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PAPER 3.1

Arbitral Jurisdiction over Tortious Privacy Violations

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ARBITRAL JURISDICTION OVER TORTIOUS PRIVACY VIOLATIONS

I. Introduction

Arbitrators have repeatedly upheld the privacy rights of employees, stating that "[i]t is well established that persons do not by virtue of their status as employees lose their right to privacy and integrity of the person" (*Monarch Fine Foods Co. Ltd. and Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647* (1978), 20 L.A.C. (2d) 419 (Picher) at 421). In British Columbia ("BC"), privacy rights originate in the *Privacy Act*, R.S.B.C. 1996, c. 373 (the "*Privacy Act*"), which creates a tort out of a privacy violation. However, the statute is absent from most arbitrations enshrining employees' privacy rights. From where, then, do those well established rights arise?

While parties appear to shy away from relying on the *Privacy Act*, there are countless decisions relying on a variety of other privacy related statutes, such as the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("*FIPPA*"), the *Personal Information Protection Act*, S.B.C. 2003, c. 63 ("*PIPA*"), the *Privacy Act*, R.S.C. 1985, c. P-21 (the "*Federal Privacy Act")*, and the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5. There has also been some debate over the existence of a common law tort of invasion of privacy. Why have more causes of action not been founded in the *Privacy Act*?

This paper will attempt to find an answer to this, focusing on whether an arbitrator has jurisdiction over the *Privacy Act*, and if so, the benefits and detriments to using it in arbitration. As a result, we will address the following questions: what have the courts said about jurisdiction over torts that arise in labour disputes? Does an arbitrator have jurisdiction to hear and determine an action under the *Privacy Act*? Does the *Privacy Act* preclude common law tort claims? And what remedial jurisdiction does an arbitrator have in breach of privacy claims?

II. Jurisdiction Over Torts in Labour Disputes

In the last two decades, the Supreme Court of Canada has dealt with the issue of an arbitrator's jurisdiction in a variety of circumstances. These cases provide the framework for determining whether or not an arbitrator may hear and determine a particular dispute. An analysis based on them should be able to resolve the issue of whether arbitrators have the jurisdiction to determine a tort violation and interpret and apply the *Privacy Act*.

The *Labour Relations Code*, R.S.B.C. 1996, c. 244 (the "*Code*") provides the legislative source for an arbitrator's jurisdiction. The *Code* confers exclusive jurisdiction to deal with all disputes related to the collective agreement. Thus, the Supreme Court of Canada has found that where a dispute "expressly or inferentially" arises out of a collective agreement, an arbitrator has exclusive jurisdiction. That is, if "the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement," then "the claimant must proceed by arbitration and the courts have no power to entertain an action in respect to that dispute" (*Weber v. Ontario Hydro*, [1995] 2 S.C.R. 92 (QL) ("*Weber*"), at paras. 50-52). In *Weber*, the Court found that it would be more appropriate for the arbitrator dealing with the grievance to deal with all the issues, including those of the alleged tortious and *Charter* violations by the employer. Where an employee is claiming a tortious violation, the proper forum is before an arbitrator if the underlying dispute is related to the collective agreement.

Subsequent cases confirm that arbitrators may have exclusive jurisdiction over a variety of tort claims, such as conspiracy, interference with contractual relations, deceit, negligent misrepresentation, infliction of mental distress, negligence and defamation (*Blanco-Arriba v. British Columbia*, [2001] B.C.J. No. 2376 (S.C.) (QL), at para 39). Similarly, arbitrators have been found, in some cases, to have jurisdiction over remedies arising from tortious violations, such as aggravated and punitive damages (*Moznik v. Richmond* (2006), 62 B.C.L.R. (4th) 374 (S.C.) ("*Moznik*")).

An arbitrator also has jurisdiction over rights and obligations contained in employment related statutes pursuant to s. 89(g) of the *Code*, which says an arbitrator has power to "interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement, even though the Act's provisions conflict with the terms of the collective agreement ..." Furthermore, the Supreme Court of Canada has found jurisdiction over rights and obligations in human rights and employment related statutes, which are effectively read into collective agreements (*Parry Sound(District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)*, [2003] 2 S.C.R. 157 (QL)).

Collectively, these cases make clear that an arbitrator has jurisdiction over tort claims where the dispute essentially relates to the collective agreement, and over a statutory violation where the legislation is employment related. Assuming the *Privacy Act* is employment related, there appears a sound basis for an arbitrator to interpret and apply the *Privacy Act* if an employer violates the privacy of its employee(s) in the course of employment. Why then are unions, employers and arbitrators not taking full advantage of this privacy protecting statute? The balance of the paper will examine this.

III. The Privacy Act

The *Privacy Act* is a short piece of legislation passed in 1968 that makes a privacy violation a tort. Its key provisions, contained in s. 1, are:

> (1) It is a tort, actionable without proof of damage, for a person, willfully and without a claim of right, to violate the privacy of another.
>
> (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.
>
> (3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence, and occasion of the act or conduct and to any domestic or other relationship between the parties.
>
> (4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

Section 2(2) provides for exceptions to what would otherwise be a violation of privacy, such as if "it is consented to ..." or "the act or conduct was incidental to the exercise of a lawful right of defense of person or property." Section 4 states that an action "must be heard and determined by the Supreme Court."

Three other jurisdictions have similar pieces of legislation: Saskatchewan (*The Privacy Act*, R.S.S. 1978, c. P-24), Manitoba (*The Privacy Act*, C.C.S.M. c. P125), and Newfoundland (*The Privacy Act,* R.S.N.L. 1990, c. P-22).

A. Historical Origins

Although other jurisdictions have enacted privacy legislation, BC was the first in Canada to create "an independent cause of action for the unreasonable and unwarranted invasion of an individual's privacy" (Emily Yearwood-Lee, "Historical Developments in B.C. Privacy Law" (2007) Legislative Library of British Columbia ("Historical Developments") at 3). The statute was passed amidst controversy concerning electronic eavesdropping during a trade union convention (BC Law Institute, *Report on the Privacy Act of British Columbia*, February 2008, BC Law Institute Report No. 49 ("*Report on the Privacy Act*") at 11-13; R.A. Sargent (Commissioner), *Report of the Royal Commission of Inquiry into Invasion of Privacy* (Victoria: The Queen's Printer, 1967) at 5-9).

In November 1966, a private investigator working for one union planted eavesdropping devices in a hotel room occupied by another union's leaders (Historical Developments, *supra*, at 3). The "bugging" led to a Royal Commission investigation. The focus of the Commission was:

> ... [the] nature and extent of the use of recording devices and records thereof for the purpose of invading the privacy of persons or organizations ... with a view to determining whether any legislative enactment ... [was] necessary for the preservation of privacy as a civil right ... (Judith Antonik Bennett, *Royal Commissions and Commissions of Inquiry under the Public Inquiries Act in British Columbia 1943-1980* (Victoria: The Queen's Printer, 1982 ("*Royal Commissions*") at 20).

The Commissioner recommended that provincial laws be enacted and the *Privacy Act* was passed (*Royal Commissions*, *supra*, at 20; Historical Developments, *supra*, at 3). The main impetus behind the legislation was public concern about wiretapping and electronic eavesdropping, which were new technologies at the time, ultimately reflected in s. 1(4). However, the Attorney General reportedly said the following of the legislation:

> Essentially, this means you have a right to be left alone. But it is also worded in such a way as to leave the legal definition of privacy in a specific case to the discretion of the court. (*Report on the Privacy Act, supra*, at 5, footnote 15).

B. Overview of the Privacy Act

Like its counterparts in other jurisdictions, the *Privacy Act* creates two torts: 1) willfully violating the privacy of another person, and 2) using the name/portrait of another person for the purpose of advertising property or services.

Section 1(1) creates the tort. The subsections of s. 1 then limit the right to privacy to that which is reasonable in the circumstances (s. 1(2)) and with regard to the context in which the violation occurs (s. 1(3)). The legislation does not define privacy, but provides examples of how one's privacy *may* be violated, such as through eavesdropping and surveillance. It is significant that the examples are provided "without limiting the aforementioned sections ..." (s. 1(4)).

Courts in BC have interpreted privacy as a heavily fact dependent right, and the *Privacy Act* as potentially covering four distinct torts (*Davis v. Mcarthur* (1969), 10 D.L.R. (3d) 250 (B.C.S.C.) (QL) ("*Davis (SC)*"), rev'd 17 D.L.R. (3d) 760 (B.C.C.A.) ("*Davis (CA)*")). Those four torts were said to constitute "breach of privacy" in an influential 1960 paper on the American approach to this tort[1]:

1. Intrusion on the plaintiff's seclusion or private affairs;
2. Public disclosure of embarrassing facts about the plaintiff;
3. Publicity that places the plaintiff in a false light in the public eye; and
4. Appropriation of the plaintiff's name or likeness for the defendant's advantage.

Privacy rights protected in the legislation are not absolute and depend on their circumstances (*Davis (CA)* at 763). In all cases, the courts ask whether the plaintiff was entitled to privacy in the circumstances, and if so whether the defendant violated that privacy (*Getejanc v. Brentwood College Association*, [2001] B.C.J. No. 1249 (S.C.) (QL) ("*Getejanc*") at para. 16).[2]

Section 1(1) also requires the violation to be done "willfully" and "without claim of right." Courts have interpreted "willfully" to mean that the defendant knew or ought to have known the act would violate the plaintiff's privacy, not only that the act was voluntarily performed (*Getejanc*, at para. 22). Some cases have even suggested a malice requirement (*Davis (SC)* at 765) although this has not been applied in most cases (*Report on the Privacy Act, supra*, at 12). A "claim of right" has referred to an "honest belief in a state of facts which, if it existed, would be a legal justification or excuse" (*Hollinsworth v. BCTV*, [1998] B.C.J. No. 2451 (C.A.) (QL) at 127).

Where a privacy violation has been established, it will be "actionable without proof of damage" (s. 1(1)). The *Privacy Act* serves to deter and compensate for the loss of privacy (*Report on Privacy Act*, at 13).

C. Arbitral Jurisdiction and the Privacy Act

Section 4 requires that an action be brought in the Supreme Court. Some commentators have found such provisions "unsurprising":

> Section 4 requires an action under the *Privacy Act* to be brought in the Supreme Court of British Columbia, notwithstanding anything in another Act. Thus, the action must be brought in the Supreme Court even if the amount of damages sought would otherwise bring the claim within the small claims civil jurisdiction of the Provincial Court. ...
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> ...

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1 Dean Prosser, "Privacy" (1960) 48 *Cal. L. Rev.* 383 at 389.

2 For a good review of examples where the court has, and has not, found a right to privacy and a violation, see *Report on the Privacy Act,* at 9-10.

> Sections 4 and 5 give the statutory torts under the *Privacy Act* features that are shared with the torts of libel and slander, often referred to collectively as "defamation." Defamation actions must also be brought in the Supreme Court regardless of the amount, if any, claimed in damages, and a right of action for defamation also ends with the death of the person allegedly defamed.
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> ...
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> ... Damage to reputation can also be one of the consequences of a violation of privacy or exploitation of someone's name or photographic image. The same facts may conceivably support a claim for defamation and another under the *Privacy Act*. It is appropriate and efficient to try them before the same court in the same action. For these reasons, the presence of sections 4 and 5 in the *Privacy Act* is unsurprising. (*Report on the Privacy Act*, at 20)

The above comments suggest that s. 4 may only have intended to provide jurisdiction to the Supreme Court as opposed to the Provincial Court, as in the case of similar torts like defamation, and to ensure efficiency by having similar causes of action in the same forum.

There is no doubt that s. 4 grants exclusive jurisdiction to the Supreme Court. In *Petrov v. British Columbia Ferry*, [2003] B.C.J. No. 395 (QL), 2003 BCSC 270 ("*Petrov*"), in chambers, Madam Justice Stromberg-Stein dealt with the preliminary issue of whether the Supreme Court had jurisdiction to hear an employee's claim against her employer under a collective agreement for the manner in which the employer opposed her claim for a work related injury (at para. 1). The plaintiff based her claim on negligence, breach of fiduciary duty, nuisance, harassment, breach of the *Workers Compensation Act*, breach of the *Human Rights Code* and breach of the *Privacy Act*.

The Supreme Court reviewed the applicable law with respect to jurisdiction, and found that the Court lacked jurisdiction to hear the plaintiff's claims of negligence, breach of fiduciary duty, nuisance, harassment, breach of the *Workers Compensation Act* and breach of the *Human Rights Code* because an arbitrator had exclusive jurisdiction (at paras. 39-42). In the circumstances, the Court found that the essential dispute arose from the collective agreement (at para. 45). However, the Court determined that the Supreme Court retained jurisdiction with respect to the privacy claim:

> By operation of s. 4 of the *Privacy Act*, this court has exclusive jurisdiction to hear the claim for violation of s. 1(1) of the *Privacy Act*. Section 4 states:
>
> > 4. Despite anything contained in another Act, an action under this Act must be heard and determined by the Supreme Court.
>
> Ms. Petrov's claim for breach of the *Privacy Act* is properly heard by this Court ... (at paras. 47-48)

This chambers decision reinforces a formal interpretation of s. 4, suggesting that arbitrators may not in fact have jurisdiction to hear and determine a breach of the *Privacy Act*.

Despite this narrow interpretation by the courts, some arbitrators have chosen to rely on the *Privacy Act*. The courts have hitherto not overruled them, although the Court of Appeal noted the jurisdictional issue in *Communications, Energy and Paperworkers' Union of Canada, Local 433 v. Unisource Canada Inc.*, [2004] B.C.J. No. 1261 (QL), 2004 BCCA 351 ("*Communications*"). In that case, the Court of Appeal held that it had no jurisdiction to review an arbitrator's decision regarding camera surveillance, because in substance it concerned labour relations matters and was properly a matter for the Labour Board. The Union had raised, and the arbitrator had considered, the *Privacy Act* at the hearing. As an aside, the Court commented that:

> Although not mentioned by the arbitrator, it is significant that the *Privacy Act* assigns exclusive jurisdiction for deciding actions for the statutory tort outlined in s. 1(1) to the B.C. Supreme Court. (at para. 9)

The Court found that the arbitrator's decision did not turn on any analysis or interpretation of the *Privacy Act*, but rather on factual determinations and management rights. Therefore, there was no issue of general law. However, the Court did not take issue with the arbitrator's findings regarding the applicability of the *Privacy Act* in the circumstances.

1. Surveillance

Arbitrators have tended to make most use of the *Privacy Act* in the context of surveillance related privacy breaches. One particularly significant case is *Doman Forest Products Ltd and IWA, Local 1-357* (1991), 13 L.A.C. (4th) 275 (Vickers) ("*Doman Forests*"). The grievor was discharged and the employer sought to introduce video and personal observation evidence. The union objected to its admission on the basis of the grievor's privacy rights. Arbitrator Vickers made the following oft-quoted comments in regards to the *Privacy Act*:

> In British Columbia, the subject of privacy is addressed in the *Privacy Act*. Section 1 reads as follows:
>
> ...[cites sections of the *Privacy Act*]...
>
> The first thing to note is that the right to privacy is not absolute. It must be judged against what is "reasonable in the circumstances" and, amongst other things, is dependent upon competing interests such as "the relationship between the parties." It may be violated by the "surveillance," which I take to be both visual and electronic. The *Privacy Act*, therefore, gives the grievor a legal right to privacy in certain circumstances, quite apart from any contractual right he may have with the company.
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> ...
>
> While no specific provision exists in the collective agreement insuring a right to privacy it is, in my opinion, impossible to read this agreement outside of the value system imposed by the *Charter* and the statement of law contained in the *Privacy Act*. Indeed, the company did not argue that the *Privacy Act* was inapplicable. (at 279-80)

This leading surveillance case demonstrates how arbitrators have relied on the *Privacy Act* to create "...a legal right to privacy ..." quite apart from any specific contractual language, and have unquestionably taken jurisdiction over it. The test for breach of privacy, articulated following this passage, is frequently quoted by arbitrators without reference to the *Privacy Act* itself.

The only arbitration to explicitly deal with jurisdiction and s. 4 of the *Privacy Act* is *Saint Mary's Hospital (New Westminster) and Hospital Employees Union*, [1997] B.C.C.A.A.A. No. 855 (QL), (1997), 64 L.A.C. (4th) 382 (Larson). This case concerned the employer's surreptitious video surveillance of its employees at work. Arbitrator Larson reviewed the *Privacy Act*, and emphasized that the state assumes no role in the statute's enforcement as it "establish[es] a civil right which can ordinarily only be enforced through litigation ..." (at 390). According to the arbitrator it is this point that is confirmed by s. 4, and an arbitrator may take jurisdiction despite this section under the provisions of the *Code*:

> ... By way of confirmation of that enforcement mechanism, section 4 says that an action under the Act shall be heard and determined by the Supreme Court.
>
> Nevertheless, it is my view that an arbitration board may take jurisdiction under section 99 of the *Labour Relations Code*, S.B.C. 1992, c. 82, to interpret and apply the Act for any purpose that is incidental to a determination of a substantive issue that arises under a collective agreement ... (at 390)

Other surveillance-related arbitrations have referred to the *Privacy Act* as authority for employees' privacy rights, but have failed, at least explicitly, to interpret and apply the legislation any further. In most cases, the employer has attempted to lead evidence obtained on surveillance, and the union has opposed it on the basis of the *Privacy Act*.[3]

2. Personal Information

There are only a few BC arbitrations that explicitly refer to the *Privacy Act* in non-surveillance contexts. One of these cases is *Health Employers Association of British Columbia v. British Columbia Nurses' Union*, [2006] B.C.C.A.A.A. No. 162 (Hickling) (QL) ("*Health Employers*"). In this case, the union filed a policy grievance with regard to questions on the employer's routinely administered medical form. The union raised three statutes recognizing privacy, one of which was the *Privacy Act*. Although appearing to implicitly accept jurisdiction over the *Privacy Act*, Arbitrator Hickling determined that it was not relevant in the circumstances:

> The first, in terms of the order of enactment, was the *Privacy Act* (1979), which made it a tort, actionable without proof of damage, willfully and without claim of right to violate the privacy of another. *The focus of that statute was on such matters as trespass, eavesdropping, surveillance or the unauthorized use of another's name or portrait. Its citation was appropriate in the St. Mary's Hospital and Alberta Wheat Pool cases which involved that kind of situation*. It is not particularly pertinent to the present situation. (at para. 70; emphasis added)

Aside from the issue of jurisdiction, the narrow interpretation taken in *Health Employers* of what kinds of matters fall under the *Privacy Act* is somewhat at odds with the statute's historical origins and the explicit language of s. 1(4) that states, "Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass." Not only are privacy violations not limited to trespass actions, but the examples of eavesdropping and surveillance are given "without limiting" the other provisions of the *Privacy Act*. This interpretation is also at odds with how the courts have interpreted privacy under the statute, which has been found to include the inappropriate release of individual's financial information and intrusive personal questions (*B.M.P. Global Distribution Inc. v. Bank of Nova Scotia* (2005), 8 B.C.L.R. (4th) 247 (S.C.), varied on other grounds (2007), 63 B.C.L.R. (4th) 214 (C.A.); *I.C.B.C. v. Somosh* (1983), 51 B.C.L.R. 344 (S.C.)).

Another case making limited reference to the *Privacy Act* is *Canadian Assn. of Industrial, Mechanical & Allied Workers, Local 12 v. Shell Canada Products Ltd. (Shellburn Refinery) (Vickers Grievance)*, [1990] B.C.C.A.A.A. No. 402 (QL), (1990) 14 L.A.C. (4th) 75 (Larson, Henderson, Hunter) ("*Shell Canada*"). This grievance concerned the right of the employer to unilaterally impose a policy requiring medical certificates of fitness. The panel commented that the legislation was a foundation for privacy rights, although it did not make any further comment on it throughout the decision:

> Under s. 1(1) of the *Privacy Act*, R.S.B.C. 1979, c. 336, it is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right to violate the privacy of another. The problem for the employee, however, is that right is not absolute. Section 1(2) qualifies it by reference to what is "reasonable in the circumstances, due regard being given to the lawful interests of others." Section 1(3) goes even further by requiring that regard be had to the nature of the relationship between the parties. (at para. 61)

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3 See *Alberta Wheat Pool and Grain Workers' Union, Local 333 (Re)* (1995), 48 L.A.C. (4th) 332 (Williams); *Pacific Press Ltd. v. Vancouver Printing Pressmen, Assistants and Offset Workers' Union, Local 25 (Dales Grievance)*, [1997] B.C.C.A.A.A. No. 574 (QL), (1997) 64 L.A.C. (4th) 1 (Devine); and *Public Service Employee Relations Commission v. BCGEU (Watta Grievance)*, [1998] B.C.C.A.A.A. No. 699 (McConchie) (QL) ("*Public Service*").

The Labour Relations Board has also sparingly addressed the *Privacy Act*. In *P. Sun's Enterprises (Vancouver) Ltd. (Re)*, [2003] B.C.L.R.B.D. No. 301(QL), the employer argued that if it provided the union with a list of names, home addresses and telephone number of employees in the bargaining unit, it would amount to a breach of the *Privacy Act*. The Board held that the *Privacy Act* made it a tort to violate the privacy of another, but was not applicable in the circumstances and/or did not constitute a privacy violation:

> British Columbia's *Privacy Act*, R.S.B.C. 1996, c. 373 does make it a tort for any person to wilfully and without claim of right to violate the privacy of another. However, it contains no reference to "personal information" and, in any event, provides, in Section 1(2) that "[t]he nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others." In my view, an employer does not violate the privacy of its employees if it provides to those employees' certified bargaining agent information that enables the bargaining agent to contact the employees to fulfil its statutory obligations to the employees. (para. 31)

3. Unreasonable Search

The *Privacy Act* has also been invoked in an unreasonable search case. In *Bullmoose Operating Corp. v. Communications, Energy and Paperworkers Union of Canada, Local 443 (Power Grievance)*, [2001] B.C.C.A.A.A. No. 361 (Moore) (QL), the employer attempted to rely on surveillance evidence to substantiate the discharge of the grievor. The union objected to its admissibility on the basis that it was obtained as a result of an improper or unreasonable search (at para. 2). The union relied on the *Charter* and the *Privacy Act*. Arbitrator Moore found the *Charter* inapplicable, and relied on the law as developed in *Doman Forests* that, as we have seen, in turn relied on the *Privacy Act* (at paras. 50-51).

4. BC Arbitrations: Summary

The above cases suggest that arbitrators are more willing to rely on and make reference to the *Privacy Act* where it has been used before: surveillance cases. However, even in those cases, arbitrators only refer to it in the sense of creating privacy rights for employees, failing to fully engage in an analysis under the statute in terms of whether or not there has been a privacy violation. Most arbitrators choose to follow "arbitral jurisprudence," although that very jurisprudence may itself be an application of the *Privacy Act*. In non-surveillance contexts, arbitrators have predominantly found the legislation inapplicable, choosing to unnecessarily limit the scope of the *Privacy Act*.

Although *Petrov* states exclusive jurisdiction lies with the courts, it is the authors' view that this underused statute may properly be interpreted and applied pursuant to an arbitrator's ever expanding jurisdiction. Arbitrators in other jurisdictions appear to support this view.

D. Jurisdiction in Other Provinces

Privacy legislation in Saskatchewan and Newfoundland contain similar clauses to s. 4. Section 5 of the Saskatchewan *Privacy Act*, states that: "Notwithstanding anything in any other Act, an action for violation of privacy shall be commenced, tried and determined in the Court of Queen's Bench." Newfoundland's *Privacy Act* similarly states that actions can only be brought in court, pursuant to s. 8: "An action for violation of privacy shall be heard and determined by the Trial Division." Although Manitoba has similar privacy legislation, it contains no provision limiting the forum in which the action may be brought.

Despite this clear direction to bring actions before the Queen's Bench in Saskatchewan, one arbitrator has taken jurisdiction over the statute's interpretation and application. We could not locate any arbitrations from Newfoundland that explicitly discussed their *Privacy Act*.

In *United Steelworkers, Local 7552 v. Agrium (Schulte Grievance),* [2009] S.L.A.A. No. 9 (Hood) (QL) ("*United Steelworkers*"), the employer terminated the grievor and wished to introduce video surveillance of the grievor's off-site activities to justify termination. The union objected on the basis that it violated the grievor's privacy and was unreasonable in the circumstances. Arbitrator Hood reviewed the diverging arbitral law with respect to the tests to be applied to admitting such evidence, from the *Doman Forest* approach focusing on reasonableness to the court's approach of relevance and reliability. Arbitrator Hood made the following comments with respect to the *Privacy Act*:

> Saskatchewan has legislation that protects a person's privacy. *The Privacy Act*, R.S.S. 1978, c. P-24 (the "*Saskatchewan Privacy Act*") provides an actionable tort compensable in damages and other relief when there is a violation of a person's privacy. *The Privacy Act* provides examples of violations of privacy, defenses and considerations in determining when such violation takes place. The relevant sections are as follows:
>
> ...
>
> Saskatchewan law protects a person's privacy ... Employers are obliged to comply with the law. *I see little difference between The Privacy Act and other employment related statutes, the substantive rights and obligations of which are implicit in every collective agreement* (see *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42) (at paras. 24, 47; emphasis added)

It is clear that Arbitrator Hood had no difficulty implying the rights and obligations of the *Privacy Act* into the collective agreement.

This case strongly suggests that the *Privacy Act* may be properly read into collective agreements and create the necessary foundation for an arbitrator to take jurisdiction. At least one arbitrator has explicitly found that such privacy legislation is "employment related." Unfortunately, the arbitral and case law in this area is sparse and fails to provide any further guidance.

IV. Common Law Torts

A. Breach of Privacy

As discussed above, unions have chosen to ground some privacy claims in the *Privacy Act*. There is also, in some cases, some discussion of "*Charter* values" and the need to develop the common law in accordance with them (for example, *Communications*, para. 22). However, just as the arbitral jurisprudence lacks a rigorous analysis of the *Privacy Act*, it also lacks an analysis of whether the tort of breach of privacy exists in BC, and if so, what the elements of that tort are. Absent such a tort, it is difficult to conceive what "common law" rights the *Charter* values would be applied to.

The common law tort of invasion of privacy has not been recognized by the courts in BC. The judgment in the first case decided under the *Privacy Act*, *Davis* (C.A.), *supra*, states (at para. 7):

> I have not found any Canadian, English, or American cases which are of assistance in construing the British Columbia *Privacy Act*. Such as deal with the invasion of personal privacy are mostly concerned with publication of facts relating to the lives of citizens and their peccadilloes, with wire tappings of conversations, and with the unauthorized use of portraits.

In the absence of common law jurisprudence on the subject, the Court turned to the *Black's Law Dictionary* definition of "Right of Privacy" to interpret the statute.

Legally, there are many ways to deal with privacy issues. Other torts, such as defamation, intentional infliction of mental suffering, or trespass, have been applied to facts that could also be litigated as breaches of personal privacy. Section 7 of the *Charter* has been invoked as guaranteeing a right to

privacy, as have *Charter* values. Part 6 of the *Criminal Code* addresses breaches of privacy through eavesdropping equipment, while other Parts deal with trespass, stalking, and defamation.

Canadian jurisdictions such as Ontario, that do not have a statute like BC's *Privacy Act*, have debated whether to recognize a common law of breach of privacy. Recently, that debate has shifted towards recognition. In *Somwar v. McDonald's Restaurants of Canada*, [2006] O.J. No. 64 (S.C.J.), the defendant employer had conducted an unauthorized credit check on the plaintiff employee. The employee sued for breach of privacy, and the defendant brought a motion to strike on the basis that there was no such cause of action. The Court considered whether there was a common law tort of invasion of privacy (paras. 13, 22, 31):

> The potential existence of a common law intentional tort of invasion of privacy has been discussed on various occasions in the jurisprudence of the courts of Ontario. Many of these cases involved intrusion into the plaintiff's seclusion or private affairs and thus fall within Prosser's first category of privacy interests.
>
> ... It is not settled law in Ontario that there is no tort of invasion of privacy ...
>
> Even if the plaintiff's claim for invasion of privacy were classified as "novel" (which, in any event, is not a proper basis for dismissing it) the foregoing analysis leads me to conclude that the time has come to recognize invasion of privacy as a tort in its own right.

This debate has also taken place in the BC courts. In *Lord v. Canada*, [1999] B.C.J. No. 356 (C.A.), the Court overturned a lower court's dismissal of a breach of privacy action. The plaintiff was videotaped by prison authorities while visiting his son and the tape was subsequently broadcast on television. The two year limitation period for actions under the *Privacy Act*,[4] set by s. 3(f) of the *Limitation Act*, had expired. The Court determined none of the postponement provisions of the *Limitation Act* applied, and found (paras. 18–19):

> I cannot say, in light of the expansion of tort liability which has taken place in Canada in recent years, that the appellant has no possible claim.
>
> ...
>
> Insofar, therefore, as this action is founded upon the *Privacy Act* of British Columbia, it is statute barred but, as I have said, it is not statute barred if it can be founded on a common law right. Whether any action lies at common law for what happened in this case is not in issue before this Court.

The case was sent back because the plaintiff had never argued a common law tort before the court. McKinnon J. ([2000] B.C.J. No. 1206) declined to determine whether there was such a tort, in part because the plaintiff was self-represented and could not make adequate legal argument to found a new tort. Instead, the Court found that the facts of that particular case could not support finding a breach if such a tort did exist.

The question has come up in two subsequent cases: *Hung and Gardiner*, 2002 BCSC 1234, upheld 2003 BCCA 257, and *Bracken and Vancouver Police Board*, 2006 BCSC 189. *Bracken* includes a statement that there is no common law tort of invasion of privacy, and references *Hung* as authority for that statement. *Hung*, however, could be interpreted less restrictively. The Supreme Court ruling in *Hung* was a Rule 18A application by the Institute of Chartered Accountants to dismiss the plaintiff's action against them. Ms. Hung, an accountant, had been reported to the Institute and subsequently sued them for several torts including breach of privacy. The plaintiff was self-represented. The Court found that

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4 Note that s. 3(1)(a) places the two year limit on "damages in respect of injury to person ...", but Southin J. found the separate inclusion of defamation and *Privacy Act* actions in s. 3 indicates s. 3(1)(a) does not have a broad enough meaning to encompass actions for breach of privacy.

"she has not provided any authorities that persuade me there is a common law tort of invasion of privacy in this province" (para. 110). Ultimately the decision was made, and upheld at the Court of Appeal, on the grounds of absolute privilege for professional bodies. Given that *Bracken* also involved a self-represented litigant, it may be that the argument for a common law tort has yet to be made.

It remains, in our opinion, an open question whether a common law tort of breach of privacy exists in BC, and even in Canada. Given that s. 4 of the *Privacy Act* could preclude arbitrators from considering the statutory tort (although we argue that it does not), one would expect some debate in the arbitral jurisprudence as to whether there is a cause of action for breach of privacy before an arbitrator.

Nonetheless, no such debate exists. Rather, there are numerous arbitration awards that discuss *Doman*, privacy rights, or *Charter* values. There is no longer any debate over whether such rights exist. If so, according to the old maxim,[5] there must be a remedy. What cause of action founds that remedy?

In *Bullmoose*, Arbitrator Moore based his analysis on *Doman*, as stated above, but did not cite the *Privacy Act*. Rather, he stated that (at para. 50):

> Finally, the cases demonstrate that the recognition of a potentially limited right to privacy for employees and the adoption of a reasonableness test has found its way into the arbitral jurisprudence or what may be called the arbitral common law (see for example *Algoma*). Although some of this jurisprudence predates the *Charter* it is clear that at least some of the post enactment cases have found support for this reasoning and approach in the *Charter*. I therefore propose to apply to the search related privacy issue in this case the same reasonable balancing of interests approach as was used in *Doman* with respect to the surveillance based privacy issue.

Despite this, we have been unable to discover any BC arbitration awards that explicitly acknowledge the existence of a common law tort for breach of privacy or deny its existence, apart from some very early decisions against it (*SFU and AUCE Local 2*, [1985] B.C.C.A.A.A. No. 310 (Moore), citing also *Pacific Press*, unreported, November 14, 1975 (McIntyre)).

1. Ontario Arbitrations

In Ontario, at least one arbitrator has ruled that there is no common law tort of invasion of privacy. In *Cargill Foods and UFCW, Local 633* (2004), 133 L.A.C. (4th) 306, Arbitrator Craven dismissed a claim in tort for breach of privacy (at paras. 80-83):

> The Union says there is an established or emergent tort of invasion of privacy at common law, and that an allegation that an employer has invaded the privacy of unionized employees by implementing video surveillance is arbitrable because it arises within the ambit of the collective agreement per *Weber*. The Employer says the courts of Ontario have not recognized a tort of invasion of privacy; that in any event employees have no right to privacy in the workplace, where they are subject to supervision; and that even if there were such a right, arbitration would not be the proper forum in which to enforce it.
>
> ...
>
> Whether or not there is an established or emergent tort of invasion of privacy at common law, there is certainly an emergent consensus of opinion among arbitrators in Ontario that employees do not have a reasonable expectation of privacy in the workplace where they are subject to supervision. Despite an earlier inclination to

5 *Ubi jus ibi remedium*, where there is a right there is a remedy.

> follow *Re Doman Forest Products Ltd. and I.W.A., Loc. 1-357* (1990), 13 L.A.C. (4th) 275 (Vickers), more recently arbitrators in this province have recognized that that decision was based at least in part in a statutory right arising out of the British Columbia *Privacy Act*, R.S.B.C. 1996, c. 373, which has no counterpart in Ontario. See, for example, *Toronto Transit Commission* (Solomatenko) at 99-101 and 106, *Hercules Moulded Products* at 184, and arbitrator Armstrong's final award in *Lenworth* at 86.
>
> If there is not a free-standing common law right to privacy in the workplace in circumstances where the employee is subject to supervision, then it is difficult to see how a tort claim asserting an invasion of privacy by the employer in those circumstances can be made out. I acknowledge that this reasoning is somewhat circular, in the sense that the evolution of the common law might conceivably lead to the discovery by Ontario courts that there is a legal right to privacy in the workplace, however qualified. None of the cases cited to me establishes that this evolutionary threshold has been crossed. The fact that the legislatures of other common law jurisdictions in Canada and elsewhere have found it necessary or advisable to make special statutory provision for workplace privacy strengthens the view that it has not been crossed.

Note that Arbitrator Craven did not say that management enjoyed an unfettered right to conduct surveillance of its employees. In his subsequent award on the merits, he stated that "the collective agreement should be read to include an implied term that intrusive employer inquiries, including the in-plant video surveillance at issue here, are only permitted if reasonable in the circumstances" ([2008] O.L.A.A. No. 393 para. 97).

Even so, one arbitrator in Ontario has awarded damages for breach of privacy. In *North Bay General Hospital and OPSEU*, 2006 CLB 12757, an in-house occupational health and safety manager disclosed the vaccination status of an employee to her manager. Arbitrator Randall awarded her $750 in punitive damages, a small sum to enforce the need to protect the integrity of the Occupational Health Department. Union counsel cited *Doman* in support of his submissions.

2. Standing?

Even if the cause of action can be established, a further wrinkle has arisen with respect to breach of privacy claims: whether unions have standing to pursue such claims on behalf of their members.

In *Facilities Subsector Bargaining and HEU and BCNU*, [2009] B.C.J. No. 2267 (Punnett), BCNU applied to strike HEU's claim against it which in part was for breach of privacy. HEU alleged that personal information of their members was obtained and used by BCNU without consent, for the purposes of organizing. BCNU argued that the *Privacy Act* created an *in personam* claim only, and that HEU could not sue in tort on behalf of its members. The Court agreed, finding (at paras. 54–58):

> Although unions do have the right to represent members' rights generally in such matters as right to information applications and collective bargaining, the authorities cited do not support a union's right to advance a claim in tort for the breach of privacy allegedly suffered by its members.
>
> ...
>
> ... Unions seeking to protect their members' privacy rights from other unions is neither within a union's role nor does it go to the root of a union's existence. Members join a union in order to increase their bargaining power with employers and to have an advocate when employer actions are not in line with the collective agreement. They do not join a union because they wish to have their privacy rights protected from violation by another union ...
>
> This appears to be the first time a union has attempted to bring an action in tort for breach of privacy of a member. No authority directly on point has been cited.

> I conclude that the *Privacy Act* establishes a statutory tort of breach of privacy that is an *in personam* right to privacy.

This finding could be limited to inter-union disputes, since a claim against an employer could fall within the purpose of union membership.

B. Breach of Confidence

Due to the legal complications outlined above, unions may wish to bring actions under other torts that are more frequently used to obtain damages, such as intentional infliction of mental suffering. We will briefly review another that is seldom used by unions: breach of confidence.

Breach of confidence can found an action that includes components of breach of privacy. The three elements of breach of confidence are[6]:

> First, the information itself ... must "have the necessary quality of confidence about it." Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it ...

The duty of confidentiality is well recognized in business relationships (as in *International Corona v. Lac Minerals*, [1989] 2 S.C.R. 574) and in privileged relationships, such as that between lawyer and client. A duty of confidentiality has also been applied to government records, medical records, financial records, and school records.[7]

In the labour context, the duty has been successfully invoked by employers wishing to suppress confidential documents. In *Fraser Health Authority v. Hospital Employees' Union*, 2003 BCSC 807, the Court upheld an injunction granted to the FHA, ordering the HEU to remove confidential documents from its website and to surrender those documents to the FHA. An injunction was also granted to Telus in *Telus v. Telecommunications Workers' Union*, 2005 BCSC 642, preventing the TWU from using confidential documents in ongoing court and tribunal proceedings. In both cases, the documents were leaked to the union. In neither case did the employer establish that the union owed a duty of confidentiality. Rather, the Court stated that confidentiality adheres to documents even as they pass to third parties, as found in *Cadbury Schweppes v. FBI Foods*, [1999] 1 S.C.R. 142.

Also in the labour context, employees have been disciplined for breaching their duty of confidentiality by disclosing medical records (*G.R. Baker Memorial Hospital Society and H.E.U.* (1997), 50 CLAS 305), personnel files (*Yellowknife Education District No. 1 and U.S.W.A., Local 8646* (1992), 28 CLAS 135), and details of a harassment complaint (*Heritage Credit Union and U.S.W., Local 1-405* (2009), 186 L.A.C. (4th) 252).

This tort could be used by unions in cases where, rather than seeking to prevent a breach of privacy, they are litigating one that has already occurred. These rulings could be cited by unions in cases where documents containing, for example, employee medical information are mishandled by the employer.

This appears to be the approach in *Kawartha Pine Ridge District School Board and Elementary Teachers' Federation of Ontario* (2008), 169 L.A.C. (4th) 353. A principal released details of a teacher's illness to parents, an action that was grieved by her union. The Board challenged the jurisdiction of an arbitrator to hear the dispute. Arbitrator Luborsky found that he had jurisdiction to hear the claim in tort. The collective agreement contained a privacy clause. He found that the information about her condition had only come to the Board due to the employment relationship, so that the *Weber* analysis

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6 *Coco v. A. N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.) at 47.

7 "Privacy's Other Path: Recovering the Law of Confidentiality," Neil Richards and Daniel Solove. *Georgetown L. J.*, Vol. 96:123 at 157.

conferred jurisdiction on him. He found that employers collect information about their employees on the basis that it will be kept confidential, and a breach of confidentiality gives rise to an action in tort (although he variously described this as a breach of privacy and a breach of confidentiality). He also found he would have jurisdiction to award damages for that breach.

Given that Arbitrator Luborsky was able to find language in the collective agreement that dealt with confidentiality, his award may not be generally applicable. Unions without such language should certainly consider bargaining for its inclusion.

V. Remedies for Breach

An arbitrator's remedial powers arise under s. 89 of the *Code*, which for our purposes includes the authority to provide a final and conclusive settlement of a dispute and make a monetary order:

> **Authority of arbitration board**
>
> 89 For the purposes set out in section 82, an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement, and without limitation, may
>
> (a) make an order setting the monetary value of an injury or loss suffered by an employer, trade union or other person as a result of a contravention of a collective agreement, and directing a person to pay a person all or part of the amount of that monetary value, ...

Such remedial authority has been interpreted broadly, as recognized by the Supreme Court of Canada:

> This Court's jurisprudence has recognized the broad remedial powers required to give effect to the grievance arbitration process. The need for restraint in the fettering of arbitral remedial authority was initially acknowledged by Dickson J. (as he then was) in *Heustis, supra*, at 781, wherein the policy rationale for judicial restraint was explained thus:
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> ...
>
> ... These decisions mark a trend in the jurisprudence toward conferring on arbitrators broad remedial and jurisdictional authority. Moreover, I cannot help but reiterate this Court's oft-repeated recognition of the fundamental importance of arbitral dispute resolution; see *Heustis*, *supra*; see also *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476; *Toronto Board of Education, supra*, and *Parry Sound, supra*. Arming arbitrators with the means to carry out their mandate lies at the very core of resolving workplace disputes. (*Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28, at para. 40)

An arbitrator may grant a declaration, damages or any other remedy that effectively settles a dispute. This has in some cases included the remedial authority to award aggravated and punitive damages (*Moznik*), as well as Charter damages (*Weber*).

The *Privacy Act* does not specify what particular remedy is available following a breach. However, the privacy legislation in Manitoba, Saskatchewan and Newfoundland all contain express powers regarding remedies, which includes awarding damages and granting injunctions. In Manitoba, the *Privacy Act* even provides for the exclusion of evidence that is obtained by virtue or as a consequence of a privacy violation (s. 7).

To date, courts have only granted damages for violations of the *Privacy Act* (*Report on the Privacy Act*, at 41). Although injunctions may be available in cases of continuing violations, the courts have tended not to grant them (*Report on the Privacy Act*, at 40-41).

In arbitrations that refer to the *Privacy Act*, the "remedy," if it can be called that, appears to be the exclusion, or in some cases destruction, of the evidence obtained contrary to the grievor's privacy

rights. For some reason damages appear not to have been sought or awarded. This may be related to the idea that damages are incapable of properly compensating such an invasion (*Shell Canada*, at para. 32). In nearly all the cases cited, the employer has attempted to admit video evidence, and the union has objected to its admissibility on the basis of the *Privacy Act*. This is so despite comments from the BC Supreme Court that inadmissibility does not automatically result from such a violation. In *Richardson v. Davis Wire Industries Ltd.*, [1997] B.C. J. No. 937 (S.C.) (QL) ("*Richardson*") a dismissed supervisor relied on the *Privacy Act* to exclude videotape evidence of him sleeping in the lunch room while on duty (at para. 40). The Court made the following comments:

> Furthermore, even if he had an expectation of privacy, a breach of privacy does not lead to the exclusion of the evidence in this case. The *Privacy Act* merely provides the foundation for a claim in tort and does not prohibit the admission of evidence, even if it were gathered contrary to the Act. (at para. 48)

Richardson was applied by the Labour Board in *Fraser Health Authority and BCNU*, BCLRB No. B102/2009 (Mullin).

Arbitrators in BC and Saskatchewan, however, appear more likely to exclude evidence on this basis than courts. In *St. Mary's Hospital*, Arbitrator Lanyon found that the employer had improperly used a surveillance camera. As a result, he ordered that the video be surrendered to him, only to be returned upon written request and once he was able to verify that it had been erased (at 401). In *GVRD and GVRDEU* (1996), 57 L.A.C. (4th) 113 (McPhillips), the arbitrator stated he would not hesitate to rule inadmissible evidence which had been obtained through an unreasonable invasion of privacy.

A similar remedy has been used for violations of provincial legislation regulating personal information, such as *PIPA* (*International Assn. of Bridge, Structural, Ornamental & Reinforcing Iron Workers, Shopmen's Local 712 v. EBCO Metal Finishing Ltd.*, [2004] B.C.C.A.A.A. No. 260 (Blasina) (QL)) and *FIPPA* (*University of British Columbia*, [2007] B.C.I.P.C.D. No. 30 (Boies Parker) ("*UBC*"). In *UBC*, the union alleged the employer had collected surveillance information in violation of *FIPPA* and then used that information to terminate the grievor. The union filed a complaint with the Privacy Commissioner, but the employer asked the arbitrator in the termination grievance to order that the material be preserved for production at the hearing. Arbitrator Hope so ordered. The decision from Ms. Boies Parker stated (para. 115 and 126):

> It would seriously undermine the important objectives of *FIPPA* if public bodies were free to use, with impunity, information collected in contravention of the law. Normally, it would be appropriate in these circumstances to either order the destruction of those records, or parts of them, which contain the illegally obtained information or, in the alternative, order UBC to refrain from making any use of them. The question raised in this case is whether I should exercise my discretion to issue such an order given the existence of an order by an arbitrator ...
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> ...
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> The complainant's submission makes it clear that the purpose of seeking the destruction of the documents is to preclude their use at the grievance hearing. However, the question of whether the records are admissible in the grievance hearing is a matter which is squarely within the authority of an arbitrator. I am satisfied that the arbitrator will take into account the fact that the information was collected contrary to law, and the importance of *FIPPA's* objectives, in making the determination regarding admissibility.

In the non-surveillance case of *Bullmoose*, Arbitrator Moore found that the employer violated the grievor's privacy by undertaking an unreasonable search (at para. 61). Arbitrator Moore located an arbitrator's jurisdiction to exclude improperly obtained evidence in the "unfair hearing principle" contained in the *Code* (at para. 61), and proceeded to exclude both the grievor's statements with respect to the evidence and the evidence itself (at para. 64).

Some arbitrators have recognized that the statutes do not require an automatic exclusion of evidence upon a privacy violation, but that arbitral authority has developed in surveillance cases to exclude the evidence at least where the employer has intended and/or sanctioned such improper surveillance (*Public Service*, at paras. 28-32). Intention has also played a large role in Manitoba caselaw (*Canada Safeway Ltd. v. United Food and Commercial Workers' Union, Local 832*, [2003] M.G.A.D. No. 10 (Hamilton) (QL), at para. 26).

In Saskatchewan, Arbitrator Hood declined to follow the court's approach to the admissibility of improperly obtained video evidence, stating that it is counterproductive to labour relations to allow the employer to rely on evidence that has violated one's privacy rights:

> ... It would be illogical to permit an employer to breach this legislation and then as a result of the breach rely upon evidence to establish just cause to support the termination of the employee whose very privacy was violated. Two wrongs do not make a right ...
>
> ...
>
> It is my view, in the circumstances, that it would neither be appropriate nor necessary to conclude that the surreptitious video surveillance of Schulte be admissible as of right if it passed the court test for admissibility. In the present circumstances this is not the appropriate test. Video surveillance of an employee's off-site activities should not be condoned when there is no reasonable basis to conduct the surveillance. Arbitrary or random surveillance runs afoul the purpose of the Collective Agreement. Such surveillance would not promote or continue the existing harmonious relations of the parties. It would be counterproductive to the employer-employee relations in a collective agreement to permit the employer to adduce video surveillance evidence of an employee's off-site activities no matter how obtained, unless otherwise agreed to, in support of just cause for termination. (*United Steelworkers, supra*, at paras. 47, 54)

Like the decision in *UBC*, this award appears to be principled rather than legalistic, motivated by a desire to achieve fairness. In the authors' view, this approach is consistent both with the *Code* and the current jurisprudence on the principled approach to admissibility.

VI. Conclusion

Due to the potential difficulties involved in pursuing a tortious claim pursuant to the *Privacy Act* before an arbitrator, one may ask where the utility lies in raising it, especially given other provincial legislation governing the collection, use and disclosure of personal information such as *FIPPA* and *PIPA*.

The authors suggest that the benefit primarily lies in the potential for a monetary award without proving that losses occurred. Where a union is faced with a privacy violation of its members and where there is difficulty in establishing actual loss or damage, the *Privacy Act* is a tool for obtaining a substantial remedy. A party may also be able to exclude a variety of evidence obtained in a manner that violates one's privacy, based on the arbitral authority that has developed. Additionally, where privacy legislation such as *FIPPA* and *PIPA* do not cover the privacy violation, parties should be able to rely on other sources of legislation to uphold their claim. As it is likely that the privacy rights enjoyed by employees in BC are not grounded in the common law, but the *Privacy Act*, it may simply be correct in law for arbitrators and counsel to refer to this founding piece of legislation in cases involving privacy violations.

On the other hand, parties need to be alive to the detriments involved in pursuing such a claim. While arbitrators have tended to take a more relaxed approach to determining privacy violations than the courts, a more stringent adherence to law as developed under the *Privacy Act* may ultimately limit the

success of such a claim. Indeed, one of the biggest problems with claims under the *Privacy Act* in court is that they are frequently unsuccessful. Another problem, not addressed in this paper, is the focus of the legislation on willfulness, which does not appear to have been taken up by arbitrators.

Where they can, unions may wish to pursue other avenues for remedying privacy violations: bargaining and enforcing collective agreement language; using other statutes, where applicable; and pursuing claims under other causes of action such as defamation and breach of confidentiality. Ultimately, though, the courts may need to be asked to make a final determination on whether a common law tort exists, and arbitrators may have to tackle the jurisdictional issues arising from s. 4, in order to have any certainty in this area of the law.