

Competing Rights and Interests: Employer's Right to Monitor the Workplace and Employee's Right To Privacy

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Overview

1. What is 'electronic monitoring' in the workplace?
2. What are the competing interests and rights in workplace monitoring?
- 3. What role have Canadian courts and arbitrators played in balancing interests?
4. What challenges do electronic technologies pose to workplace privacy rights?
5. What steps can employers take to safeguard employees' privacy rights?

Scope and Definition of ‘Electronic Monitoring’ in the Workplace

“**Electronic monitoring**” is a general term that refers to:

- the practice of continuous monitoring of the employee’s movement, thoughts, feelings, behaviour and actions;
- the collection and processing of information using AI/ML for the purpose of influencing or assessing the targeted employee;
- may also involve the exercise of power.

Technologies involved in Workplace Monitoring

- **First-generation:** audio and video surveillance (i.e. telephone and video cameras)
- **Second generation:** internet and email monitoring
- ~~○ **Third generation:** GPS (global positioning systems for purpose of (i.e.) tracking of drivers and vehicles~~
- **Fourth-generation:** biometric, access cards etc.
- **Fifth generation** - Today the combination of these technologies are being used in the workplace powered by artificial intelligence and machine learning (i.e.) data analytics that collects, process and analyze the aggregated data and provide insight about an individual or group of employees' performance



Global Demand for Workplace Monitoring Technologies

2015 – 30% of large employers monitored employees in a non-tradition way (including analyzing email texts, logging computer usage or tracking employee movements) (Gartner, HR Practice Group, 2019)

2018 – increased to 46% of employers were using electronic monitoring (Gartner, HR Practice Group, 2019)

2020 - global demand for employee monitoring software increased by 108% in April 2020 (Ball, Office of EU, at 12)

2021 - global value for employee monitoring software market was USD 1.12 billion (Spherical Insight Report)

2030 - expected to reach USD 2.10 billion (Spherical Insight Report)

Sources: The Future of employee monitoring - <https://www.gartner.com/smarterwithgartner/the-future-of-employee-monitoring>; Ball, K., *Electronic Monitoring and Surveillance in the Workplace*, Publications Office of The European Union, Luxembourg, 2021, ISBN 978-92-76-43340-8, doi:10.2760/5137, JRC125716; Spherical Insight Report <https://www.sphericalinsights.com/reports/employee-monitoring-software-market>

Competing Rights and Interest in the Employment Relationship

Employment relationship – formed through a contract or employment agreement that sets out the terms and conditions of the employment relationship.

Employer's interest – secure and maintain a productive and efficient workforce, minimize risks and liabilities and ensure a profit and stakeholder value

Employee's interests – gain employment, income and professional fulfilment.

Employer's Right:

- to collect data, process and disclose employee data for the purpose of efficiently and safely running its business operation

Employee's Privacy Rights:

- reasonable expectations of privacy in the workplace, including the right to know what data is being collected, when it's being collected and how it's being used

Role of Canadian courts and arbitrators in balancing competing interests

Courts and labour arbitrators have generally adopted a balancing approach, weighing the employee's right to privacy against the employer's *legitimate interests* in monitoring the workplace and considering the "the totality of the circumstances".

Four lines of inquiry guide the application of this test:

- 1) Whether there is a legitimate issue or demonstrable need for monitoring;
- 2) Whether the monitoring is likely to be effective to address that issue or meet that need;
- 3) Whether the loss of privacy is proportional to the benefit gained through the monitoring;
- 4) Whether there is a less privacy-invasive way of achieving the same end.

Role of Canadian Courts and Arbitrators in Balancing Competing Interests

—*Puretex Knitting Co. Ltd. v. Canadian Textile Chemical Union*, (May 29, 1979)

—Leading case that considered the legality of surveillance cameras in the workplace

—Arbitrator Ellis ordered for some of the cameras to be removed as it placed the ‘employees in constant surveillance;

[...] *In the use of electronic surveillance, it is apparent that we confront conflicting social values of considerable significance. There is on the one hand the principle of the right to privacy [...] of the crucial importance of preserving and nurturing the historically fragile concept of human dignity.*

[...] *The full-time use of closed-circuit television systems for constant observation of the work performance and conduct of employees in an industrial setting would be widely regarded, I believe, as seriously offensive in human terms. ... [I]t is difficult to conceive of circumstances in which considerations of efficiency would justify such an affront to human dignity, although even so, perhaps it is not impossible to do so.*”

— privacy interests must be balanced against the competing considerations of the employer’s operational concern and while the use of cameras to monitor employees was “*intrinsically objectionable*,” the “*degree of objection*” depended on the way the cameras were deployed and the purposes for which they are used

Role of Canadian Courts and Arbitrators in Balancing Competing Interests

Labourers' International Union of North America, Local 625 v. Prestressed Systems Inc. (2005), 137 L.A.C. (4th) 193

— *[...] the employer's right to protect its legitimate business interests **shapes the scope of the privacy right, but ... does not negate it.***

reasonableness test "better reflects the importance of privacy as an employee entitlement" because it prevents employers from "benefiting from the unwarranted acquisition of surveillance evidence" and ensures that "the employee whose right to privacy has been violated unreasonably [is] not penalized as a consequence."

Role of Canadian Courts and Arbitrators in Balancing Competing Interests

Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, 2013 SCC 62

[...] The ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy. As this Court has previously recognized, legislation which aims to protect control over personal information should be characterized as “quasi-constitutional” because of the fundamental role privacy plays in the preservation of a free and democratic society. [...]

Role of Canadian Courts and Arbitrators in Balancing Competing Interests

Elementary Teachers Federation of Ontario v. York Region District School Board, 2022 ONCA 476 (CanLII)

- OCA held that the teachers' recorded log on a personal google doc was considered a private diary; that they were entitled to record their private thoughts and have a reasonable subjective expectation of privacy
- OAC held that the school board and school principal violated the teachers' s. 8 of the Charter (right to be free from unreasonable search and seizure)
- OCA also held that information which tends to reveal intimate details of the lifestyle and personal choices of an employee also included any electronic communication of personal nature;

Challenges new technologies pose on employees' privacy rights

Traditional vs. Contemporary electronic monitoring

- Source and Degree of Intensity
- Quantity of Data Collected
- Use of AI/ML to Process Data
- Employer's Scope of Control Over Employee's Data
- Shift from the Core Purpose of workplace monitoring



Steps Employers Can take to Safeguard Employee's Privacy Rights

PRELIMINARY RISK ASSESSMENT

PROGRAM/ACTIVITY	
LOWER RISK	HIGHER RISK
Your program's risk level is based on the total of all risk factors. Each risk factor either increases or decreases the overall program risk.	
Involves limited personal information	Involves large amount of personal information
Does not involve sensitive personal information	Involves sensitive personal information such as financial or medical information, SIN, children's information
Context is not sensitive	Context is sensitive
Involves the personal information of a few individuals	Involves the personal information of many individuals
Does not involve personal information of vulnerable populations	Involves personal information of one or more vulnerable populations
Has a minimal impact on individuals (e.g. lower stakes)	Has a major impact on individuals (e.g. high stakes)
Is one-time or short term	Is long-term
Does not involve the additional risk factors (see additional risk factors above)	Involves one or more of the additional risk factors (see additional risk factors above)

- 1. Legitimate Purpose
- 2. Data Minimization
- 3. Transparency
- 4. Accountability
- 5. Substantial Privacy Risks Assessment