s application on the following terms.

1. The WCB disclosure file may be used by the Employer for the preparation and presentation of its case before this arbitration board. The Employer must limit its dissemination to those who need access for the purpose of the preparation and presentation of the Employer’s case.
2. The Employer may provide the disclosure file to an expert or experts of its choosing to assist in the preparation of its case including for the preparation of a report and for the giving of testimony. Any such expert or experts must be advised of the limits imposed on the disclosure of the information in the file created by this determination.
3. Given the concerns raised by the Union as to the accuracy of the transference of the video taped material it shall be permitted to witness new copies being produced from the originals. Such copies shall be provided to the Union and members of the board.

Subsequently, by letter dated November 3, 2005, we were advised that the grievance had been settled. An issue then arose with respect to whether we should publish reasons for our earlier rulings. Submissions were invited from counsel on that issue.

Publication of Reasons

Union’s Submission

The Union in taking the position that we should not render reasons for our preliminary rulings advances a number of arguments. First, it argues that it is an “unnecessary exercise” as the reasons would not help the parties in resolving their differences as they already have done so. Further, the issue is now moot as the Union had not sought a review of our rulings. Second, it submits that it would be an “unreasonable exercise” because given the evidence, arguments and authorities placed before us it would “inevitably entail a long and complex writing process” involving additional expense. Third, it says that the issuance of a fully reasoned award would be an “inconsistent exercise” as it would involve incurring further costs where the parties have decided to settle their differences. That it submits would not be in accord with the statutory requirement to “promote[s] conditions

favourable to the orderly, constructive and expeditious settlement of disputes: (see *Labour Relations Code*, RSBC 1996 c. 244, as amended, s. 2(e) (the “*Code*”). Finally, the Union submits that it would be an “unauthorized exercise” as the dispute with respect to which we have been constituted has been resolved. Our jurisdiction under s. 92(2) of the *Code* ends upon final resolution of that dispute and we are therefore *functus officio*.

Employer’s Submission

In support of its position that we ought to render our reasons the Employer advances two arguments. First, it submits that there is a general duty or obligation in law to provide reasons for decisions. In this regard it relies on *HLRA Health & Benefit Plan -and- HEU, Local 180*, IRC No. 72/89 & *BC Rail -and- UTU, Local 1778 & 1923*, BCLRB No. 185/93. Second, the Employer argues that we are bound by the parties’ agreement at the hearing on September 13th that written reasons would follow a “bottom line” decision.

In support of these positions particular reliance is placed upon *British Columbia -and- BCGEU*, (2002) 109 LAC (4th) 193 (Hall – B.C.). In that case Arbitrator Hall heard a preliminary objection prior to the hearing of the merits. He described the process as follows:

Counsel agreed that I would provide a “bottom line” decision with reasons to follow. In accordance with their agreement, I advised counsel in a short letter that the Employer’s preliminary objection was dismissed, and stated reasons would be provided in due course.

(at para. 1)

After the “bottom line” was rendered the grievance was settled and the same dispute as is before us arose. In deciding to publish reasons Arbitrator Hall indicated that he felt obligated to do on the basis of the original agreement between the parties. In his view, it was open to the parties to renegotiate their agreement but that otherwise he was obliged to honour it. Within this context the parties could have addressed any concerns they may have as to the expense associated with the publication of a full award. In the case before us the Employer submits that this is the answer to the Union’s submission that it would be inconsistent with the objects of the *Code* and unreasonable to publish reasons. Arbitrator Hall also rejected the

employer's submission that the issue was moot on the basis that at the time the decision was made the issue was still in dispute.

As to the Union's *functus officio* argument the Employer submits that this doctrine does not arise until the award has been perfected and, in any event, only relates to the ability to make or alter decisions after the final decision has been made.

Finally, reference is made to *Intercontinental Packers Ltd. -and- UFCW, Local 1518*, [1997] BCCAAA No. 307 (Larson – B.C.) where Arbitrator Larson, in the context of a preliminary application, determined that he had jurisdiction over the dispute and indicated that he would issue reasons for this determination at the request of either party. The substantive difference was then settled and a difference then arose with respect to the publication of an award. Arbitrator Larson determined that he had a discretion in that regard and issued an award setting out his conclusion but declining to provide reasons.

Union's Reply

In its reply the Union submits that the approach taken by Arbitrator Larson is to be preferred as here, as there, there is no labour relations purpose to be served by issuing reasons. With respect to the obligation to issue reasons the Union notes that the underlying rationale, of preserving the efficacy of any review process, is not applicable in this case as it has not sought a review. Finally, with respect to Arbitrator Hall's decision the Union notes that an important interpretive issue between the parties was at stake. In this case the issue is one of admissibility in circumstances which are fact dependent and, thus, of no assistance to the parties in their future dealings.

Analysis & Decision

Whether described as a duty or obligation the jurisprudence of the reviewing tribunal, be it the Industrial Relations Council or the Labour Relations Board, indicates that there is some expectation that arbitrators provide reasons for their decisions. Not surprisingly, given the context in which the issue has arisen, the rationale for this obligation was related to the efficacy of the right of appeal. We do not, however, think this to be the sole rationale, as even absent an intention to appeal the conduct of the parties

may be influenced by not just the adjudicative result but also the reasoning upon which it is based. That said, we do not believe that the obligation is absolute. Arbitrator Larson described the matter as discretionary and then did not issue reasons. Arbitrator Hall decided to issue reasons on the basis of an agreement between the parties and not upon any more general legal requirement. We view these approaches as consistent with an arbitration board's power under s. 92(1)(a) of the *Code* to determine its own procedure. In reaching these conclusions we reject the submissions with respect to mootness and *functus officio*. With respect to the former we agree with Arbitrator Hall that mootness relates to the status of the dispute at the time the decision is made and not to the point of the publication of reasons. As to the latter we agree with the Employer's submission that we do not lose jurisdiction over the dispute until the decision making process is complete which could include the publication of reasons.

With that in mind we turn to the circumstances of this case. Unlike the circumstances in *British Columbia -and- BCGEU* we do not consider ourselves bound by an agreement between the parties. The decision to issue a "bottom-line" award followed by reasons was made by the board and was not the result of an agreement between the parties. Nevertheless, we consider it significant that this was the status at the time the settlement was reached. As such, it was not necessarily 'carved in stone' and, in our view, it was open to the parties to agree that we not issue reasons. Although perhaps not technically bound by that agreement we would have been obliged to give it effect unless there were compelling reasons to the contrary. However, absent such an agreement we view ourselves as obliged to fulfill our previously stated intention unless we are persuaded that the circumstances have changed or are such as to no longer warrant the publication of reasons.

The Union questions the utility of rendering reasons in the circumstances of the underlying dispute having been resolved and no appeal having been taken of our rulings. It submits that the rulings are fact dependent and, thus, of little ongoing assistance to the parties. While undoubtedly some aspects of our rulings were ultimately fact driven that does not, in our view, give adequate recognition to the thorough and wide ranging submissions made by the parties with respect to a number of legal issues. With regard to the latter our reasoning may be some assistance to the parties in their future dealings with respect to production/privacy related issues that in our experience are increasingly common.

The Union also argues that the nature of the issues and arguments may render the expenses associated with the publication of reasons unreasonable and unnecessary as the matter has been resolved. While we would not dispute that the complexity and number of issues argued, with the attendant arbitral and other jurisprudence, makes this a difficult and extensive adjudicative process, the reality is that a substantial part of that work including a review of the evidence and legal authorities as well as award drafting had to be performed prior to the issuance of our rulings. That is not to suggest that additional adjudicative resources were not required to finalize this award, including dealing with this additional preliminary issue. However, this is not a case of an impromptu ruling being made after a short break or overnight in the course of a hearing. In that sense the failure to publish reasons may in fact deprive the parties of the benefit of work they are paying for.

Taking all of the circumstances into consideration we are of the view that it is appropriate to issue reasons for our rulings in accordance with our earlier stated intention. However, in the circumstances we will not be as detailed as we might otherwise have been particularly in areas relating to our factual determinations.

WCB File Issue

Relevant Legislation

The relevant portions of the *WCA* provide as follows:

SECTION 95

Secrecy

- (1) Officers of the Board and persons authorized to make examinations or inquiries under this Part must not divulge or allow to be divulged, except in the performance of their duties or under the authority of the Board, information obtained by them or which has come to their knowledge in making or in connection with an examination or inquiry under this Part.
 - (1.1) If information in a claim file, or in any other material pertaining to the claim of an injured or disabled worker, is disclosed for the purposes of this Act by an officer or employee of the Board to a person other than the worker, that person must not disclose the information except,

- (a) if anyone whom the information is about has identified the information and consented, in the manner required by the Board, to its disclosure,
 - (b) in compliance with an enactment of British Columbia or Canada
 - (c) in compliance with a subpoena, warrant or other order issued or made by a court, tribunal, person or body with jurisdiction to compel the production of information, or
 - (d) for the purpose of preparing a submission or argument for a proceeding under this Part, Part 3 or Part 4.
- (1.2) No court, tribunal or other body may admit into evidence any information that is disclosed in violation of subsection (1.1)
- (2) Every person who violates subsection (1) or (1.1) commits an offence against this Part.

SECTION 156

Information that must be kept confidential

- (1) A person must not disclose or publish the following information, except for the purpose of administering this Act and the regulations or as otherwise required by law:
- (b) information with respect to a claim under part 1 of this Act obtained by a person by reason of the performance of any duty or the exercise of any power under this Part, Part 4 or the regulations;

Other statutory provisions referred to or relied upon include:

Freedom of Information and Protection of Privacy Act, RSBC 1996 c.165 as amended ("*FOIPPA*")

- 2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
- (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies

3(2) This Act does not limit the information available by law to a party to a proceeding.

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

- (a) the personal information relates to a medical, psychiatric or psychological, history, diagnosis, condition, treatment or evaluation,
- (d) the personal information relates to employment, occupational or educational history

32 A public body must ensure that personal information in its custody or under its control is used only

- (a) for the purpose for which that information was obtained or compiled, or for a use consistent with that purpose (see section 34)
- (b) if the individual the information is about has identified the information and has consented, in the prescribed manner, to the use, or
- (c) for the purpose for which that information may be disclosed to that public body under sections 33 to 36.

34(1) A use of personal information is consistent under section 32 or 33.2 with the purposes for which the information was obtained or compiled if the use

- (a) has a reasonable and direct connection to that purpose, and
- (b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information or causes the information to be used or disclosed.

Evidence

The Employer called three witnesses. Although the Union called no witnesses it adduced, by agreement, the notes made by its President Bill Eastwood with respect to a meeting held on January 20, 2005 involving the Grievor and representatives of both the Union and the Employer.

Garth Mooney is the supervisor of investigations for the WCB and was involved in its investigation in relation to the Grievor. He testified that the WCB decided to investigate the Grievor's claim because not all of the subjective complaints reported by him were supported by objective medical evidence. In those circumstances the WCB wanted to assess McEachern's physical presentation in an uncontrolled as opposed to a controlled

environment. To do that it retained the services of a private investigator and authorized twenty hours of surveillance. While one instance of the Grievor using a walker while getting out of a van was reported there were some observations of what Mooney described as inconsistent conduct including performing a visual inspection of the gutters at his home while walking normally and without assistance, as well as alighting from a van and crouching down to inspect the rear wheel of a boat trailer without support or assistance.

At this time the WCB was undertaking renovations to the Grievor's home to allow wheelchair access and improved internal mobility. It learned that the Grievor had decided to travel to Mexico while the renovations were underway. Mooney arranged for surveillance with respect to this trip. Considerable video was obtained. Mooney testified that with the exception of his airport departure where he used a wheelchair, the Grievor was not observed using a walking aid. The video was viewed by the Rehabilitation Consultant and Case Manager assigned to the Grievor's claim as well as a WCB doctor. The latter prepared a report which included a detailed analysis of the video and determined that the subjective complaints did not match the objective findings, that the Grievor had misrepresented his condition and that he was able to work. Mooney then halted the renovation and ultimately advised the Grievor of his decision.

Mooney testified that the Case Manager decided to close the Grievor's claim on the basis of misrepresentation and/or fraud. The WCB also declared an overpayment of approximately \$54,000.00. A report to Crown Counsel was prepared and forwarded. Fraud charges have now been approved. Mooney testified that the WCB does not often pursue criminal charges but felt compelled to do so due to the magnitude of the difference between his controlled and uncontrolled presentation. The WCB had allocated a pension reserve of \$660,000.00 with respect to the claim.

Mooney testified that prior to the commencement of the investigation the Employer was not advised of the WCB's concerns and took no part in the decision to investigate. He stated that he is very conscious that an employer has its own interests and his concern is with the interests of the WCB. He believed that he had spoken to a representative of the Employer no more than twice with respect to the investigation and described his own conduct as "guarded" as to the details of the investigation.

Under cross-examination Mooney agreed that he first spoke to the Grievor while the latter was still in Mexico. The conversation occurred as a result of the stopping of the renovations. Mooney agreed that initially while the Grievor was in Mexico the latter's primary contact at the WCB was the Case Manager. He testified that at some point it became clear that there was a problem and the decision was made that the Grievor would be required to make contact with the WCB through him. Mooney agreed that the Grievor had been keeping his Case Manager apprised of medical appointments he was attending in Mexico. Mooney agreed that in his contact with the Grievor he did not ask him about his medical treatment. He stated that he had no expertise in that regard and that the Grievor was encouraged to provide information with respect to his treatment which when faxed to the WCB was placed in the Grievor's file. Mooney had a vague recollection of the Grievor stating he was awaiting money so that he could return from Mexico and agreed that the Grievor was upset.

Mooney agreed that a difference between subjective complaints and supporting objective medical evidence can be a flag to his department. As a matter of "due diligence" surreptitious video surveillance is sought of conduct in uncontrolled environments. He could not recall asking for either an independent medical examination or functional capacity evaluation. He agreed that after the initial surveillance which took place over three or four days that he did not contact the Grievor. He explained that the Grievor could have indicated that he was "having a good day" and that the WCB needed to find out about his presentation over a longer period of time.

Dean Lodge is the President of Lodge & Associates a private investigation firm that conducts video surveillance for the WCB and others. He arranged for one of his senior investigators to conduct video surveillance with respect to the Grievor's trip to Mexico. The investigator obtained approximately eight and one-quarter hours of surveillance video. Lodge edited it down to eight hours and five minutes by removing portions of the video where the conduct of the Grievor is not included and transferred the material to CD-ROMs without otherwise altering or modifying the original video. He agreed in cross-examination that the Grievor was not told that he was being video surveilled and his consent was not obtained.

Keith Arkell is the Employer's Corporate Safety Supervisor whose responsibilities include accident prevention and WCB claims management. He testified that he first became aware of an investigation by the WCB when

he received a telephone call from the Grievor about his benefits being cut off. The Grievor suggested he call Mooney. Arkell testified that Mooney told him that it was a matter between the WCB and the Grievor, that there was a concern about misrepresentation and that there had been video surveillance in Vancouver and Mexico. Arkell testified that the Employer played no part in initiating the investigation and that prior to learning about it had no reason to believe that there was a problem with the Grievor's WCB claim.

Arkell testified that when the Grievor appealed the discontinuance of his claim the Employer received notice of the appeal and he, on its behalf, decided that the Employer would take part in the appeal. As a matter of course the Employer sought the disclosure of the Grievor's WCB file. The file contained video obtained by the WCB initially in videotape form and later as CD-ROMs.

Under cross-examination Arkell testified that he received notice of the Grievor's appeal of the discontinuance in the fall of 2003. In that appeal the Employer supported the denial of the claim based upon the information it had. The WCB Review Board issued its decision in the spring of 2005 and the matter is now before the WCB Appeal Tribunal.

Arkell agreed that he did not take part in the Employer's disciplinary decision with respect to the Grievor and that that decision was made by the Human Resources Department headed by Johnstone Hardie. Arkell testified that he did not pass the file information he received from the WCB to the Human Resources Department although he did discuss the matter with members of the Department. He did pass along what he described as "employer information" which included such information as the status of the matter and the appeal submissions. He agreed that references to the video would have been included in the submissions. Arkell also testified that copies of information he received from the WCB were being sent directly to the Human Resources Department by the Grievor. With respect to the video evidence at Hardie's direction, and possibly through him, he passed it along to counsel for the Employer. The videotapes were sent to Employer Counsel in late 2004. Prior to sending his only copies of these tapes to counsel the only persons who had viewed them were he and his clerk.

A meeting involving the Grievor, Eastwood and others from the Union with Hardie, Arkrell and others from the Employer occurred on

January 20, 2005. From Eastwood's notes it appears that both Hardie and Arkell raised questions relating to the video. Hardie's question was framed as 'how and why' the descriptions of the injuries and pain in earlier medical assessments were contradicted by the video. The explanation given by the Grievor related to the treatment he received in Mexico in the form of a "morphine block". Arkell's question was more specific and addressed the Grievor's "apparent mobility when he arrived in Mexico". The Grievor's response was that he never lost his mobility and specifically addressed circumstances in the video which had been "made much of" by the WCB.

Employer's Argument

Two interrelated issues were addressed by counsel, the appropriateness of an order under s. 95(1.1)(c) of the WCA and the admissibility of the video evidence in the hearing of the merits.

Dealing first with the s. 95 issue the Employer asserts that the legislation does not operate as a ban to the disclosure of the WCB information relying upon *Smith & Smith v. Discovery Land Service Ltd.*, (1979) 12 BCLR 150 (BCSC). With respect to the arbitral jurisprudence the Employer points to *Fording Coal Ltd. -and- USWA, Local 7884*, [1996] BCCAAA No. 94 (Dorsey – B.C.) which identifies the underlying privacy interest of workers that s. 95 seeks to protect and sets out an adjudicative approach when faced with an application under that provision:

The bar against admission into evidence, if disclosed in violation of the statute, reinforces the worker's privacy and discourages violation of his or her privacy by limiting the uses that can be made of improperly disclosed information. It places a responsibility on courts and other adjudicators to inquire and ensure that the balance between privacy and disclosure of information under the Workers Compensation Act is respected.

(at para. 31)

A balancing approach has been adopted either expressly or implicitly in a number of subsequent arbitral decisions including *MacMillan Bloedel Ltd. (Powell River Division) -and- CEP, Local 76*, (1997) 67 LAC (4th) 443 (Taylor – B.C.), *Crown Packaging -and- CEP, Local 951*, (2002) 111 LAC (4th) 279 (Moore – B.C.) & *Workers' Compensation Board -and- CEU*, [2001] BCCAAA No. 168 (Dorsey – B.C.). Particular reliance was placed on *HEABC (Salvation Army – Sunset Lodge) -and- HEU*, [2004] BCCAAA No. 12 (Jackson – B.C.) where WCB video was reviewed by the arbitrator

but ultimately not considered sufficiently probative of the employer's allegation. We note, however, that the union in that case "once it was apparent that an Order would be issued" consented to the use of the videotape. Thus, while it illustrates a likely conclusion it does not set out a consideration of the issue.

Turning to the issue of the admissibility of the video the Employer submits that the evidence is relevant, material, probative and compelling. It relies on *R. v. Nikolovski*, (1997) 141 DLR (4th) 647 (SCC) to underscore the probative value of evidence of this kind. In that case the Supreme Court after noting the "modern trend" of "admitting all relevant and probative evidence" in order to achieve a "just result" observed that video may be the best evidence as it is accurate, unbiased and dispassionate thereby avoiding the "frailties" associated with witnesses. Further, the Employer submits that relevant evidence ought not to be excluded unless its admission is contrary to a rule of evidence or was obtained illegally (see *Richardson v. Davis Wire Industries Ltd.*, [1997] BCJ No. 937 (BCSC) & *Domtar -and- CEP, Local 789*, [2000] BCCAAA No. 285 (McPhillips – B.C.)). It argues that in only rare and compelling circumstances should arbitrators exclude evidence that would be admissible in the courts (see *Toronto Transit Commission –and- ATU, Local 113*, (1999) 79 LAC (4th) 85 (Solomatenko, Crockett & Reistetter – Ont.)). Reference is also made to s. 82 of the *Code* which requires arbitrators to "have regard to the real substance of the matters in dispute" which the Employer argues creates an overarching duty that necessitates the consideration of the video evidence in this case.

Anticipating a submission of the Union the Employer takes a number of positions with respect to the following considerations set out in *Doman Forest Products Ltd. -and- IWA, Local 1-357*, (1990) 13 LAC (4th) 275 (Vickers – B.C.) with respect to the admission of video evidence:

I accept that an employee has a right to freedom of privacy, but I do not need to go as far as the language in *Re Canada Post*. In my opinion, it is a balancing of interests that is required. The employee's right to privacy weighed against the company's right to investigate what it considered to be an abuse of sick leave. Questions to be answered include:

- (1) Was it reasonable, in all of the circumstances, to request a surveillance?
- (2) Was the surveillance conducted in a reasonable manner?
- (3) Were other alternatives open to the company to obtain the evidence it sought?

(at pp. 281-282)

First, the Employer argues that the *Doman* test is not applicable in the circumstances of this case as it was the WCB and not the Employer that decided to engage in surreptitious video surveillance. Further, the Employer had no role in the decision to obtain the evidence and was not aware that surveillance had been undertaken until after it was completed. In this regard the Employer submits that *PSERC -and- BCGEU (Watt)*, [1998] BCCA AAA No. 699 (McConchie – B.C.) is particularly apposite. In that case the employer sought to rely upon and the union sought to exclude audiotapes of telephone conversations between the grievor and her daughter intercepted by a feuding neighbour of the latter using a scanner. The telephone conversations related to the alleged assistance given by the grievor to her daughter in defrauding the agency the former worked for. The audio tapes were provided by the neighbour to the employer who wished to rely on them in a discharge arbitration.

Arbitrator McConchie described the neighbour's conduct in taping the private conversations of family members as "highly offensive". He observed that as the employer was not involved in the decision to intercept the communications the "test used by arbitrators in the surveillance cases is unfortunately of little or no value" and that it was not appropriate to place the employer in the position of the neighbour in assessing the reasonableness of the surveillance. Recognizing that the evidence was relevant and "highly probative" Arbitrator McConchie applied a balancing test of the relevant interests in the context of fair hearing considerations. Applying *Charter of Rights and Freedoms (The Constitution Act, 1982)* (the "*Charter*") principles and values he stated the test as which of the inclusion or the exclusion of the evidence "would bring the administration of justice into greater disrepute". He concluded that its exclusion would have the greater effect and accordingly ruled in favour of its admissibility.

On the basis of this case the Employer submits that as it was not involved in the decision to conduct surveillance the *Doman* test is immaterial and the proper test is whether the admission or exclusion of the video evidence would bring the administration of the arbitral justice system into dispute. It argues that given the serious nature of the allegation, its non-involvement in the decision to obtain evidence in this matter and the non-repugnant nature of the WCB investigation a failure to admit the evidence

would bring the arbitration system into disrepute. As to the significance of the allegation of fraud in vitiating any bar to production the Employer refers to *Pax Management Ltd. v. CIBC*, [1987] BCJ No. 1134 (BCCA), a case where solicitor client privilege was overcome in order that an allegation of fraud could be determined in the courts.

Second, if the *Doman* test is applicable the Employer argues that it either wrongly decided or no longer represents the true state of the arbitral law. With respect to the former the Employer relies on *Toronto Transit Commission*, above. As to the current arbitral jurisprudence in this jurisdiction the Employer submits that the test is really one of reasonableness considered in two contexts; was the manner in which the surveillance conducted reasonable and was it reasonable in the circumstances to conduct surreptitious surveillance. We pause to note that the Union in this case does not take issue with the manner in which the surveillance was conducted. We understand the Employer to be arguing that the *Doman* question with respect to alternatives has been subsumed into the issue of the reasonableness of the decision to conduct an investigation in this manner.

In the context of this approach the Employer advances a number of arguments. First, it argues that its conduct in relying on the evidence is not unreasonable as by the time it became aware of the evidence there was no practical manner to obtain useful or probative evidence with respect to his uncontrolled conduct. Second, it submits that even if it were “placed in the shoes” of the WCB it was not unreasonable for the surveillance to be conducted in the circumstances of the differences between the subjective complaints and the objective medical evidence. Third, it says that the test, however formulated, does not require the exhaustion of all possible alternatives (see *Steels Industrial Products -and- Teamsters, Local 213*, (1992) 24 LAC (4th) 259 (Blasina – B.C.) & *X -and- Y (Z Grievance)*, [2002] BCCAAA No. 292 (Taylor – B.C.)). Fourth, it submits that a persons right to privacy is not absolute. Fifth, it argues that in determining the reasonableness of the Employer’s conduct with respect to the surveillance a number of interests must be weighed and balanced including an individuals privacy interest, the nature and degree of the intrusion into privacy, whether a reasonable expectation of privacy exists in the circumstances, the reasons for the intrusion into privacy, the seriousness of the matter at hand and the probative value of the evidence. In support of these various assertions the references were made to a number of cases including those referenced above

and *Marmon/Keystone -and- Ironworkers, Shopmen's Local 712*, [2002] BCCAAA No. 8 (Foley – B.C.), *R. v. Edwards*, [1996] 1 SCR 128 (SCC), *R. v. MRM*, [1998] 3 SCR 393 (SCC), *Canadian Timkin Ltd. -and- USWA, Local 4906*, (2001) 98 LAC (4th) 129 (Welling – Ont.), *Wood Buffalo (Municipality) -and- CUPE Local 1505*, (2001) 98 LAC (4th) 440 (Jones, Grimaldi & McPhail – Alta.), *City of Edmonton -and- ATU, Local 569*, (2004) 124 LAC (4th) 225 (Alta. QB), *BCMEA -and- ILWU*, [2002] CLAD No. 310 (Munroe – B.C.), *Vancouver (City) -and- CUPE, Local 15*, [2003] BCCAAA No. 86 (Sullivan – B.C.), *Extra Foods -and- UFCW, Local 1518*, [2002] BCCAAA No. 377 (Glass – B.C.) & *Brewers Retail Inc. -and- United Brewers' Warehousing Workers' Provincial Board*, (1999) 78 LAC (4th) 394 (Herman – Ont.).

Union's Argument

The Union submits that the uses of the information sought by the Employer is not statutorily permissible. The Union also takes issue with the Employer's view of the law as it relates to the *Doman* test and its evolution over time. In its submission the *Doman* approach remains good law and, if anything, the importance of privacy interests reflected therein have been strengthened and reinforced by legislation such as *FOIPPA* and the *British Columbia Personal Information Protection Act*, 2003 SBC c. 63, as amended, ("*PIPA*") (with regard to the latter see *EBCO Metal Finishing Ltd -and- Ironworkers, Shopmen's Local 712*, [2004] BCCAAA No. 260 (Blasina – B.C.) & *Ainsworth Lumber Co. -and- USWA, Local 1-417*, [2005] BCCAAA No. 73 (Hall – B.C.)). Further, the mandate of arbitrators is to decide issues of this nature in the context of labour relation realities and arbitral jurisprudence rather than the approaches utilized by the courts in criminal and civil matters. The *Code* specifically requires a consideration of the rights of employees (s. 2(a)) and evidential admissibility in arbitrations is not necessarily to be treated the same as the courts (s. 92(b)).

The Union submits that as a "public body" as defined in *FOIPPA* the Employer is governed by that legislation and not by *PIPA*. In its submission there is clearly a privacy interest in the information the Employer obtained from the WCB as it relates to both his medical condition (s. 22(3)(a)) and his employment (s. 22(3)(d)). *FOIPPA* also requires that the information in the Employer's possession should only be used for the purposes for which it was obtained or a use consistent with that purpose. In the Union's submission the information was obtained from the WCB for the purpose of the

adjudication of the Grievor's benefit claim and by virtue of s.32 cannot be used to either ground or justify discipline. The Union asserts that it has no objection to the Employer seeking out its own information after it received the WCB file. Only that it must do so having regard to appropriate privacy concerns.

The office of the Information and Privacy Commissioner appointed pursuant to *FOIPPA* had occasion to consider the concept of "consistent purposes" in *Investigation Report 00-01: Use of Alumni Personal Information by Universities*, [2000] BCIPCD No. 58 in the following terms:

A "reasonable and direct connection to the original purpose", one could say, is that which is logically or rationally, connected to the original purposes. The *ISTA Manual* says "the consistent use must have a logical and plausible link to the original purpose. It must flow or be derived directly from the original use or be a logical outgrowth of the original use." The *ISTA Manual* goes on to suggest that a guideline to consider, in determining if there is a consistent use, is "whether the person concerned would expect his or her personal information to be used in the proposed way, even if that use has not been spelled out."

(at para 65)

The Union submits that a disciplinary related purpose is neither consistent with the purpose for which the file was obtained nor a reasonably expected use of the information.

With respect to the application of the concept of using for different purposes information obtained under statutory mandate the Union relies on *Abitibi-Consolidated Company of Canada -and- CEP, Local 402* (unreported – September 7, 2005) (Hope – B.C.). In that case the employer imposed discipline based upon information it obtained from an accident investigation report mandated by the *WCA*. As the employer was in the private sector the union relied upon provisions in *PIPA* as well as the *WCA*. Arbitrator Hope concluded as follows:

In terms of the Union's submission that the provisions of *PIPA* govern the circumstances, I agree with the Employer that the privacy contemplated in the Act cannot be read as extending to the circumstances. The question raised by the Act relates to the interpretation and application of s. 15(1) which prescribes the circumstances in which personal information can be used without the consent of an individual who is asserting the right of privacy. Assuming without deciding that the product

of an accident investigation constitutes “personal information” within the meaning of the Act, its use in the circumstances of this dispute is expressly authorized in s. 15(1)(c). It reads:

15(1) An organization may use personal information about an individual without the consent of the individual, if

(c) it is reasonable to expect that the use with the consent of the individual would compromise an investigation or proceeding and the use is reasonable for purposes related to an investigation or a proceeding . . .

I agree with the Employer that an accident investigation falls within s. 15(1)(c) and thus falls outside the privilege extended under the Act. However, I also agree with the Union that facts developed in an accident investigation in which an employee is compelled to participate by the provisions of the Workers Compensation Act are privileged and cannot be relied upon to support disciplinary initiatives. That privilege arises under s. 156(b) which reads as follows:

156(1) A person must not disclose or publish the following information, except for the purpose of administering this Act and the regulations or as otherwise required by law;

(b) information with respect to a claim under Part 1 of this Act obtained by the person by reason of the performance or any duty or the exercise of any power under this Part, part 4 or the regulations . . .

In my view, requiring an employee to participate in an accident investigation mandated under the Act and then using facts derived in that investigation to support the imposition of discipline would be in clear contravention of the privilege imposed under s. 156(b). That interpretation of the language of the Act is reinforced by the public policy implications of the Employer’s interpretation. At best it can be expected that compelling employees to give up the limited right they have to remain silent in the face of possible discipline, (a right that is recognized in the authorities relied on by the Union), would have a chilling effect on them in their participation of investigations mandated by the Act. That interpretation cannot be reconciled with the legislative intent implicit in the Act to have full and informed participation in accident investigations.

(at para 40-42)

On this basis the Union argues that information obtained under statutory power (ie. the right of disclosure) cannot be used for a purpose other than for which it was obtained.

The Union submits that legislation such as *FOIPPA* and *PIPA* require unions and employers (and presumably arbitrators) to be more careful with respect to the use of information in relation to employees. As an example of the potential problems associated with the dissemination of that information the Union points to *Coast Mountain Bus Co. -and- COPE, Local 378*, [2005] BCCAAA No.86 (Burke – B.C.). There the union in the context of a policy grievance with respect to job competitions sought production of copies of job applications and related material obtained by the employer in the course of a posting. The employer resisted production relying in part on *FOIPPA*. The union argued that the production it sought was consistent with the original purpose for its provision in that the job applicants would have known that the information was with respect to a job posting which in turn was subject to consideration under the collective agreement. In addressing this issue Arbitrator Burke referenced the “rebuttable presumption” created by s. 22(3)(d) with respect to personal employment information as well as s. 3(2) of *FOIPPA*. She concluded as follows:

I agree with the Employer that any decision to compromise a person’s personal information is best made in light of all of the circumstances and the labour relations context of the case. The obligation of a public body to protect information should only be compromised to the extent necessary to ensure a fair hearing of the grievance and for the Union to meet its obligations as exclusive bargaining agent for the employees. This is something that in reality in a selection process can only be determined on a case-by-case basis.

To conclude otherwise may well lead to significant compromise of privacy rights without due consideration. While section 3(2) specifically makes clear the Act does not limit the information available by law to a party to a proceeding, it imposes limits on the disclosure of personal information when that is not the case. While the Union says that it is not requesting anything more than ordinary information, even the name of an unsuccessful applicant may in certain circumstances be considered personal information which they may not wish to be disclosed for a variety of reasons. The successful applicant in the selection process will of course be known and not have the same privacy concerns.

It is not without some hesitation that I make this decision. I am cognizant of the need for efficiency in the process between the parties and

the resultant benefits. In addition, the Union has a unique status as exclusive bargaining agent with consequent obligations. As the Employer says however, that is the price that must be paid for preservation and protection of privacy rights put in place by the legislation.

(at para. 54-56)

We note that since this matter was argued before us the *Coast Mountain Bus* decision has been overturned by the Court of Appeal (see *COPE, Local 378 v. Coast Mountain Bus Co.*, [2005] BCJ No. 2655). While the Court of Appeal disagreed with the applicability of s. 22 considerations on the facts of that case we do not consider it in any way took issue with respect to the import of s. 3(2) of *FOIPPA*. We have not otherwise taken cognizance of the decision of the Court of Appeal as it is not factually analogous to the issue before us and, in any event, was not pronounced when we made our rulings.

With respect to the *WCA* provisions the Union submits that the ability to allow disclosure under s. 95(1.1)(c) should not just be used as a “rubber stamp”. It must be considered in light of the privacy interest as well as s. 156(1)(b) which prohibits disclosure of information with respect to a claim “except for the purpose of administering this Act”. The importance of the privacy interests is underscored by s. 95(1.2) which prohibits the admission of *WCB* disclosure file information if it in turn has been improperly disclosed (see *MacMillan Bloedel Ltd.*, above). The Union submits that *Arkell’s* disclosure of information to the Human Resources Department was not necessary for the administration of the Act and, thus, the disclosure file is not admissible in this proceeding.

As noted at the outset of this part of the award the Union maintains that the *Doman* approach still applies although some of the cases have collapsed the three questions into two. The Union argues that in order to admit the video evidence it is necessary to determine whether at the time the surveillance was conducted it was reasonable for the Employer, or in the alternative the *WCB*, to seek to obtain evidence in this manner. The Union submits that at the time of the surveillance the Employer had no basis for taking such a step. It also argues that the *WCB* did not have a reasonable basis for surveillance. It was operating on a mere suspicion founded on the difference between the Grievor’s symptoms and the objective medical evidence. Further, after the initial surveillance which occurred over two or three days there were only three observations of conduct potentially

inconsistent with the Grievor's subjective reporting. In the Union's submission these limited instances did not justify the additional surreptitious surveillance as lesser measures such as seeking an explanation from the Grievor or additional medical testing could have been used to address any concerns.

With respect to the application of the *Doman* test we were referred to a number of cases. In *Alberta Wheat Pool -and- GWU, Local 333*, (1995) 48 LAC (4th) 332 (Williams – B.C.) the arbitrator described surveillance as “intrusive” and opined that its use should be “only as a last stop”. *Ross v. Rosedale Transport Ltd.*, [2003] CLAD No. 237, an unjust dismissal case decided under federal legislation, applied the three question test formulated in *Domans. Toronto (City) -and- CUPE, Local 79*, (2004) 128 LAC (4th) 217 (Kirkwood – Ont.) is relied upon for the proposition that the rules of evidence and admissibility utilized by the courts need not be mechanically applied by arbitrators. *EBCO*, above, is relied upon as a decision of Arbitrator Blasina confirming that his earlier award in *Steels Industrial Products*, above, is merely a refinement of *Doman* and for the proposition that the probative value of the evidence should not influence its admissibility as it would tend to render the reasonableness of the decision “irrelevant”. *Centre for Addiction and Mental Health -and- OPSEU*, (2004) 131 LAC (4th) 97 (Nairn – Ont.) is referred to for its rejection of the critical analysis of *Doman* found in *Toronto Transit Commission*, above. Union counsel also noted the other cases emanating from Ontario cited above as implicitly rejecting the point of view expressed in *Toronto Transit Commission*. Finally, reference was made to *Ainsworth*, above, both generally with respect to the application of as reasonableness test and specifically with respect to the reasonableness of the option of an employee being confronted with any concerns rather than simply embarking on surreptitious surveillance.

Analysis & Decision

On its face the evidence that is the subject of these applications is relevant to the matters in dispute. At the base of all of the applications and submissions before us is the question of whether for a variety of statutory and other legal reasons the evidence should be excluded. Although somewhat interwoven we will address the statutory issues before turning to the more general exclusionary issues.

Headed “secrecy” there can be little doubt that s. 95 of the *WCA* is intended to create a right of privacy for individuals that are the subject of claims related documentation. Its significance is underscored by the consequence of inadmissibility (s. 95(1.2)) and the creation of an offence (s. 95(2)) should there be a breach of that right. At the same time the legislation clearly contemplates the disclosure and use of the information in a variety of circumstances including for present purposes “in compliance with a subpoena, warrant or other order issued or made by a court, tribunal, person or body with jurisdiction to compel the production of information” (s. 95(1.1)(c)). Faced with applications for such orders arbitrators have sought to balance the competing interests of the right to privacy of employees with the right of parties to legal processes to natural justice in the presentation of their cases. (see *Fording Coal, MacMillan Bloedel Ltd., Crown Packaging & Workers Compensation Board*). Generally these interests have been reconciled by permitting disclosure and use for purposes necessary for the provision of a fair hearing while imposing conditions designed to minimize the impact on the privacy right. We see no reason to depart from that practice in this case. As noted above the evidence at issue is relevant to the dispute in this case and the principles of natural justice require that the Employer be allowed to fully present its defense to the Union’s grievance.

We reject, as unsubstantiated on the evidence, the Union’s submission that the evidence should be deemed inadmissible by virtue of s. 95(1.2) as a result of it being improperly disclosed by Arkell. We note that the Union, quite properly, did not take issue with the disclosure to counsel for the Employer. Beyond that the evidence of Arkell as to the limited nature of his disclosure was unchallenged. The only potential evidence of a wider disclosure is contained in Eastwood’s note of the January 2005 meeting and in particular the questions asked by Hardie. However, a review of the questions asked does not indicate any knowledge beyond what would have been included in the submissions in the review process which Arkell described as ‘employer information’ and was not obtained as a result of the Employer seeking disclosure of the file.

We turn next to *FOIPPA*. We are not persuaded that this legislation acts to prevent the usage of the information as sought by the Employer. We reach this conclusion for two reasons. First, s. 3(2) of *FOIPPA* states that the “Act does not limit the information available by law to a party to a proceeding”. In our view this is an explicit recognition that the legislation, as a whole, is not intended to prevent the disclosure of information that is

otherwise lawfully the subject of a legal proceeding. And as was noted above, the *WCA* contemplates that the information contained in a compensation claim file may be ordered to be disclosed in the context of a legal proceeding. That is evident from the wording of both s. 95(1.1)(c) and s. 156(1) of the *WCA*. Second, and in any event, we are of the view that the proposed use by the Employer is, in the circumstances of the case, consistent with the purpose for which it was obtained as that term is used in s. 32 and defined in s. 34(1) of *FOIPPA*. While undoubtedly the *WCB* file was obtained for the purpose of dealing with the Grievor's appeal of the discontinuance of his claim s. 32 does not limit its subsequent use to that purpose alone. It may be utilized for other uses consistent with the purpose it was initially obtained. In order to be consistent with that purpose it must have a "reasonable and direct connection". This has been described by the Information and Privacy Commissioner, who is charged with the administration of *FOIPPA*, in a variety of ways: "logical and plausible link", "flow or be directly derived from" and "logical outgrowth". In applying these criteria the Commissioner also appears to accept the concept of the "expectation" of the subject or provider of the information. The purpose must also be necessary for the performance of either its "statutory duties" or for "operating a legally authorized program".

Applying those considerations to the circumstances of this case we are of the view that the intended use of the information is consistent with the purpose for which it was obtained. When the Employer decided to become involved in the *WCB* appeal Arkell was aware that there was an issue with respect to the validity of the claim based upon concerns as to misrepresentation. It is well recognized in the arbitral jurisprudence that an employer has a valid and real interest in the adjudication of *WCB* claims and in particular in the legitimacy of those claims. In that context we view the use of the file as an element of proof in a disciplinary matter to be a "logical outgrowth" of the initial use. It strikes us that both unreasonable and artificial to find that the proposed evidential use in this case is not reasonably and directly connected to the original purpose of addressing the legitimacy of the *WCB* claim. As the most contentious part of the information was not knowingly created by the Grievor the utility and applicability of an expectation test is problematic.

We do not find *Abitibi Consolidated* to be factually apposite to the circumstances in this case as it relates to the provision of information by an individual under statutory compulsion. Further, the public policy

considerations are not, in our opinion, the same. While the policy considerations supporting the importance of fostering safety related investigations are clear no such imperative arises on the facts of this case. Indeed, it is arguable that a strong public policy argument can be made as to the importance of addressing alleged abuses of the workers compensation system.

Turning next to a consideration of more general legal issues we recognize, as noted above, that they are in some respects interwoven with the statutory matters we have addressed. The main difference between the parties in this area relates to the applicability of the approach with respect to the admissibility of surreptitious video surveillance evidence articulated by Arbitrator Vickers, as he then was, in *Doman*. Stated in very broad terms the Employer submits that *Doman* is no longer good law and that the appropriate approach is to admit the evidence if it is relevant and probative. For its part the Union submits that *Domans*, whether formulated as a two or three factor test, is good law and has been reinforced by subsequently enacted statutory privacy rights. We are of the view that *Domans* remains good law in this jurisdiction. That said, it must be remembered that the approach it adopted and the issues identified for consideration were formulated in the circumstance of an employer deciding to conduct surveillance. Thus, the concerns it identified as to whether an employee's privacy rights were unreasonably interfered with were focused on what the employer knew and did, including potential alternative investigative steps, as of the time the decision was made to conduct surveillance. In the case before us the Employer had no role in and indeed no knowledge of the decision to conduct surveillance. It was done by another party, independent of and not directly related to the employment relationship. The decision was made on the basis of considerations unrelated to the employment relationship and within the context of a very different kind of relationship. As noted by Arbitrator McConchie the precise formulation developed by Arbitrator Vickers is not readily applicable to the facts and circumstances of this case and, thus, in itself, of very little assistance to us. However, we are of the view that the underlying principles are applicable and, as noted above, remain sound. What is required in the circumstance is a balancing of the Grievor's right to privacy, both enshrined in statute and as a *Charter* value, with the Employer's right to address its legitimate concerns as to misconduct. In our view, this should be done in the context of a standard of reasonableness having in mind the exigencies of the situation and the nature of the employment relationship. In saying this we agree with the Union that

evidential determinations of this nature are not simply based on common law legal principles but may also be influenced by policy considerations attendant to the nature of the employment relationship.

The parties differed considerably over what should be considered in assessing the reasonableness of the circumstances in which the decision to obtain surreptitious video was made. Again stated broadly, the Union argues that the Employer should in effect be placed in the shoes of the WCB and we ought to determine in applying the *Doman* test that it was not reasonable to conduct surveillance as, amongst other things, alternative investigative techniques such as seeking additional medical evaluation had not been pursued. On the other hand the Employer submits that in assessing reasonableness it is only the Employer's conduct at the time it received the information that is relevant. At that point the issue of the legitimacy of the claim had reached the point that taking alternative or additional steps was rendered futile. Further, and in the alternative, the Employer submits that if cognizance is taken of the WCB's conduct it was in the circumstances reasonable.

We are of the opinion that in assessing the reasonableness of the circumstances surrounding the creation and utilization of the surreptitious video surveillance for the purposes of determining its admissibility it is the conduct of the Employer from the point when it became aware of its existence that should properly be the subject of our inquiry. That is not to say that earlier circumstances relating to its creation are necessarily irrelevant. Indeed, that was the case in *PSERC* where the evidence was initially obtained in repugnant and "unreasonable by any standard" circumstances and Arbitrator McConchie relied on *Charter* based concepts and principles to assess whether permitting the employer to adduce and rely on the evidence would bring the system of justice into disrepute. In the circumstances of this case it is not necessary for us to apply a similar analysis as we do not view the decision of the WCB to use surreptitious surveillance as unreasonable in the circumstances relevant to the relationship between it and McEachern. We were presented no authority to suggest that the decision of the WCB to conduct surveillance was in itself inappropriate or improper or could have had the effect of rendering it inadmissible in any civil or administrative proceedings with respect to the validity of the claim. Thus stated, this is a markedly different circumstance from that in *PSERC*.

As indicated above we consider the appropriate consideration in this case to be an assessment of the Employer's conduct commencing with the point that it became aware of the evidence or its import. In the circumstance the focal point of the conduct to be considered is the reasonableness of simply relying on the surveillance evidence as opposed to having required the Employer to have engaged in alternative acts to address the issue before being allowed to rely on that evidence. Implicit in and underlying this balancing process and fundamental to the protection of the privacy interest is the belief that it is unreasonable to conduct surreptitious surveillance if efficacious alternatives exist that would not encroach upon an employee's privacy. Our reading of the cases in this area lead us to the view that what is reasonable will very much be dependent on the facts and circumstances of each particular case. Thus, we do not find characterizations such as "last stop" particularly helpful. That is simply because what may be a reasonable or useful investigative alternative action in one case may have no value in another.

In this case it was urged upon us by the Union that other investigative options existed, whether at the point when the WCB decided to conduct surveillance or the point that the employer became aware of the issue. It was argued that either obtaining additional medical evaluations or directly raising the concerns with McEachern ought to have been pursued prior to either undertaking or relying on the surveillance. We are not persuaded that either of these courses of action could reasonably be required of the Employer in these circumstances. While medical evaluations such as functional capacity assessments, may be of assistance their ultimate reliability is often dependent on the reliability of the reporting of the person being tested. In a circumstance such as this where the legitimacy of the claimed disability is in issue we do not view this approach as being sufficiently reliable to require the Employer to pursue this investigative avenue before it could rely on surreptitious evidence. Similarly, we do not view the so-called direct confrontation approach to be reasonably required in these circumstances. Although this was ultimately done in the January of 2005 meeting the reality is that the events had transpired to that point in time rendered such an approach virtually meaningless. The final alternative measure, implicit but not expressed in the Union's submission, is the possibility of the Employer when it became aware of the WCB surveillance evidence seeking its own surveillance evidence. This too does not strike us as a reasonably efficacious investigative act. By this time the Grievor was aware that the legitimacy of his claim and of his conduct was in question and, thus, the

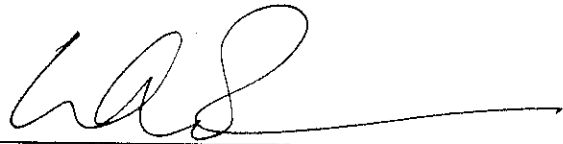
reasonableness of an opportunity to obtain further evidence of misconduct was by this time highly problematic.

Taking all of this into account and balancing the Grievor's right of privacy against the Employer's legitimate interests with respect to his conduct we are of the opinion that the Employer in seeking to rely on the surreptitious video evidence is not acting unreasonably and that in the circumstances it ought to be admitted into evidence.

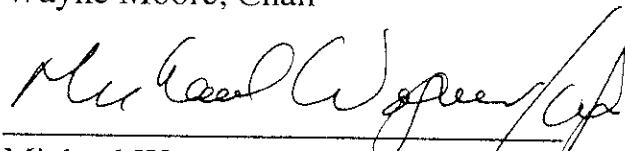
Summary

We conclude, that despite the resolution of the underlying dispute this is an appropriate case to render reasons as initially indicated at the time when we published out 'bottom line' rulings.

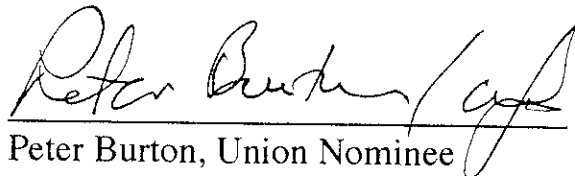
As to the initial applications for the reasons outlined we conclude that the orders sought with respect to the production and use of the WCB file ought to be granted. We further find that there is no statutory or other legal reason to require the exclusion from evidence of the surreptitious video evidence obtained by the WCB. The members of the board have authorized the Chair to sign on their behalf.



Wayne Moore, Chair



Michael Wagner, Employer Nominee



Peter Burton, Union Nominee