Workplace Privacy in Canada: A Content Analysis of Canadian Labour Arbitration Cases.

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Abstract

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Privacy in Canadian society has changed over the past several decades. With the development of computer technologies, the creation of new communication mediums, and the invention of increasingly sophisticated surveillance mechanisms, more personal information and data on our daily activities is being captured; we are leaving a digital footprint. This new technology and surveillance mechanisms are also entering our work lives. As a result, privacy protection is becoming an area of increasing concern for employees in the workplace. As technology advances and impacts on our privacy to a greater extent, Canadian laws and legislation need to advance and change to ensure the law progresses and provides adequate protection for Canadians in the workplace.

The employment relationship is unique in that there is an unequal power balance between the employer and the employee. Technological advances have made it easier for employers to monitor various aspects of their employees' daily work activities and gather very personal information about their employees. Some of the collected material and monitoring may be used for legitimate business purposes, but other material may be used as evidence in a discipline or dismissal action against employees.

Workplace privacy infringements are being reported with greater frequency. These infringements can take the form of an external hacker obtaining personal information on the company's clients; improper release of information, including losing a computer with personal information stored on it; or within an organization employees

themselves may be infringing on the privacy of clients by surfing client accounts; or employees may be left feeling their right to privacy was infringed upon by their employer, for example when an employer requests information from the employee, such as access to an employee's driver's abstract, when the employee is not hired as a driver for the company.

The question being asked in this study is: what is happening in the Canadian unionized workplace in regards to workplace privacy?

This study explores Canadian Labour Arbitration decisions using a content analysis approach to examine the nature of privacy decisions relating to Canadian unionized workplaces. This analysis looks for trends and findings that have developed over the years in these settings. The findings are presented in terms of descriptive statistics such as the name of the organization, the name of the union, and the sex of the grievor. Common themes evident in the cases are determined. The themes include: (1) the fact that the employer must follow the procedures set forth in the collective agreement and cannot discipline an employee when the employer has clearly not followed the process set out in the collective agreement; (2) a discussion of the Obey now, grieve later provision developed within the context of the case situation and (3) the need for the arbitrator to cite aspects of Brown & Beatty's Canadian Labour Arbitration book. Themes related to policy were also identified and include: (1) Does the employer have a right to implement the policy being questioned and does the policy invade employee privacy? and (2) How can privacy rights and dignity of individuals be balanced against the business interests of the employer when implementing a policy especially when safety/best interest of the worker is a concern? This analysis of Canadian Labour

Arbitration cases provides insight into the current position of privacy concerns in unionized workplaces in Canada and the direction arbitrators are taking in respect to these cases.

Acknowledgements

Many people have contributed to and been a part of my journey in completing not only this signature project, but also all that this program has entailed over the last three years.

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I could not have accomplished this goal without all of you. Through this process I have learned a lot about myself and gained new confidence in my abilities. It has changed me. However, it is time to close this chapter of my life and place my energy in other areas.

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CHAPTER 1: INTRODUCTION

Privacy is a challenging issue for workplaces in Canada. With the increase in technological innovation and advancements, more and more employee personal information and activities are being saved, shared, and accessible through computer systems. As well, there is more surveillance taking place than ever before. Employee privacy rights have a greater potential to be eroded and law makers must be encouraged to keep pace with these technological changes and enact new laws to protect employee privacy rights in Canada.

To visualize the extent to which our privacy is encroached upon in our day-to-day work lives, Levin (2007) writes:

> Let us follow Jennifer, a Canadian worker, as she goes through a typical day at work: As Jennifer arrives at work she will swipe a magnetic or radio frequency card with her photo and possibly other biometric information on it through a card reader in order to access her place of work. She may subsequently need to swipe her card again in order to move between areas within her workplace. Her entry, and perhaps several of the areas she moves through at the workplace, will be digitally video recorded. When Jennifer logs onto her computer a notice will pop up, informing her that the computer and all the content she will input while working, such as emails, instant messages, web addresses, etc. are the property of her employer and therefore subject to monitoring and retrieval at any time. She will have to click to indicate her acceptance of this notice before she is able to begin with her work of the day. If her employer is one of those that have already migrated to a digital phone system such as Voice over Internet Protocol (VoIP) Jennifer's telephone conversations will be recorded as well, although if Jennifer is employed as a

> customer services representative she will be have been used by now [sic] to continuous monitoring and recording of her telephone conversations. Our Jennifer, however, is a technician that conducts service calls at her employer's clients. As she drives around Canada her van is constantly communicating its location via Global Positioning System (GPS) technology directly to her employer (p. 313).

This example shows just how much technology has advanced and provides frequent access to our lives in ways that we once considered private. The employer/employee relationship is ever evolving and privacy rights of employees are of paramount concern in this changing technological world. Employees are watched in more ways and have more information accessible through various sources than ever before. Our privacy is not as secure as it was in simpler times, before all of the advancements in technology.

I became interested in employee privacy issues due to changes in my workplace. These concerns led me to the research question, What is happening in the Canadian unionized workplace in regards to workplace privacy? To examine this question, I decided to analyze Canadian Labour Arbitration cases to determine what specific privacy issues are facing unionized organizations in Canada and what are the resultant actions and decisions in these cases.

The purpose of this study is to review Canadian Labour Arbitration cases in regards to workplace privacy, which contain a component of disciplinary action, to determine if any trends exist, and what arbitrators are deciding in these cases.

Privacy: An analysis of Canadian Labour Arbitration cases

Research Overview

This content analysis uses Weber's (1990) Basic Content Analysis approach to determine trends in Canadian Labour Arbitration decisions relating to privacy in the Canadian unionized workplace. An analysis was completed of the descriptive statistics present in these cases. In addition, an analysis of the decisions and conclusions of the arbitrators was conducted to identify common themes in the cases.

Organization of this Thesis

This paper is organized into five chapters. Chapter 2 reviews the relevant literature in regards to privacy in Canada and provides a definition of privacy that will be used in this paper. Chapter 3 provides the approach to the study, including the data collection process, the criterion for inclusion of cases into this study, and data analysis procedures. Chapter 4 presents the findings from the study, including the descriptive statistics of the data collected, as well as identifying patterns, trends and themes within the arbitrator decisions and conclusions. The final chapter, Chapter 5, provides the discussion and conclusion aspects of this study. It also indicates the limitations of the study, and future research areas available as a result of this study.

CHAPTER 2: LITERATURE REVIEW

The literature in this section provides insight into scholarship written about workplace privacy in Canada. This section will examine how privacy has been defined and indicate what specific definition is used for the purpose of this study. Other topics covered include a discussion of the dynamics of the workplace relationship and how that relationship impacts privacy rights in the Canadian workplace as well; an outline of current privacy legislation available in Canada is provided. This section will also review areas such as workplace surveillance and drug testing.

Canada is an information society. With developments in computer technology, more information about us is collected, stored and disseminated in ways that could infringe on our right to privacy. The need to protect our information and privacy has been succinctly stated by Cameron & Palmer (2009) as follows:

> Citizens legitimately worry about encroachment upon their privacy rights. The potential for unwarranted intrusion into individual personal lives is now unparalleled. In an era where people perform many tasks over the Internet, it is possible to learn where one works, resides or shops, his or her financial information, the publications one reads and subscribes to, and even specific newspaper articles he or she has browsed. This intrusion not only puts individuals at great personal risk but also subjects their views and beliefs to untenable scrutiny […] (p. 116).

We, as citizens, have a right to privacy. Yet, it is not a complete right. Information must often be provided for legitimate business purposes, such as the requirement to provide information to our employer, such as personal data and contact information, medical information

for workplace accommodation issues; banking information for direct deposit purposes, or providing a detailed history to our employer in order to maintain or enhance a current security clearance (deBeer, 2003).

Employment relationship

The employment relationship is unique. Unlike most relationships, this is one where an unequal power balance exists with the employer holding more power in the relationship. The employee is vulnerable because of the economic necessity of employment. Work is a significant aspect of our lives and Anderson (2006) describes the importance of work in our lives as follows:

> Work is one of the most fundamental aspects of a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect (p. 2).

To the employee, work and privacy are equally important. Because of the inequity of the employment relationship, there is a greater need for privacy protection of the employee. Both the employer and the employee have a role to play in protecting that privacy and one tool that can be used to balance the inequity is legislation, which helps to define internal policy and develop actions which are equitable to both parties. deBeer (2003) argues, "judges, arbitrators, legislators, politicians, and other policy makers have not been unmindful of the power imbalance that often exists in the employment relationship, and have previously attempted to balance employers' needs and employees' rights" (p. 1).

Employment relationship – privacy concerns

Workplace privacy matters are becoming a more prominent focus in today's workplace because of advancements in computer technology and the development of new communication mediums. In the employment context, three aspects of privacy are an evolving issue. The first of which is employee testing policies, which include drug and alcohol testing and personality testing. The second issue is electronic monitoring practices. Technology has changed the way in which monitoring occurs, and surveillance can take place in many forms, including face-to-face surveillance, telephone tapping, computer monitoring, hidden cameras, global positioning system (GPS) data and card access readers. The third matter of concern is information contained in employment records, some of which is very sensitive in nature (deBeer, 2003).

According to deBeer (2003), a conflict in the workplace may occur when the employer and employee have a difference of opinion on whether an employer action constitutes a privacy invasion. This difference of perception often has a negative impact on the atmosphere of the workplace. The mere perception of a privacy invasion can result in a substantial cost to the employer in quantifiable terms, such as reduced productivity, increased absenteeism, and increased usage of disability plans or may cause morale problems and extreme stress for employees (deBeer, 2003).

Collecting certain personal information is necessary in the employment relationship, such as collecting personal data for payroll purposes. However, employers also feel they have a right to intrude on employee privacy, one reason being the employer's belief that this information will ensure workplace efficiency. Monitoring computers can provide assurance that employees are only using the systems for work-related purposes and employers state monitoring can also be used for employee training (deBeer, 2003).

Employers also argue that they could be held liable for unlawful acts of employees in the workplace. As such, employers may implement a drug and alcohol testing policy as a means of ensuring a safe workplace. Monitoring employee e-mail may prevent illegal activities and thus prevent crimes, such as terrorist activities and downloading of child pornography and as a result reduce liability of the employer (deBeer, 2003).

Definition

Definitions of privacy vary within the literature and the scope in which privacy is considered can contribute to that variance in definition. Cameron & Palmer (2009) clearly indicate the difficulty in selecting the perfect definition for the term privacy, when they state, "although the term 'privacy' eludes attempts at uniform definition, there is little doubt that the protection of privacy is a matter of importance in our information society" (p. 116) and MacKinnon (2010) also states "privacy is an evanescent concept in the sense that it is difficult to arrive at a generally accepted definition of the idea" (p. 1045).

Under the realm of a rights based approach to privacy, Penney (2007) indicates privacy is a "fundamental right, rooted in notions of dignity, autonomy, identity, personality, or liberty (p. 478-479). Shade (2008) indicates privacy is "the right to control access to ourselves and to personal information about us" (p. 80). Cameron & Palmer (2009) refer to one definition of privacy used by the British Columbia courts as follows: "the right to be let alone, the right of a person to be free from unwarranted publicity […] The right of an individual (or corporation) to withhold himself and his property from public scrutiny, if he so chooses" (p. 114).

Defining privacy in terms of an individual perspective, Rule (2004) defines privacy as "the effective exercise of an option to withhold information about oneself" (p. 4). Anderson (2006) describes privacy as "an expression of an individual's unique personality or personhood,

privacy is grounded on physical and moral autonomy—the freedom to engage in one's own thoughts, actions and decisions…" (p. 2). McIsaac, Shields and Klein (2000) argue privacy is "based in dignity and control, as limiting access to a person's body and limiting information about a person, as a human right and as an instrumental right" (p. 313). deBeer (2003) indicates privacy is "an expression of personhood defining the individual's human essence and the individual's right to determine when, how and to what extent information about him or her is communicated to others" (p. 2).

Defining privacy from an information or knowledge based perspective, Miller and Weckert (2000) indicate "privacy is a condition of not having undocumented personal knowledge about one possessed by others..." (p. 256). Personal knowledge "consists of facts about a person which most individuals in a given society at a given time do not want widely known about themselves" (p. 256).

Study definition

The definition used by Shade (2008) will be used for this study. Shade (2008) defines privacy as "the right to control access to ourselves and to personal information about us" (p. 80). The reason this definition was chosen is because it is succinct, all-encompassing and defined in a plain language format; it is a good working definition for the purpose of this study.

Legal aspects- Canada

Privacy rights in Canada are protected by legislation: the Privacy Act, the Personal Information Protection and Electronic Documents Act (PIPEDA) and the Canadian Charter of Rights and Freedoms.

Carey (2003) indicates the Privacy Act was developed to create a mechanism for privacy protection and provide a means by which individuals could access data about themselves. The Privacy Act "regulates the collection, retention and disposal of personal information by federal government institutions and departments" (p. 3).

The private sector in Canada uses federal legislation called the Personal Information and Electronic Documents Act (PIPEDA). The purpose of this Act is to protect personal information that is "collected, used or disclosed in connection with the operation of a federal work, undertaking or business." (Levin (2007) p. 7). Personal information is defined as "information about an identifiable individual" (Levin (2007) p. 314). However, PIPEDA applies "to federally regulated workers which are mainly in the telecommunications, banking and interprovincial transportation industries" (Levin (2007) p. 314) and PIPEDA applies to the private sector in the provinces that do not have similar legislation already in place, such as Quebec, British Colombia and Alberta (Levin, 2007).

The Canadian Charter of Rights and Freedoms provides no specific right to privacy but Sections 7 and 8 of the Charter provide avenues of privacy protection; however that protection only applies to actions of the government; it is not applicable to a private employment relationship. deBeer (2003) states, "Section 7 recognizes that everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice ….. and Section 8 of the Charter … guarantees that everyone has the right to be secure against unreasonable search and seizure" (p. 7).

Another source of legal protection for individuals in Canada is tort law –"the area of law that deals with unlawful harm caused by one person to another" (Levin (2007) p. 315). British Columbia, Manitoba, Newfoundland and Saskatchewan have established a tort of invasion of

privacy. Workplace privacy is not specifically addressed in these legislations. The other provinces do not have a statutory law of invasion of privacy and therefore employees cannot legally challenge an employer for a workplace invasion of privacy (Cameron & Palmer, 2009; Levin, 2007).

Courts have discussed the need for an invasion of privacy law in Canada, however, Cameron and Palmer (2009) state "a full trial or an appeal of a privacy tort claim" (p. 117) is needed to ensure it is created (Cameron & Palmer, 2009).

Canadian courts normally consider invasion of privacy through other torts, including nuisance, harassment and defamation. Canadian court cases, including *Somwar v. McDonald's* Restaurants in 2006 and MacDonnell v. Halifax Herald Ltd case in 2009 have addressed the need for an invasion of privacy tort (Cameron & Palmer, 2009).

According to Hunter (2012), on January 18, 2012 in the Court of Appeal for Ontario, in the case of Jones v. Tsige, the court recognized a particular privacy breach by recognizing the tort of "intrusion upon seclusion" (p. 1). Recognizing this tort was seen as a way of changing common law to meet the needs of today's society.

Surveillance and monitoring

Employers indicate the reason for employee monitoring is to prevent crimes from occurring on the employer's property although Levin (2007) indicates that workplace monitoring and surveillance "is not addressed in provincial and federal employment standards or labour relations legislation" (p. 314). Employers feel they can implement these aspects because of the management rights clause, which allows an employer to effectively and efficiently manage the workplace (Levin, 2007; deBeer (2003).

Again, court cases are instrumental in affecting change. In the case of Eastmond v. Canadian Pacific Railway (2004 FC 852), workplace surveillance was established as the basis of the case and involved a complaint of employer workplace monitoring in a federally regulated workplace. In this case, a four-part test was used to determine the reasonableness of workplace surveillance as follows:

- Is the measure demonstrably necessary to meet a specific need?
- Is it likely to be effective in meeting that need?
- Is the loss of privacy proportional to the benefit gained?
- Is there a less privacy-invasive way of achieving the same end? (Levin (2007) p. 316).

This test is now used as a measure in other workplace surveillance cases. In this case, the court concluded that the employer was permitted to install the cameras as the cameras were installed as a means of preventing theft and were not installed to specifically monitor employees (Levin, 2007).

Other forms of employee surveillance include employee e-mail monitoring and employee internet monitoring. Employers can be held liable for problematic acts employees perform in the workplace, such as discrimination, harassment, distribution of pornographic material and disclosure of intellectual property and copyright infringement. Improper use of the employer's network is just cause for dismissal or suspension and collective agreements in Canada are now making internet usage part of many collective agreements (Corry & Nutz, 2003).

Drug testing

Drug use in the workplace is an issue as it causes safety, performance, liability and morale issues. Therefore, drug testing allows management to take control of the issue, but can also cause conflict between employer safety issues and employee privacy rights. Employees

often challenge the implementation of these policies for human rights concerns and privacy concerns and unions often raise the issue of privacy and proper testing or excessive use of management rights. Many arbitration decisions often discuss balancing employee privacy with workplace safety. In unionized environments, employees can file a grievance and in non-unionized environments, employees can file a human rights discrimination complaint (Pearce, 2008).

Importance of the collective bargaining process

Employees in a unionized environment have a greater level of protection and recourse than employees in a non-unionized environment. Unionized employees participate in a collective bargaining process with the importance of which deBeer (2003) states as follows:

> One of the most important ways in which an employee can overcome their vulnerability, and protect their privacy, is through the collective bargaining process. Most individual employees are not in a position to contest an employer's assertion of the right to invade an employee's privacy. However, in combination a large group of employees pose a substantial threat to the employer and are capable of influencing management policies through collective agreements. Thus, if there has been an invasion of privacy, the grievance procedures that exist in a collective bargaining context provide the much-needed access to adequate remedial mechanisms. Moreover, invasions of privacy can often be prevented in the first instance. In these ways, employee privacy rights, in a unionized environment are protected significantly more than in a non-unionized workplace (p. 14).

Gaps and Future Research

This research contributes to the current literature available on privacy rights in the Canadian workplace. It provides insight into Canadian Labour Arbitration decisions and provides a synopsis of the impact these case types are having on workplace privacy in Canada. There is a limited amount of specific legislation in regards to privacy in Canada and so far, has concentrated mostly on information privacy. Yet, even that legislation does not cover all Canadians. Further research into the effectiveness of these legislative mechanisms could be studied to determine what other avenues of protection are required within Canada to ensure the privacy protection of Canadians, and specifically privacy protection of employees in the workplace. In this paper, the scope of this study included Canadian Labour Arbitration cases. There is an opportunity for future research using other forms of cases, such as Supreme Court Cases, to determine what themes are evident within those case types and the direction the courts are taking in regards to privacy rights of employees in Canada. As well, privacy issues in non-unionized workplaces could be studied and compared and contrasted against unionized environments.

CHAPTER 3: METHODOLOGY

This study was conducted using Weber's (1990) content analysis methodology and Canadian Labour Arbitration cases were analyzed to determine communication trends. Conducting analysis of the case decisions and conclusions, this research project examines the use of Canadian Labour Arbitration cases on workplace privacy decisions in Canada.

Research Framework

The purpose of this study is to examine the current legal and legislative practices with regard to privacy in the Canadian workplace and to compare and contrast those practices to employer practices in Canadian unionized environments, as detailed in Canada Labour Board arbitration cases. A qualitative approach is used in analyzing the arbitration cases. Descriptive statistical areas are identified and examined, including the name of the company, the name of the union, the gender of the grievor, and the year of the grievance. See Appendix A for details. Further analysis of the decisions and conclusions of the arbitrators is conducted to indicate common themes that are present in these cases. Arbitration cases can serve as a benchmark for indicating inefficiencies in current legislation and also indicate weaknesses or flaws in current laws that may need to be improved.

Case Selection Criteria

A two-step process was used to complete the search for relevant data. First, a broad search of all Canadian Labour Board Arbitration cases was conducted in Quicklaw using high-level search terms (privacy, workplace, disciplinary action); a second step then narrowed down the cases to those that fit within the scope of this study. To determine the number of applicable cases several criteria steps were taken:

1. The main focus of the case must have been a workplace privacy issue.
2. Even if privacy was not cited as the main reason for the grievance, a workplace privacy issue must emerge within the context of the case.
3. Employee discipline or dismissal must also have been a key element of the arbitration case.
4. A final decision must have been rendered.

The definition of privacy is considered throughout the above process. For the purpose of this study, the definition used by Shade (2008) was deemed to be the working definition of privacy. Shade (2008) defines privacy as "the right to control access to ourselves and to personal information about us" (p. 80).

Research Summary

This study contributes to the privacy literature by offering an examination of Canadian Labour Arbitration cases and indicates the direction workplace privacy decisions are taking within Canada. This research will also uncover themes and trends in Canadian Labour Arbitration cases on workplace privacy in Canada, and therefore contributes to privacy literature. These trends are significant as they indicate current employer practices in regards to workplace privacy in unionized environments in Canada and also uncover themes that are developing, some of which may be influencing privacy laws within Canada.

CHAPTER 4: FINDINGS

A thorough analysis was completed of the 18 cases that fit the inclusion criteria (defined in Chapter 3) for this project. The analysis framework includes elements such as the name of the union, the name of the employer, the nature of the grievance, the date of the grievance, the gender of the grievor and the decision of the arbitrator.

Case Inclusions

Using the Quicklaw database, a general search was conducted using the terms (privacy, workplace and disciplinary action). Once that search was completed, Quicklaw divides the cases into source type (Administrative Boards and Tribunals, and Cases). Under Administrative Boards and Tribunals, Canada Labour Arbitration Decisions were selected and 85 arbitration cases were the result of that search.

An initial examination of the cases was conducted and the inclusion criteria was reviewed during each case analysis, which resulted in 67 cases being eliminated from further consideration. Some of the reasons for exclusion included: (1) privacy was not the main focus of the arbitration case; (2) the case did not include a full case decision; (3) the language of the case was not English; and (4) the case was an exact duplicate of another case. The inclusion criteria reduced the number of applicable cases to 18 cases.

A content framework table was designed and utilized to capture the important statistical data of each of the 18 included cases. The data included, but was not limited to, details such as the name of the case, the date of the decision, the name of the employer, the name of the grievor, the gender of the grievor, the name of the union, the name of the arbitrator, the basis of the case and the decision summary of the case. As well, two additional tables were created to capture the

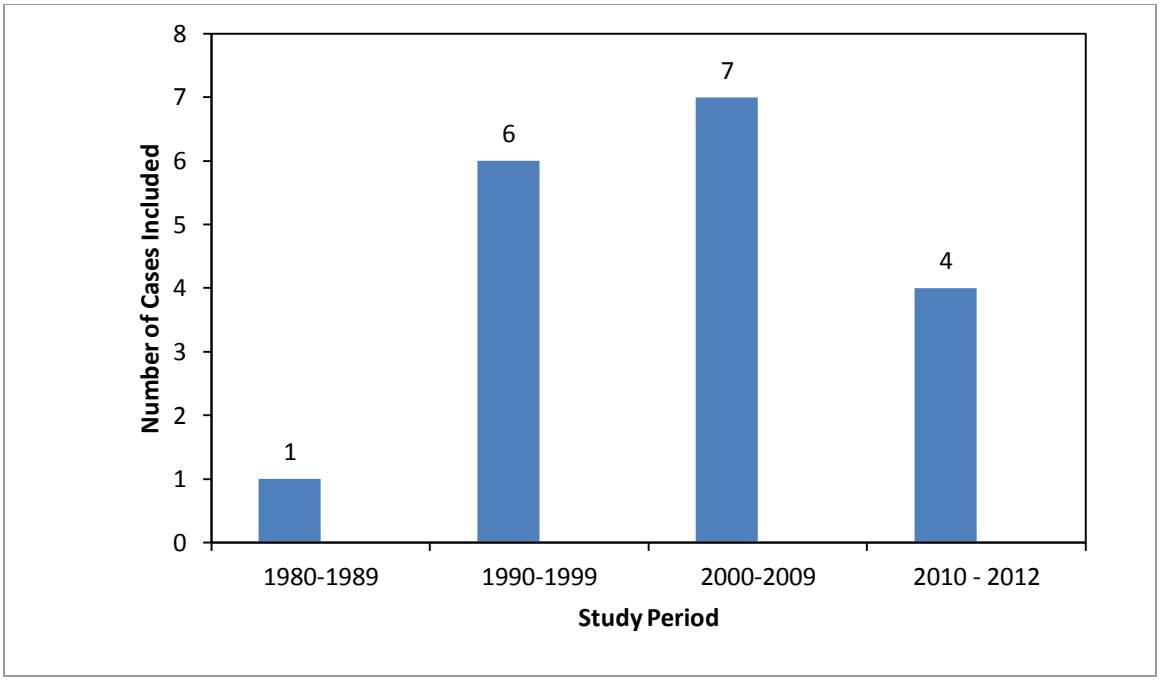
themes and trends with high saturation levels uncovered in the decision and conclusion aspects of the cases.

Results

Descriptive Statistics

Of the 18 cases included in the study, most were fairly evenly distributed between the years 1986 to 2011 (with only one case in 1986 and two cases in 2011). Figure 1 (below) depicts the distribution and quantity of cases in each specific decade.

Figure 1 – Date Ranges of Included Cases



Nine companies and nine unions were involved in these arbitration cases. One company (Canada Post) represented seven of the cases; another organization (TELUS) was the company in three of the cases, while CIBC was the company in two of the cases. Each of the following companies was also identified in one case: Manitoba Telephone Systems, Fraser Surrey Docks Ltd., Air Canada, ADM Agri-Industries Ltd., Canadian National Railway Ltd., and Spectra

Energy. Of the nine companies represented in the cases, six were Canadian companies and three were international (CN; ADM Industries Inc.; Spectra Energy).

Of the included cases, 15 identified the cities and provinces the cases were heard in. One case was heard in two provinces, Quebec and Ontario, while of the other cases, six cases were heard in British Columbia, four cases in Ontario, two cases in Alberta, one case in Manitoba and one case in New Brunswick. The companies involved employed from 500 to 72,000 employees. Of the nine companies represented, three were headquartered in Ontario, two in Quebec, one in British Columbia, one in Manitoba, one in Texas and one in Illinois. Twenty arbitrators heard these cases (one of whom heard two cases) and one adjudicator heard one of the cases. Of the grievors in the 18 cases, unions were the grievors in five cases, as they were policy grievances; women were the grievors in seven of the cases; and men in six of the cases.

Arbitration Case Analysis

With regard to the nature of the complaints, five cases involved policy grievances by the union. Of the individual grievances, 10 were brought as a result of a termination, one as a result of what was deemed excessive search policy, and two grieved a suspension for not providing the requested medical information to the employer.

The results of the grievance procedures were that seven of the grievances were allowed, three were allowed in part and eight were dismissed. Of the policy grievances, three were allowed in part, one was allowed and one was dismissed.

Of the policy grievance cases, two cases involved the implementation of a drug and alcohol policy. (Canadian National Railway Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) C.L.A.D. No, 465 (2000); ADM Agri Industries v. National Automobile, Aerospace, Transportation and General

Workers Union of Canada (CAW-Canada), Local 195) (Substance Abuse Policy Grievance), C.L.A.D. No. 610 (2004). In one case, the testing was deemed acceptable in risk-sensitive positions and in the second, the arbitrator declared parts of the policy needed to be clarified or amended, prior to implementation. In the third policy grievance, the union challenged a policy that required an employee to see a physician of the employer's choice, rather than one chosen by the employee. The union argued this order violated the employee's privacy (Telus Communications Co. v. Telecommunications Workers Union) (Denial of Benefits Grievance), C.L.A.D. No. 11 (2010). The arbitrator indicated the collective agreement must be followed and the authority to release the medical information lies in the hands of the employee. The fourth policy grievance was a case in which the employer introduced a policy that required employees to provide their provincial driving record to the employer (Spectra Energy v. Canadian Pipeline *Employees' Assn.* (Motor Vehicle Record Grievance, C.L.A.D. No. 266 (2011). The arbitrator found this policy was a violation of personal privacy. The fifth policy grievance involved a grievance against the employer's new security policy (Canada Post Corp. v. Canadian Union of Postal Workers (Plant Security National Policy Grievance), C.L.A.D. No. 5 (1990). The arbitrator found the employer was not allowed to search necessary personal articles of the employee, such as handbags, as this was deemed to be part of the person.

Medical privacy was the main topic in five of the individual grievance cases (Canada Post Corp. and Canadian Union of Postal Workers (Prince Grievance), CUPW 626-95-04893, C.L.A.D. No. 724 (1996); Canada Post Corp. v. Canadian Union of Postal Workers (Matheson Grievance), CUPW 846-07-02656 C.L.A.D. No. 349 (2011); Canada Post Corp. v. Public Service of Canada (Hanley Grievance), PSAC 00108-CR-92-054 C.L.A.D. No. 430 (1993); Canada Post Corp. v. Canadian Union of Postal Workers (Good Grievance), CUPW

846-95- 02908 C.L.A.D. No. 495 (2001); Canada Post Corp. v. Canadian Union of Postal Workers (Nelson Grievance), UPW W-350-H- 216 C.L.A.D. No. 44 (1986).

All five of the grievances were with Canada Post and the grievors were either terminated or suspended for refusing to follow the employer's instruction to see a doctor of the employer's choice. In four of the five cases, the dismissal/suspension was overturned as it was deemed the employer did not follow process and was invading employee privacy. In one case, the grievor received an indefinite suspension for failing to attend an independent medical examination. The arbitrator in this case found that the indefinite suspension was appropriate for the grievor's ongoing insubordination.

Surveillance was conducted in two of the individual grievance cases. In one of these cases, the grievor failed to provide his employer with accurate health information (Telus Corp. v. Telecommunications Workers Union (Jeffery Grievance), C.L.A.D. No. 619 (2004). The employer conducted video surveillance to determine the state of the grievor's health and the grievor was then terminated for breach of trust, when it was found that he was physically capable of more than what he was representing as his current health situation and physical capabilities.

In another case, the grievor was accused of theft after video surveillance was captured and the union, in this case, was also accused of breach of process (Fraser Surrey Docks Ltd. v. International Longshore and Warehouse Union Ship and Dock Foreman, Local 514 (Skobo Grievance), C.L.A.D. No. 48 (2007). The arbitrator found that the video surveillance was admissible as it met the requirements of PIPEDA and that the union's actions made a fair hearing impossible. The grievor was dismissed.

With respect to cases where the individual privacy was at the root of the grievance, in one case, the grievor was terminated for using the employer's telephone lines to listen to the union's

conversations (Manitoba Telephone Systems (Re) C.L.A.D. No. 910 (1998). Two of the arbitrators upheld the decision, while a dissenting opinion indicated the employer did not meet the burden of proof necessary to prove its case.

Another case involved a grievor, who was also a union official, being terminated for violating the privacy of another individual (Telus v. Telecommunications Workers Union (Hokiro Grievance), C.L.A.D. No. 14 (2008). The grievor's written warning was sustained and her five-day suspension was changed to a one-day suspension and her termination was replaced with a one-month suspension.

In the next case, the male grievor indicated that his company's search policy discriminated against him based on gender (Canadian Union of Postal Workers v. Canada Post Corp. (Cantley Grievance), CUPW 856-92-00723 C.L.A.D. No. 1218 (1994). The arbitrator ruled that the search policy did discriminate and that the company did not have the right to search the person or basic personal effects, including a purse or reasonably sized container carried by an individual.

Regarding those companies in the financial/banking industry, in one case the grievor, a bank employee, assisted her sister with a complaint against the bank. Later, the grievor received compensation, when her sister's complaint was ruled on favorably and resulted in a cash payment for compensation. In this case, the arbitrator determined that dismissal was warranted as the breach of trust with the bank could not be repaired (Teti v. Canadian Imperial Bank of Commerce) C.L.A.D. No. 392 (2010).

In another case, the grievor, a Visa employee, was terminated for violating the privacy of the company's clients and the case was upheld (Visa Centre – Canadian Imperial Bank of

Commerce v. United Steelworkers of America, Local 2104 (B) (Kuzyk Grievance), C.L.A.D. No. 11 (2002).

In the final case, in which the grievor had falsified her employment application, the arbitrator found there was no breach of privacy as the grievor gave permission to check her background on her first employment application. As a result, the grievor was not reinstated (Air Canada v. Canadian Auto Workers, Local 2213 (Desroches Grievance), C.L.A.D. No. 713 (1999).

Themes

An analysis of the conclusion/decision sections of the cases was completed on all of the cases that fit the inclusion criteria. Appendix B and C include a list of discussion points made by arbitrators, the cases the points were found in and in how many cases that theme appeared. This analysis was split into two types of grievances: policy and individual.

The findings in the cases varied as the arbitration cases were conducted on a variety of grievance issues. While some cases disputed the requirement of the employee to provide medical information, other cases included issues such as disputing the admissibility of video surveillance that was to the detriment of the employee(s), or cases where the employees did not respect the privacy of the clients of the organization and were dismissed as a result.

Findings were identified in each of the individual cases and a chart (Appendix B) documented common themes. To qualify as a theme, the theme had to be present in at least four of the 13 cases (31%). Based on that criteria, three themes qualified. They include: (1) the fact that the employer must follow the procedures set forth in the collective agreement and cannot discipline an employee when the employer has clearly not followed the process set out in the collective agreement; (2) a discussion of the Obey now, grieve later provision developed within

the context of the case situation and (3) the need for the arbitrator to cite aspects of Brown & Beatty's Canadian Labour Arbitration book. The themes that were included are discussed in detail below.

(1) The fact that the employer must follow the procedures set forth in the collective agreement and cannot discipline an employee when the employer has clearly not followed the process set out in the collective agreement.

In the case of Canadian Union of Postal Workers v. Canada Post Corp. (Cantley Grievance), CUPW 856-92-00723, C.L.A.D. No. 1218 (1994), the male grievor claimed gender discrimination in relation to the employer's search policy. The employer claimed the right to conduct searches of employees entering the workplace under the management rights clause. However, in this case, the arbitrator determined that unless the collective agreement expressly forbids employees from carrying basic personal effects into the workplace, the employees are permitted to carry these effects into the workplace on their person or in a reasonably-sized container, such as a handbag. The employer had tried to implement a policy that was outside of the scope of the collective agreement.

The Canada Post Corp. and Canadian Union of Postal Workers (Prince Grievance), CUPW 626-95-04893 C.L.A.D. No. 724 (1996) case involved the employer ordering the grievor to see a specific doctor of the employer's choice at Career Probe to obtain a functional abilities test to determine the nature of the grievor's medical condition. Again, the employer felt that the management rights clause would allow the employer to order the grievor to see a doctor of the employer's choice. However the arbitrator found that the demand was an invasion of a grievor's right to privacy and management could only do so if that directive was clearly written in the

collective agreement. In this case, the collective agreement did not allow the employer to order the grievor to see a doctor of the employer's choice.

In Canada Post Corp. v. Public Service Alliance of Canada (Hanley Grievance), PSAC 00108-CR-92-054 C.L.A.D. No. 430 (1993), the grievor was given a two-day suspension for failing to provide an Occupational Fitness Assessment form to the employer, because the grievor was absent for what the employer deemed an excessive amount of time. In this case, the arbitrator found that the employer did not possess the right to order the grievor to undergo the medical assessment.

In Canada Post Corp. v. Canadian Union of Postal Workers (Nelson Grievance, CUPW-350-H-216 C.L.A.D. No. 44 (1986), the employer had placed the grievor on off-duty status for not completing a Body Movement Form as requested by the employer. However, the collective agreement identified the proper process for requesting medical documentation from an employee and the employer had not followed that process. The employer felt management rights should allow its actions, but the arbitrator did not agree and ruled that the grievor was to be made whole.

In Canada Post Corp. v. Canadian Union of Postal Workers (Good Grievance), CUPW 846-95-02908 C.L.A.D. No. 495 (2001), the grievor received an indefinite suspension for not attending an independent medical examination as requested by the employer. The arbitrator addressed the proper procedure of following the collective agreement's process and determined, in this case, that the employer had done so.

In Canada Post Corp. v. Canadian Union of Postal Workers (Matheson Grievance), CUPW 846-07-02656 C.L.A.D. No 349 (2011), the arbitrator determined that the employer suspended the grievor from her accommodated position without cause as it had not properly followed the provisions of the collective agreement.

(2) A discussion of the Obey now grieve later provision developed within the context of the case situation.

A common union phrase is obey now, grieve later, which may also be referred to as work now, grieve later. This term refers to the requirement of the employee to obey the order of the employer and later grieve that order through the grievance process, to avoid a charge of insubordination against the employee. However, there are exceptions to this basic rule. Arbitrators in the cases, where this provision was mentioned, indicate it is imperative that employees explicitly explain the reason for their refusal, such as privacy invasion or safety concerns, when refusing an employer's order. As indicated in the Canada Post Corporation v. Canadian Union of Postal Workers (Matheson Grievance), CUPW-846-07-02656 C.L.A.D. 349 (2011)), Arbitrator Gordon cites an excerpt of the Bakker decision as follows:

> There are exceptions to the rule which obtain [sic] when an employee faced with a direct instruction fears that if he or she were to carry it out and then grieve the matter, adequate redress would not be available through the grievance and arbitration process…. Since nothing less than the grievor's privacy rights were at stake, I am prepared to say that she had open to her an opportunity to argue that she came within the exception rather than the rule (P. 40).

In the Matheson Grievance case, the grievor was suspended for refusing to see an independent medical examiner; however, the grievor refused because she felt it was an invasion of her privacy to be forced to see a doctor that she had not chosen. The order was given when there was no proof that there had been any change in the grievor's medical condition, which would warrant another examination.

In Canada Post Corp. v. Public Service Alliance of Canada (Hanley Grievance), PSAC 00108-CR-92-054 C.L.A.D. No. 430 (1993), the grievor was ordered to have a medical examination by a doctor of the employer's choice and she refused the order as there would be no basis for redress once her privacy was lost.

In Canada Post Corp. v. Canadian Union of Postal Workers (Good Grievance), CUPW 846-95-02908 C.L.A.D. 495 (2001), the grievor refused the order to see an independent medical examiner, but it was determined that the grievor had not clearly expressed the reason for refusing the order (i.e. privacy rights).

In Canada Post Corp. v. Canadian Union of Postal Workers (Nelson Grievance), CUPW W-350-H-216 C.L.A.D. No. 44 (1986), the grievor refused to provide medical information as ordered by the employer. However, the arbitrator found the grievor had clearly stated privacy as her reason for refusing the order and the arbitrator found in favor of the grievor.

(3) The need for the arbitrator to cite a*spects of Brown & Beatty's Canadian Labour* Arbitration book.

When arbitrators are analyzing the facts of the cases before them, they are also considering cases as precedents in their decision making. As well, in five of the 13 cases, the arbitrators quoted passages from Brown & Beatty's Canadian Labour Arbitration book.

In TELUS v. Telecommunications Workers Union (Hokiro Grievance), C.L.A.D. No. 14 (2008), the organization had just come through a strike and tempers in the environment were changed as a result. The arbitrator reviewed a passage from Canadian Labour Arbitration regarding the motivation of misconduct (paragraph 176) as follows:

> The motivation that lies behind the misconduct is perhaps the most important consideration in determining what penalty is just and reasonable in all of the

> circumstances. …. As a general principle, where arbitrators are satisfied that there is little likelihood of a recurrence because, for example, the employee has apologized and/or shown real remorse, they typically favor a suspension without pay for some period of time, rather than a conclusion that the grievor must lose his job. The converse of this principle is that, in the absence of extenuating circumstances, arbitrators usually do not reinstate employees who continue to deny they did anything wrong, or who refuse to take responsibility for the harm they caused. (p. 39).

In Manitoba Telephone System (Re) C.L.A.D. No. 910 (1998), the arbitrator quotes a passage from Canadian Labour Arbitration relating to the hearsay rule in deciding whether or not the action against the grievor could be substantiated with hearsay evidence (paragraph 126) as follows:

> There are exceptions to the hearsay rule: in particular, statements made to one of the union officials himself may be reported: there, the mere fact of the statement's being made (if that is believed) does tend to establish its truth. Statements made to a witness by employees other than union officials, however, are not reliable as accounts of the true facts, in our view…. (p. 25).

In Canada Post Corp v. Canadian Union of Postal Workers (Matheson Grievance), CUPW 846-07-02656 C.L.A.D. No. 349 (2011), Arbitrator Gordon used Arbitrator Norman's 1983 award in the Bakker decision as a reference (paragraph 127). Within this context, Brown & Beatty's Canadian Labour Arbitration is quoted in reference to the employer's right to request additional medical information from the employee. The excerpt reads:

> Indeed, where on reasonable grounds the employer is not satisfied with the certification offered by the employee, some arbitrators have stated that the employer may, after

> explaining the basis of its objection and precisely what is required before it will allow the employee to return, demand that the employee secure additional medical certification or undergo further medical examination by a physician designated by the employer (p. 39).

In Canada Post Corp. v. Canadian Union of Postal Workers (Good Grievance), CUPW 846-95-02908, C.L.A.D. No. 495 (2001), the arbitrator refers to Arbitrator Norman's Bakker decision (paragraph 82) in which quotes from Brown & Beatty's Canadian Labour Arbitration book is used in that decision. The arbitrator in the Good case also quotes from Canadian Labour Arbitration regarding challenging an employer order and the arbitrator indicates that employees should comply with the order and then grieve it later. The excerpt from Brown & Beatty states, "However, in erecting these specific exceptions, arbitrators have expressly stated that the employee bears the onus of proving that his circumstances fall within one of them and that he communicated the reasons for his refusal to the supervisor involved" (p. 20).

In Canada Post Corp. v. Canadian Union of Postal Workers (Nelson Grievance), CUPW W-350-H-216 C.L.A.D. 44 (1986), the Bakker case is referred to and specifically to excerpts from Brown & Beatty's Canadian Labour Arbitration (paragraph 155) as follows,

"… Employees who dispute the propriety of an employer's order should, subject to the considerations which follow, carry out those orders and only subsequently, through the grievance procedure, challenge their propriety" (p. 36).

Themes that were selected in the policy grievance cases were identified in at least three of the five policy grievance cases. Appendix C identifies these themes. The cases that were included in this study are: (1) Does the employer have a right to implement the policy being questioned and does the policy invade employee privacy? and (2) How can privacy rights and dignity of individuals be balanced against business interests of the employer when implementing

a policy especially when safety/best interest of the worker is a concern? The themes included in this study are discussed below.

(1) Does the employer have a right to implement the policy being questioned and does the policy invade employee privacy?

Each collective agreement contains employers' rights clause which allow employers the right to manage and operate the organization in a productive and efficient manner. This clause provides an additional component of rights over and above those that are negotiated and set out in other specific clauses of the collective agreement.

In Canada Post Corp. v. Canadian Union of Postal Workers (Plant Security National Policy Grievance), C.L.A.D. No, 5 (1990), the employer implemented a new security policy. The arbitrator found that the employer had the right to implement security policies, but the employer did not have the right to search employees and their basic personal belongings, which was deemed to be part of the person and an invasion of privacy.

In TELUS Communications Co. v. Telecommunications Workers Union (Denial of Benefits Grievances), C.L.A.D. No. 11 (2010), the union brought forth a policy grievance challenging the employer's right to require an employee to consult with a physician of the employer's choice. The arbitrator found that the employee has the final say in the release of his/her medical information and choice of his/her doctor.

In Canadian National Railway Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW – Canada), C.L.A.D. No. 465 (2000), the employer introduced a drug and alcohol policy. The arbitrator found that the employer had proved its need to implement the policy in cases of reasonable ground and also in the case of risk-sensitive positions.

In ADM Agri-Industries Ltd. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW- Canada), Local 195 (Substance Abuse Policy Grievance), C.L.A.D. 610 (2004), the company introduced a substance use and abuse policy. The arbitrator ruled that the entire policy need not be set aside, but required clarification in certain respects.

In *Spectra Energy v. Canadian Pipeline Employees' Assn.* (Motor Vehicle Record Grievance), C.L.A.D. No. 266 (2011), the employer introduced a policy that employees, who drive company vehicles, were required to grant access to their British Columbia Motor Vehicle Records. The arbitrator found the policy invaded the privacy of employees. Safety was a concern, but safety issues could be addressed in other ways that did not invade employee privacy.

2) How can privacy rights and dignity of individuals be balanced against business interests of the employer when implementing a policy especially when safety/best interest of the worker is a concern?

A second theme that emerged was present in all five policy cases. The arbitrators considered if the privacy rights and dignity of individuals were balanced against the business interests of the employer when implementing a policy, especially when safety/best interest of the worker was a concern.

In Spec*tra Energy v. Canadian Pipeline Employees' Assn. (Motor* Vehicle Record Grievance) C.L.A.D. No. 266 (2011), the employer introduced a policy that employees who drive company vehicles were required to give consent to the employer to access their British Columbia Motor Vehicle Records. This case set forth basic principles to assist arbitrators:

- Each case is dependent on its own facts and is to be decided on the basis of the particular circumstances involved.
- The nature and significance of the particular privacy rights and the employer's business interests in issue must be clearly identified and carefully weighed.
- Privacy rights arising from the application of statute and regulations are given greater weight than rights created in a particular workplace under the terms of a given collective agreement.
- An arbitrator's inquiry into the merits of an alleged intrusion into a privacy right established by statue or regulation should take into account the public interest that may be involved. (p. 22).

The arbitrator found the requirement to produce the driver's abstract constituted an invasion of privacy and there were other ways to address the safety concerns of the employer.

In ADM Agri-Industries Ltd. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW- Canada), Local 195 (Substance Abuse Policy Grievance), C.L.A.D. 610 (2004), the employer introduced a substance use and abuse policy. Again, the issue of balancing the privacy rights of the employee was weighed against the business operation of an employer in a safety-sensitive business. The entire policy was not set aside, but the arbitrator indicated certain aspects of the policy required clarification.

In Canadian National Railway Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), C.L.A.D. No. 465 (2000), the arbitrator also discussed the balancing of interests approach. The rights of the individual must be balanced against other aspects to ensure public or individual safety in risk-sensitive organizations, such as in a nuclear plant. The arbitrator indicated the employer needs to

prove the business requirement outweighs the privacy invasion. In this case, the arbitrator found the employer did not prove its case, except for those employees working in risk-sensitive positions.

In TELUS Communications Co. v. Telecommunications Workers Union (Denial of Benefits Grievances), C.L.A.D. No. 11 (2010), the arbitrator stated, "a general arbitral principle that attempts to balance the privacy rights of employees with the legitimate business interests of the employer is to direct employers to use the least intrusive means capable of securing whatever information they require" (p. 22). In this case, the arbitrator found the employer acted appropriately when it discontinued benefits for an employee who would not see an independent medical examiner.

In Canada Post Corp. v. Canadian Union of Postal Workers (Plant Security National Policy Grievance), C.L.A.D. No. 5 (1990), the arbitrator indicated the employer had a right to inspect items brought into and out of the plant because it constituted a legitimate business concern; however, that right to inspect does not allow the organization to intrude on the employee's privacy of the person or immediate personal effects.

The common themes identified in this study indicate similarities in the Canadian Labour Arbitration cases that were brought forth as a result of privacy and disciplinary concerns within unionized workplaces in Canada. The cases concerned various privacy reasons, but some similarities were identified between the cases and the decision formation of the arbitrators. The individual cases showed a commonality of arbitrators indicating the employers must follow the procedures set forth in the collective agreements. It was also found that arbitrators examined the Obey now, grieve later principle and often cited works from Brown & Beatty's Canadian Labour Arbitration book.

In the group grievances, it was determined that arbitrators examined issues, such as, if the employer had the right to implement the policies and if the policies invaded employee privacy. The arbitrators also considered if the employer could make a case for balancing privacy rights against the best interest of all involved when safety was a paramount concern.

This analysis allows insight into the direction arbitrators are taking in regards to privacy cases involving disciplinary action in Canada.

CHAPTER 5: DISCUSSION AND CONCLUSION

The purpose of this study was to determine the current state of workplace privacy issues within unionized environments in Canada. In particular the study looked at issues that involved a disciplinary action which ignited the need for the employee or union to address the issue formally in arbitration. In order to accomplish this task, Canadian Labour Arbitration case decisions were reviewed and analyzed. This study reviewed literature on the state of privacy in the Canadian workplace and also reviewed privacy legislation in Canada. The dynamics of the work relationship were examined and indicated employers hold a greater balance of the power in the employer/employee relationship. This inequity can leave employees feeling vulnerable and employers feeling they can manage in whatever manner they deem necessary to ensure the organization operates effectively and efficiently. However, sometimes these management techniques infringe on the privacy of employees. Various definitions for the term privacy were identified and the definition used in this study was specified.

This study also analyzed and determined the themes that were evident in the arbitration cases. Other cases within the Canadian court system that may stimulate discussion of the need for further privacy legislation within Canada were noted. This final chapter discusses and compares the legislation on privacy, the literature on privacy in Canada and the Canadian workplace, and the Canadian Labour Arbitration decisions reviewed for the purposes of this study.

Summary of Study Findings

This study indicated that employees are becoming more aware of their privacy rights and challenging the right of the employer to invade that privacy. Of the 18 cases that were included in the study, nine companies were involved and nine unions were represented. One company

(Canada Post) represented seven of the cases; another organization (TELUS) was the company in three of the cases; and CIBC (Canadian Imperial Bank of Commerce) was the company in two of the cases. Each of the following organizations was the employer in one of the cases: Manitoba Telephone Systems; Fraser Surrey Docks Ltd.; Air Canada; ADM Agri-Industries Ltd.; Canadian National Railway Ltd. and Spectra Energy. Of the nine companies represented in the cases, six are Canadian companies and three are international (CN; ADM Industries Inc.; Spectra Energy).

Of the included cases, 15 identified the cities and provinces where the cases were heard. One case was heard in two provinces, Quebec and Ontario, while of the others, six cases were heard in British Columbia, four cases in Ontario, two cases in Alberta, one in Manitoba and one in New Brunswick. The companies employed from 500 to 72,000 employees. Of the nine companies represented, three were headquartered in Ontario, two in Quebec, one in British Columbia, one in Manitoba, one in Texas and one in Illinois. Twenty arbitrators heard the cases (one of whom heard two of the cases) and one adjudicator heard one of the cases. Of the grievors in the 18 cases, unions were the grievor in five cases as they were policy grievances; women were the grievor in seven of the cases and men were the grievor in six of the cases.

One limitation of this research study is that it does not capture any data on how many incidents of workplace privacy issues were settled prior to arbitration. There may be many issues that are settled at earlier stages of the grievance process and this analysis did not allow this information to be captured. An area for future research would be to determine how often these cases arise in the workplace and are settled prior to a formal process.

An analysis of the discussion and conclusion sections of the arbitration cases determined several themes. The most common themes were divided into those found in the individual cases

and those found in the policy cases. In the individual cases, three themes were identified as follows: (1) the fact that the employer must follow the procedures set forth in the collective agreement and cannot discipline an employee when the employer has clearly not followed the process set out in the collective agreement; (2) a discussion of the Obey now, grieve later provision developed within the context of the case situation and (3) the need of the arbitrator to cite aspects of Brown & Beatty's Canadian Labour Arbitration book. One lesson for employers in unionized environments is that the collective agreement was decided in a collaborative communication process and following the agreement properly is required. Otherwise, both parties may end up in the middle of the grievance process to settle the disputes that will inevitably arise.

Themes relating to policy were also identified and include: (1) arbitrator asking the question: Does the employer have a right to implement the policy being questioned and does the policy invade employee privacy? and (2) How can privacy rights and dignity of individuals be balanced against the business interests of an employer when implementing a policy especially when safety/best interest of worker is a concern?

Research Implications

This study adds to current research in that it indicates privacy issues are a growing concern for employees in organizations. Organizations are taking disciplinary action against employees where employees are unwilling to concede and perform an order given by the employer when the employee feels it invades upon their privacy rights. Employees are challenging the employer and taking a stand on protecting their privacy in the workplace. This study also indicates that information privacy protection is available within Canada, but the available legislation does not protect the information of all Canadians. This gap could be

addressed through the introduction of new legislation. This study shows that there is a need for further research on workplace privacy and also a need for specific legislation to enhance the current privacy protection available within Canada. Further research, expanded legislation, focused education and specific action are required to ensure the privacy protection of Canadian employees.

This study contributes to the academic research in that it provides an analysis of Canadian Labour Arbitration cases on privacy in the Canadian workplace, specifically where disciplinary action was present or threatened. This research can be expanded to include other case types, such as Supreme Court of Canada cases, which can also be reviewed for themes and trends. The results can then be compared and contrasted to these cases or to future arbitration cases that are filed in regards to workplace privacy issues within Canada. As for a practitioner contribution, this study could be reviewed to ensure that employers refrain from repeating some of the mistakes made by the employers in these cases. Employers can also consider the financial costs that even an implication of a privacy intrusion can have on a workplace and how avoiding these situations can prevent a substantial financial cost in the organization.

Limitations and Future Research

There are a number of limitations evident when reviewing the results of this study. This study is not generalizable as it was conducted on only Canadian Labour Arbitration cases and contained a small sample size. The findings were of interest, but the results cannot be generalized overall.

Future research could include conducting a study on specific legislation, such as the Privacy Act and reviewing its success in protecting the privacy of Canadians in the workplace setting. Also, other types of cases, such as Supreme Court cases, could be reviewed in a similar

fashion; the results could then be compared. In addition, a study could be conducted on the legislative practices in another country and the implications on privacy in workplaces in that country. The results from that study could then be compared and contrasted to a Canadian context.

Conclusions

In conclusion, this study provides enough evidence to indicate there is a need for further laws and legislation in regards to protection of privacy of Canadians, specifically in the workplace. With regard to privacy, a legislative gap exists in Canada. Information protection is available, but does not apply to all Canadians and only a few provinces have enacted their own legislation to cover that gap. As well, there is no specific tort law for privacy protection. Employers and employees could work with legislators to ensure that new legislation protects the employee's right to privacy and ensures the employer does not face significant hindrance in the operation of his/her business activities as a result.

Privacy impacts or perception of privacy invasions have a quantifiable and negative impact to an organization, so it is in the best interest of employers to ensure privacy protection mechanisms are in place. This arbitration case analysis indicates what privacy concerns have affected employees in unionized environments over the past twenty-five years and indicates the direction arbitrators are taking in regards to these cases within Canada. Practitioners can be shown that privacy concerns are of paramount concern for employees in the workplace. This study also shows that not properly following rules already in place, specifically a collective agreement, can be detrimental. Employers need to respect the privacy of their employees and take steps to protect that privacy while also allowing for effective and efficient functioning of their daily business activities.

Workplace privacy is a serious concern for employees in the Canadian workplace, which was evident in this study. With the development of computer technologies, the creation of new communication media, and the invention of increasingly sophisticated surveillance mechanisms, privacy invasions are becoming more prevalent. We could all be a victim of a privacy invasion, if we fail to be proactive to this growing concern. Legislation is needed to ensure that the privacy of all Canadians is protected, but especially the privacy of Canadian employees. This study provides further evidence to academics, practitioners and policy makers, which could be used in their decision-making processes in order to affect positive change in regards to privacy protection of employees in the Canadian workplace. Both employers and employees have a role to play in shaping adequate privacy legislation to ensure Canadian workplaces become leaders in protecting the privacy of Canadians.

Who is watching you, recording you, and tracking your every move? If you have never asked yourself this question, perhaps you should. We could all be a victim of a privacy invasion. Recognizing the issue and admitting there is a problem is the first step in fixing it. We, as Canadian employees and Canadian employers, need to act fast to protect our personal privacy as there is no adequate redress once our personal privacy has been invaded – we become a society of privacy lost.

Appendix A: Descriptive Information

Descriptive Information
Case Number
Case Name
Date of case
Province
Employer
Size of Employer
City of Organization
Union
Arbitrator
Grievor
Gender of Grievor
Age of Grievor
Nature of Complaint/Privacy Issue
Grievance disposition: Was it upheld?
Jurisprudence
Redress or remedy

Appendix B: Individual Grievance Themes

Decision point found in conclusion	Case numbers	Cases
Employer has the right to give instructions to an employee and when an employee refuses those instructions in order to prevent erosion of his or her rights must accept that an employer has the right to take disciplinary action, which can be challenged in the grievance process, and in such circumstances, employee should indicate that is reason for refusal.	2, 29, 11	3
Obey now, grieve later provision unless privacy would be lost	2, 36, 29, 11	4
The employee cannot ignore correspondence from the employer; it is not acceptable.	2	1
Employer must follow the procedure set forth in the collective agreement. It cannot discipline an employee when it has clearly not followed the process set out in the CA.	2, 71, 34, 29, 11	5
Employees have a right to carry personal effects into the workplace, unless the CA prohibits it. They can be carried on the person or in a reasonably sized container. These items should not be subject to search and there is not to be a gender distinction in that regard.	34	1
An employer cannot invade the employee's right to privacy unless a specific provision in the CA allows an action that otherwise would be deemed an invasion.	71	1
Employee consent to have information on an employment application verified is consent for the company to validate such information.	31	1
The employer does not have the right to obtain details of the employee's specific medical condition.	36	1
Employees need to be honest to employer about the degree of a medical condition preventing employee to work. Misrepresentation is not acceptable.	48	1
Employees must respect the accounts of the clients of the employer and only access the client's accounts for legitimate business purposes.	9, 27, 30	3
Disclosure of information obtained as a result of union position is not acceptable	8	1
Context of "offensive" language use in the workplace is important. A one-off use in the heat of the moment less offensive than a continued usage.	8	1
An employee has a duty to the employer to not use information obtained in the performance of his/her job against the employer for financial gain.	9	1
The fairness of the grievance process cannot be voided by the actions of either the employer or the union; otherwise natural justice will not preside.	19	1
Employer can conduct surveillance if justified, i.e. employees are aware of general surveillance and specific surveillance can take place if for a legitimate business concern, i.e. prevent theft of gas as long as no reasonable expectation of privacy of employee.	19, 48	2
Decision not to be made a precedent	34	1
Uses precedent of arbitrator Swan	34	1

Grievor shows no remorse and has not admitted wrong doing and thus does not help his/her own case.	9, 27, 48	3
Employer should be strict in grounds upon which it has chosen to act without being overly technical in assessing an assigned cause of discharge.	31	1
Reasonableness expectation of privacy - Test to determine if video surveillance is admissible, which balances the legitimate business interests of employers, versus employees' privacy interests. E.g. Eastmond test	19	1
Can the employer/employee relationship still be considered a viable one?	8, 9	2
Quotes from Brown & Beatty Canadian Labour Arbitration	11, 29. 2, 30, 8	5
Bakker/ Church	11, 29, 2	3

Appendix C: Policy Grievance Themes

Decision points found in conclusion	Case Numbers	Cases
Arbitrator questioned does employer have right to implement policy? Also, does the policy invade employee privacy?	1, 5, 6, 17, 21.	4 – yes 1 - no
Employer must prove its case on the balance of probabilities and not to any criminal standard.	48	1
Privacy rights and dignity of individuals balanced against business interests of employer when implementing a policy especially when safety/best interest of worker is a concern.	1,5, 6, 17, 21	5
Automatic dismissal for violating drug and alcohol policy is unwarranted.	1	1
Policy is not without some legitimate merit	6	1
Employee should identify when on a prescribed drug that could endanger self or others.	6	1
Risk-sensitive positions warrant stricter rules and drug and alcohol testing should be done where reasonable grounds exist.	1, 6	2
Person entitled to privacy of person and immediate personal effects.	21	1

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