IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE
CANADA LABOUR CODE, R.S.C. 1985, c. L-2

BETWEEN:

CASCADE AEROSPACE, INC
("the Company")

AND:

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA), LOCAL 114
("the Union")

RE: **SURVEILLANCE GROUP/POLICY GRIEVANCE**

BEFORE:	**ROBERT B. BLASINA** (Arbitrator)
For the Union:	**GAVIN McGARRIGLE**
For the Company:	**PETER A. CSISZAR**
Dates of Hearing:	**JANUARY 8, APRIL 20, 21, 22, AND MAY 28, 2009**
Date of Award:	**JULY 3, 2009**

A W A R D

I

The Company is a federally regulated employer. It is in the business of repairing and maintaining aircraft, both civilian and military. This case concerns its facility at the Abbotsford International Airport, east of Vancouver.

The Company has a contract with the Department of National Defense ("DND"), which contract provides the greater part of its business. In order to maintain this contract, the Company is required to obtain and maintain a level of Facility Security Clearance ("FSC") and Document Safeguarding Capability ("DSC"). It is subject to periodic audits conducted by the Canadian and International Industrial Security Directorate ("CIISD"), which is an office of Public Works and Government Services Canada. At the same time, the Company is subject to the federal personal privacy legislation, i.e. the Personal Information Protection and Electronic Documents Act, S.C. 2000, c.5 ("PIPEDA").

I have considered all of the evidence, and the submissions and authorities cited by counsel. I am mindful that the workplace is located at an airport, and that a substantial portion of the work performed there is pursuant to a contract with the DND, and, that a collective agreement arbitration award is a public document. Therefore, I will attempt to constrain some of the descriptive detail, but this should have no substantial

effect upon the reader's understanding of the factual circumstances, and will have no effect upon the outcome of this award.

II

The Company has a number of outside surveillance cameras monitoring the perimeter and the access points to its property. These are visible cameras which have been present since the Abbotsford facility opened in December, 2000. Although these cameras would cover areas where material is stored and where employees sometimes work, their purpose is for security, and not for the supervision of work. The Union took no issue with respect to these cameras.

In January, 2008, the Company installed additional cameras – this time inside the building. These cameras were installed as part of an augmented security plan which the Company had presented to the CIISD as a result of a security audit conducted by that agency. These cameras are also visible, and their purpose is for security, and not for the supervision of work.

The additional cameras installed inside in January 2008, are for monitoring access to the building, and their coverage does include areas where inventory is stored and where employees sometimes work. The evidence was that employees are not normally assigned work in the areas covered, but that "on occasion" they do some packing and unpacking of components, and "sometimes some repair work", up to two or three hours, "it varies". This would be more time than what might be spent working

outside. The Company did not provide the Union or the employees with formal notice of the installation of these inside cameras; however, the installation was done during the dayshift. The presence of these cameras would be evident to the employees, including those who were members of the Union's collective bargaining committee. Indeed, the parties were engaged in collective bargaining at the time, and no mention of these cameras was made by anyone at the bargaining table; nor had the Union or the Company received any complaint from any employee.

In May, 2008, the Company installed an additional camera inside the building. This was a hidden camera, and it was placed in the cafeteria. The location serves as both a cafeteria and lunchroom, and so the terms "cafeteria" and "lunchroom" are used interchangeably. The cafeteria is used by employees (both bargaining-unit and non-bargaining-unit employees), contractors and their employees, and visitors. It is a place where people take their breaks, and where sometimes union meetings are conducted.

For more than a year, the catering company managing the cafeteria had been complaining about vandalism and theft, particularly at its vending machines. The Company unsuccessfully made some inquiries, and requests of employees to come forward if they had information. The incidents became more frequent; and, it was for the purpose of identifying whomever was responsible – as opposed to merely deterring future incidents – that this hidden camera was installed.

From this surreptitious video surveillance, the Company obtained information which led it to terminate two employees, and to ban the

employee of a contractor from the site. Two grievances were remitted together to me: one was a "Surveillance Group/Policy" grievance ("the policy grievance") dated June 26, 2008, and the other was an individual grievance dated July 4, 2008 on behalf of one of the employees who had been discharged, to whom I will simply refer as "the Grievor". The Grievor was terminated by letter dated July 4, 2008; however, it was the Company's revelation to the Union, a month earlier, of the surreptitious video surveillance in the lunchroom which had prompted the policy grievance.

The policy grievance protested both the "hidden and visual" video surveillance; however, with respect to the visible cameras, the Union would dispute only the additional visible cameras, except for one which did not cover a possible work area, installed inside the building in January 2008. Regarding the hidden camera surveillance, the Union had erroneously presumed that there were a number of cameras hidden in the workplace. There was only the one camera hidden in the lunchroom, which camera was intended to cover some of the vending machines. However, when the Union was preparing for arbitration, it discovered that the camera was also capturing a large part of the eating area. Indeed, this included a table near to the vending machines from which the Union conducted lunchroom meetings, and at which it balloted the employees to select its collective bargaining committee, safety committee, or shop stewards.

The arbitration hearing began on January 8, 2009. This was a single day, which Mr. Csiszar, Counsel for the Company, had understood was to be dedicated to considering a preliminary objection by the Union; i.e. a preliminary objection to the admissibility of the hidden video surveillance

as it pertained to the Grievor's discharge. This also was my understanding. Mr. McGarrigle, National Representative, for the Union, understood that this day would be dedicated to considering the whole policy grievance of June 26, 2008. The Grievor was present, and I directed that we would consider only the admissibility of the video surveillance pertaining to the discharge, and that the policy grievance would be heard later. I thereafter exercised my arbitral discretion to engage the parties in "without prejudice" mediation discussions. These discussions resulted in a settlement of the discharge grievance, which settlement included a commitment by the Company that it would remove the camera hidden in the cafeteria. That camera has been removed. The hearing on the policy grievance resumed in April.

III

The policy grievance is expressed in a letter dated June 26, 2008 from Mr. McGarrigle to Don Lundquist, Director, Human Resources:

> *On June 18, 2008, the Company suspended a Union member for alleged theft pending further investigation and informed the Union Plant Chair Nathan Shier that it had used hidden cameras to gather evidence to support its allegations. This was the first time that the Union was informed that there were hidden cameras at the Cascade Aerospace facility.*
>
> *On June 19, 2008, the Plant Chair requested a copy of any Company policies relating to surveillance and he was informed that none existed. The Plant Chair also requested a tour of all surveillance locations to determine what the equipment was viewing and/or recording. The Company informed the Plant Chair that it would not show the Union the locations of the cameras or recording equipment.*
>
> *On June 20, 2008, I confirmed with you that the Company does not have a written policy relating to surveillance (hidden or visual) and that it will not*

share any further information with the Union relating to hidden surveillance at Cascade Aerospace.

Therefore, please be advised that the Union is filing a group/policy grievance at step two of the grievance procedure. The Union may seek a preliminary and expedited cease and desist order if necessary after receiving the Company response to this grievance.

It is the Union's position that the Company has violated article 1.05, 2.15(j)(sic), *8.01, 23.01 and any other applicable articles of the collective agreement as well as the applicable sections of the Personal Information and Protection of Electronic Documents Act (PIPEDA) or other applicable legislation by a engaging in a course of conduct involving prohibited and unreasonable actions towards bargaining unit members as individuals and as a group, including but not limited to:*

1. *Instituting surveillance programs (hidden and visual) at Cascade without a written policy in place and without formal discussion with the Union despite specific requests for all policies affecting bargaining unit members made at the recent round of negotiations, and;*

2. *Failing to provide the Union with a copy of all surveillance and related material upon request, and;*

3. *Failing to demonstrate the necessity, effectiveness, and proportionality of the Cascade surveillance program and failure to provide information on any less privacy-invasive alternatives instituted or considered and/or their effectiveness, and;*

4. *Refusing the Union proper access to the facility to investigate the camera locations, viewing angles, storage, and security procedures in order to ensure that the terms of the Agreement are being adhered to and that the surveillance results are matched toward the specific and appropriate legal ends under the terms of the Agreement and applicable privacy legislation.*

5. *Violating the privacy rights of employees individually and as a group in an unreasonable manner by the improper collection, use, and/or disclosure of personal and/or employee information without consent and without meeting the applicable tests for exemptions allowed under the Agreement and under applicable privacy legislation.*

The Union requires a cease and desist order, full access to the Union to investigate the surveillance program, full redress for all affected employees including damages and interest if appropriate, and any other make whole

orders an arbitrator or applicable regulatory authority deems necessary in all of the circumstances of the case.

The Union called two witnesses: Harry Moon, Local Service Representative, and, Nate Shier, Plant Chairperson. The Company called two witnesses: David Toby, Materials Manager, and, Tom Lusk, Manager of Tooling and Facilities.

Mr. Moon testified to the collective bargaining for the current 2008-2011 collective agreement. He began by introducing a copy of a letter dated December 21, 2007 from Mr. McGarrigle to Mr. Lundquist, requesting pre-bargaining information, including a request for "All current in-force policies and/or procedures related to bargaining unit members." Mr. Lundquist responded by providing Mr. McGarrigle with a copy of the then-current 2004 employee handbook, and promised to provide him the pension booklet, and otherwise referred him back to Mr. Shier, who Mr. Lundquist believed had a good understanding of the policies and procedures. Mr. Moon testified to the Union's use of the lunchroom for union meetings and for balloting employees for selecting shop stewards, or members of the bargaining committee or the safety committee. In redirect, Mr. Moon was asked if the Company was aware that the Union used a particular table for conducting votes. He replied that hundreds of people come and go through the lunchroom. Evidently, when the Union conducted meetings there, the lunchroom was not restricted to bargaining unit personnel. Mr. Moon testified briefly about the collective bargaining preceding the parties' first collective agreement, the 2006-2008 collective agreement. In sum, there was no discussion about video surveillance in either round of collective bargaining. Furthermore, no one told Mr. Moon of the installation in

January 2008 of the additional visible cameras, despite the fact that the bargaining committee included a number of bargaining unit personnel who would have or should have been aware of their installation; and, collective bargaining was in progress at the time. The current agreement was ratified by the bargaining unit on April 23, 2008. With respect to the hidden camera in the lunchroom, Mr. Moon only became aware of it around the time that the Grievor was fired. Mr. Moon testified that he would never condone theft or vandalism, while he would object to the presence of any camera, hidden or not, in the lunchroom.

Mr. Shier is a full-time Plant Chairperson. He has been employed by the Company since 2001, and, has been the Union's Plant Chairperson since 2006, although not full-time until 2008. Mr. Shier has been on the Union's bargaining committee in both rounds of collective bargaining. He confirmed that in neither round of bargaining was there any discussion of surveillance or privacy issues, other than a privacy issue in 2006 relating to stall-dividers in the washroom. Mr. Shier was aware of the outside, perimeter video surveillance. He said he did not seek to challenge it in 2006 because it had already been in place. With respect to the inside cameras installed in January 2008, Mr. Shier was also aware of these. He testified, "I saw them; they were visible." He did not attempt to challenge these at the time. He explained that, because the Company had not consulted with the Union, he could not say whether the cameras were real or fake, and, that he was too preoccupied with collective bargaining. One would think that the bargaining table would be the very place to raise any issue or question about a contemporaneous installation of surveillance cameras; however, Mr. Shier conceded in cross-examination that it was not a priority, top-of-the-list

concern. One would have to conclude from the evidence that the newly installed inside cameras did not become a concern for the Union until after the hidden camera in the cafeteria was disclosed. Mr. Shier was asked in cross-examination if he was part of the decision to challenge the additional cameras. Mr. Shier distanced himself, stating that it was the National Representative's decision to go ahead with the policy grievance, and, that it was under the advice of the National Representative who was more knowledgeable. The problem with the installation of the inside cameras in January 2008, as Mr. Shier saw it, was that the Company had not communicated its intent to the Union and consulted with the Union. Mr. Shier was asked in cross-examination, "You're not seeking to have those cameras removed?" He replied, "I wasn't the one who filed the grievance." When further pressed, he replied, "If there's a need for the cameras to be there, they should stay there."

With respect to the hidden camera in the cafeteria, Mr. Shier complained during cross-examination that it was not all the vending machines which were covered by the camera. I understood that he was challenging the efficacy of the surveillance, and therefore questioning the sincerity of the Company's asserted interest in catching whomever was doing the vandalism and theft. Mr. Shier acknowledged though that any hidden camera would be a concern to him. He agreed that, rather than seeing the vending machines removed, he preferred to see the culprit(s) caught; but, he asserted that surreptitious surveillance should have been "a last resort mechanism". When asked what else the Company could have done without "tipping off" anyone, his response was to complain that "we [the Union] were not consulted"; but he also conceded that, had he been

informed about the presence of the hidden camera, he would have shared the information.

On June 4, 2008, Mr. Shier received a telephone call from Mr. Lundquist, advising him that there was a problem with the Grievor, relating to possible theft. Mr. Shier was on banked time-off; and, he recalled meeting with Mr. Lundquist sometime shortly afterward, and the Grievor was present. Mr. Shier recalled that Mr. Lundquist asked the Grievor whether he knew anything about vandalism in the lunchroom. The Grievor answered that he did not; and, Mr. Lundquist said that he had evidence to the contrary, and he presented some still photographs. This was when Mr. Shier became aware of the surreptitious video surveillance. Mr. Shier testified to calling the Union's National Representative for advice, and to attending another meeting with Mr. Lundquist. He testified that Mr. Lundquist had trouble getting the tape rolling, and so he (Lundquist) showed him (Shier) the tape the next day. Mr. Shier could not confidently recall whether, at the time, he asked for copies of the video or of the pictures; however, he did recall that he asked Mr. Lundquist for a copy of any surveillance policies, and, Mr. Lundquist replied that the Company did not have one. Mr. Shier also recalled asking Mr. Lundquist if there were any more cameras, i.e. any more hidden cameras. Mr. Shier testified, "He looked at me, and said 'I'm not going to tell you that.'".

Mr. Shier testified that he afterward "made it known that there was a hidden camera in the area." He spoke to other shop stewards, and to some of the bargaining-unit members with whom he regularly talked. He testified that their reaction was "very strong"; that "people were quite upset"; that he

was asked when this happened, and, how many more cameras there were? In cross-examination, Mr. Shier agreed that if Mr. Lundquist had told him of other hidden cameras, he would have disclosed that information to the others. Mr. Shier was asked in cross-examination if he had explained to the others that there was a history of vandalism behind the placement of the hidden camera. He recalled only that he said something about vandalism. Mr. Shier conceded that the main gist of what he told employees was that there was a hidden camera in the lunchroom, and, that it would not be surprising to receive a vehement reaction if that was all that employees were told.

The Union entered into evidence a copy of a Bulletin it published on June 26, 2008:

> *TO: ALL CAW LOCAL 114 MEMBERS AT **CASCADE AEROSPACE***
>
> ***SURVEILLANCE GRIEVANCE LAUNCHED***
> ***HIDDEN CAMERAS AND REFUSAL TO PROVIDE ACCESS***
> ***ARE KEY ISSUES***
>
> *Greetings Brothers and Sisters:*
>
> *On June 18, 2008, Union Plant Chair Nathan Shier learned from the Company that it had used hidden cameras to gather evidence to support allegations against a bargaining unit member. This was the first time that the Union was informed that there were hidden cameras at the Cascade Aerospace facility.*
>
> *On June 19, 2008, the Plant Chair requested a copy of any Company policies relating to surveillance and he was informed that none existed. The Plant Chair also requested a tour of all surveillance locations to determine what the equipment was viewing and/or recording. The Company informed the Plant Chair that it would not show the Union the locations of the cameras or recording equipment.*
>
> *On June 20, 2008, National Representative Gavin McGarrigle confirmed that the Company does not have a written policy relating to surveillance (hidden*

or visual) and further that it will not share requested information with the Union relating to hidden surveillance at Cascade Aerospace.

The Union believes the Company actions are in violation of the collective agreement and applicable privacy legislation including the federal Personal Information Protection and Electronic Documents Act (PIPEDA). We are also disturbed that the Company would not work with the Union to review its goals related to surveillance activity and provide access to the Union to ensure that employee privacy rights are appropriately protected.

The Union has filed a group/policy grievance with the Company over these actions. We are seeking a cease and desist order, full access to the Union to investigate the surveillance program, full redress for all affected employees including damages and interest if appropriate, and any other make whole orders an arbitrator or applicable regulatory authority deems necessary in all of the circumstances of this case.

Mr. Shier testified that bargaining unit members were "furious" and "extremely angry". He said that he had no answer to their questions, that he was "floundering" because Mr. Lundquist had said that he was not going to tell him any more. Shier was asked in cross-examination if there was any change in how union members felt about the surveillance after publication of the above "memo". He answered, "Even more so." He stated that people were angry at the Union; that he could not tell them anything; that several people were talking about walking out, but that he dissuaded them and told them that he was talking to the National Representative.

Mr. McGarrigle directed Mr. Shier to Article 2.13(j) of the current collective agreement:

2.13 Information for the Union

(j) Any new rules, policies, or procedures implemented by the Employer through the Document Distribution System (DDS) will be provided to the Plant Chair in hard copy written format on an ongoing basis. Where not distributed on the DDS, all new or revised Human

Resources policies which affect members of the bargaining unit will be given to the Plant Chairperson in hard copy written format.

Mr. Shier explained that Article 2.13(j) was a new clause. He testified that there were problems with the internal DDS system; this is an "intranet" communications system. He interpreted the clause as requiring the Company to provide him with a hard copy, apart from the internal internet, "of anything that's been changed in respect of employees."

Mr. Shier, in cross-examination, testified that he had asked Mr. Lundquist for any Company surveillance policy, and that Mr. Lundquist had told them there was not one. However, Mr. Shier testified that he researched the intranet the next day and found one. He referred to a document entitled "Cascade Industrial Security Briefing" which document had been circulated via the intranet, on May 30, 2008, by Mr. Lusk, who was referred to there as the "Company Security Officer". This document had been sent by e-mail to Mr. Shier that very day, and he testified that he checked his e-mail regularly, and that perhaps he was mistaken when he testified to the effect that he had discovered it after his inquiry of Mr. Lundquist. Mr. Shier acknowledged that the "Cascade Industrial Security Briefing" had been distributed by e-mail, and not via the DDS System, and that all he had to do to get a hard copy was press "print". Mr. Shier was also directed to the Company's intranet home page, via which one could link to the Human Resources home page, and on to any existing human resources policies, including the "Employee Handbook". Mr. Shier agreed that a new rule or procedure which was not implemented through the DDS, and which was not a human resources policy, would not be affected by Article 2.13(j).

In his capacity as Materials Manager, Mr. Toby manages the Company's contract with the catering company. The contract with the catering company dates back to November 2006, and it has resulted in a marked improvement over what the lunchroom had been before. The catering company provides a hot-kitchen food service from 6:00 a.m. to 7:00 p.m. In addition, the catering company provides microwaves and vending machines which dispense beverages, snacks, cold sandwiches, and frozen food. The cafeteria area serves as both a cafeteria and lunchroom. During cafeteria operating hours, there is always catering company staff present; but, the vandalism and theft would occur on graveyard shift and on weekends. Mr. Toby would be the Company's on-site liaison person, and he would be speaking to the on-site cafeteria manager on an almost daily basis. In early 2007, the cafeteria manager began reporting to Mr. Toby about damage being done during cafeteria off-hours to the catering company's equipment. In the overwhelming majority of cases, the concern pertained to the vending machines. There were repeated incidents of the machines being kicked or shaken, and product gone missing. The machines would shut down, and then require repair and resetting. Mr. Toby testified that these incidents occurred sporadically during 2007, but increased in frequency in 2008. Mr. Toby also testified to other incidents of vandalism or theft; but, these did not pertain to the vending machines, and were isolated events. For example, Mr. Toby testified to the "float" going missing in the cafeteria. In cross-examination, he stated, "It was a one-off incident." He also referred to the cappuccino machine being damaged twice.

Mr. Toby would speak to Mr. Lusk, whose duties included supervising security, and to Mr. Lundquist. Mr Toby testified, "I was pushing for a video camera to see if we could catch the culprits, because it wasn't stopping." Mr. Toby started advocating for hidden camera surveillance of the vending machines in 2007, and "really started pushing for it" in 2008 when the problem was worsening with events occurring every weekend. Mr. Toby testified that it looked like people were "catching on" that they could get product without paying. In cross-examination, Mr. Toby confirmed that he wanted a camera installed in the lunchroom from the very beginning, "to catch who was damaging the machine." He agreed that the posting of a sign advising of video surveillance, or the visible presence of a camera, would have a deterrent effect; but he maintained that his intent was to catch whomever was guilty of the vandalism and theft.

However, a decision would not be taken until January 2008, and the hidden camera was not actually installed until May. Mr. Toby was not party to that decision. Indeed, he had come to feel that his exhortations were futile. When testifying in cross-examination about the apparent theft of the "float", he testified that he knew he was not going to get a camera for a one-off incident, and so he did not ask. Furthermore, he stated, "From past experience I figured there would never be a camera installed." In May, 2008, about a week after the camera had been installed, Mr. Toby went to Mr. Lusk to report another incident. This was when he learned of the camera's presence.

It would appear from the evidence that there were no further incidents following the terminations. As a result of the settlement achieved on

January 8, 2009, the Company removed the hidden camera. Since then, there has been one incident of someone trying to break into the cafeteria change machine. Mr. Toby thought it was now common knowledge that the camera had been removed.

Mr. Lusk, Manager of Tooling and Facilities, is responsible for security at the facility. The inside visible cameras were installed on January 8, 2008, as a part of a plan the Company submitted to CIISD. Mr. Lusk testified that they were intended to capture any unauthorized access to the facility, and to protect equipment and parts. There had been a CIISD security audit, and CIISD was looking for some upgrade to the Company's security system. CIISD did not formally demand in writing that these particular cameras be installed; but, the Field Industrial Security Officer ("FISO") had expressed a caution about persons possibly being able to "piggy-back" entering the facility. During cross-examination, Mr. Lusk explained that, "in conversation", the FISO had requested the cameras be put there. Mr. Lusk was asked in examination-in-chief, if the removal of any of the visible cameras would "potentially jeopardize" the Company's CIISD clearance. He thought it would. In cross-examination, Mr. Lusk was asked about whether placing additional cameras outside could be equally effective. He thought they could, "But", he said, "our plan was to keep our auditor [the FISO] happy." Mr. Lusk testified that he was thinking about privacy, and about minimizing the impact, and the location of the cameras was chosen with that in mind. At the same time, he did not dispute Mr. Shier's evidence about employees working in the area, and he agreed there would be less an impact if the cameras were outside.

The Company had reported to CIISD that two lap-top computers had been stolen from secured areas. This matter was commented upon in the CIISD security audit. In cross-examination Mr. Lusk testified that one of the lap-tops was stolen from one of the contractors, and it was not clear from the evidence from whom the other lap-top was taken. No one was ever caught. Mr. McGarrigle asked Mr. Lusk if he would expect CIISD to be more concerned about the theft of the lap-tops (as opposed to theft from the vending machines)? Mr. Lusk answered, "I would expect that they'd be concerned about any theft."

Mr. Lusk identified the "Cascade Aerospace Security Manual", revised to May 10, 2006, which manual was in effect on January 8, 2008. He also identified the "Cascade Aerospace Security Manual", revised to June 16, 2008. Article 1.6 is entitled "Cascade Security Policy". It says nothing about surveillance cameras; and, Mr. Lusk testified that there is no Company "surveillance policy" in place. Chapter 4 is entitled "Facility Security", and Article 4.3.6 does describe the camera system. These would be the visible cameras. Article 4.3.6 was revised in the June 16, 2008 edition as a result of the addition of more visible cameras in January, 2008. There is nothing in the "Cascade Aerospace Security Manual", including Article 1.6 dealing with a "Cascade Security Policy" about hidden cameras.

In examination-in-chief, Mr. Lusk was directed to Article 2.13(j) of the collective agreement. He testified that the Cascade Security Manual was not distributed through the DDS System, and, that it was otherwise available to all Company employees (including any local officers or shop stewards)

via the Company intranet. Indeed, a link to it appears on the Company's intranet home page.

In cross-examination, Mr. Lusk was directed to the "Cascade Industrial Security Briefing" which Mr. Lusk provided to all employees on May 30, 2008, via the Company intranet. This was published a month after the conclusion of collective bargaining for the current collective agreement. The following excerpts were noted:

> ***Cascade Industrial Security Briefing***
>
> ***Cascade's Industrial Security Program***
>
> *Background*
>
> *...This security requirement will bring about some changes to Cascade's facility and the way it operates.*
>
> *Cascade's Security Policy*
>
> *Cascade's Security Policy objective is to prevent unauthorized disclosure, destruction, removal, modification or interruption of Protect or Classified information and assets that are in Cascade's care. Achievement of this objective requires an organizational structure and procedures, supporting the subsystems of:*
>
> - *Personnel security*
> - *Physical security*
> - *Information Technology security.*
>
> ...
> *Cascade Security Manual*
>
> *Cascade has prepared a Cascade Security Manual that provides policy and procedures for industrial security at Cascade. The Cascade Security Manual is available to employees on the Cascade Intranet. ...*

Mr. McGarrigle pointed out to Mr. Lusk the use of the word "policy", and he drew Mr. Lusk's attention to the inclusion in the grievance of a

complaint that the Company had failed to provide the Union with a copy of all surveillance policies and related material.

With respect to the hidden cameras in the lunchroom, Mr. Lusk recalled that Mr. Toby first came to him in early 2007 with a concern about damage and theft. Mr. Lusk followed-up by talking to the catering company employees, and to supervisors and employees in the lunchroom. These would have been informal conversations, in the nature of "If you hear anything, just let me know." This would not appear to have been a very effective investigative method, and indeed no information was forthcoming in response.

In cross-examination, Mr. Lusk continued to maintain that the delay in installing the hidden camera in the lunchroom was because of the contractor's schedule, not the Company's. Mr. McGarrigle pointed out that collective bargaining started in January 2008 and concluded on April 20, 2008. He pressed Mr. Lusk that part of the delay "perhaps had something to do with collective bargaining" or was "somehow related to collective bargaining". Mr. Lusk responded with an unequivocal "No."

Mr. Lusk testified that Mr. Toby continued to report to him events of vandalism and theft, which seemed to increase in frequency in 2008. Mr. Lusk testified, "Basically, we wanted to find the individual or individuals responsible." He concluded that there was no less invasive alternative than surveillance by hidden camera; which was what Mr. Toby had been advocating from the beginning. Mr. Lusk testified that, in late 2007 or early 2008, he sought and received approval from his superior, Ramsey Sarkis;

and, the camera was installed on May 12, 2008. The delay had to do with the availability of the installation contractor to come at a time when no one else would be present. In the meantime, incidents of vandalism and theft were continuing.

The camera was hidden in the ceiling in a smoke detector. It had a fixed focus, i.e. no zoom capability. Management would have access to recorded footage; however, Mr. Lusk testified, "The only time we view any footage is when there is an incident. We never view on an ongoing basis." Within a week of installation of the hidden camera, Mr. Toby reported another incident. Mr. Lusk testified that he then viewed the footage, and, that he would not have done so had he not gotten a report. He testified that he saw footage of two Company employees and a contractor's employee shaking the vending machines and taking product.

Mr. Lusk testified that there are vending machines elsewhere in the plant, to which damage was done "a couple of times". He testified that he had resisted requests to install cameras there, because there was not a chronic problem and he did not feel that camera surveillance was necessary.

IV

Mr. McGarrigle, for the Union, submitted firstly that the Company breached Article 1.09 of the collective agreement:

ARTICLE 1 – RECOGNITION

1.09 Co-operation

All parties to this Agreement hereby commit themselves to the fullest co-operation with the objective of maintaining safe and efficient and uninterrupted production in the Company's plant.

Mr. McGarrigle pointed to Mr. Lundquist's refusal to respond to Mr. Shier's inquiry whether there were any other hidden cameras in addition to the one in the lunchroom. He also referred to the second paragraph of his grievance letter to Mr. Lundquist of June 26, 2008:

> *On June 19, 2008, the Plant Chair requested a copy of any Company policies relating to surveillance and he was informed that none existed. The Plant Chair also requested a tour of all surveillance locations to determine what the equipment was viewing and/or recording. The Company informed the Plant Chair that it would not show the Union the locations of the cameras or recording equipment.*

Mr. Csiszar, for the Company, objected that there was no evidence that the Plant Chairperson had requested a tour, and, Mr. McGarrigle submitted that the Company had not disputed this paragraph; and therefore, it must be accepted at face value. Equally, Mr. McGarrigle submitted that the Company had not disputed the Union's bulletin of June 26, 2008 entitled "Surveillance Grievance Launched". Mr. Csiszar countered that the Company had responded to the viva voce evidence adduced, and he submitted that the admission into evidence of a document was only evidence of the document having been published, but not of the truth of the contents. Mr. McGarrigle submitted that an adverse inference should be drawn. Mr. McGarrigle referred to a telephone conversation he had had with Mr. Lundquist on June 20, 2006, asserting that he had requested information from Mr. Lundquist, but gotten none. Mr. McGarrigle had not

testified either; but, he submitted that an adverse inference should be drawn in respect to Mr. Lundquist.

Mr. McGarrigle submitted that the Company breached Article 2.10(a) paragraph 2:

> ***2.10 Union Representatives' Hours***
>
> ***(a) Plant Chair***
>
> *...The Plant Chair shall attend to Union business as required and as necessary for the administration of the collective agreement and shall be given free access to the premises and the Union office for these purposes. The Plant Chair shall be permitted to attend all meetings related to bargaining unit members if requested. The Plant Chair shall be eligible to sign-up for voluntary overtime (at the rate applicable to their classification prior to serving as the Plant Chair) in line with the applicable provisions of the agreement and their normal seniority.*

Mr. McGarrigle submitted that Mr. Shier should have been given access to the viewing monitors and video footage. He submitted that this was an ongoing breach up to the first day of the hearing. Mr. McGarrigle later submitted that Article 1.05 should be added to his Article 2.10(a) argument. Article 1.05 is concerned with "Union Access to Facility".

Mr. McGarrigle pointed to Article 1.03:

> ***ARTICLE 1 – RECOGNITION***
>
> ***1.03 No Other Agreement***
>
> *No employee shall be required or permitted to make a written or oral agreement with the Company which may conflict with the terms of this Agreement.*

He submitted that employees cannot waive an unlawful breach of privacy rights, or a violation of the collective agreement. Therefore, it was irrelevant that employees did not complain about the additional visible surveillance cameras installed in January 2008.

Mr. McGarrigle submitted that the Company had breached Article 1.01:

> ***ARTICLE 1 – RECOGNITION***
>
> ***1.01 Bargaining Recognition***
>
> *The Company recognizes the Union as the sole and exclusive bargaining agent for all employees as defined in Article 1.02 hereof, for the purpose of establishing rates of pay, hours of work and other conditions of employment.*

He submitted that the Company's expansion of its surveillance program in January 2008 constituted a new rule, i.e. imposing additional video surveillance upon employees, and, that the Company should have involved the Union in consultation and discussion. Mr. McGarrigle submitted that the Union was not asking for the removal of the additional visible cameras; but, that the Union was seeking an order compelling the Company to consult with the Union and to provide applicable information so that the parties could discuss whether less privacy-invasive alternatives could be implemented. He submitted that I should retain jurisdiction so that, if the parties could not resolve the issue, the matter would be remitted to me to determine.

Mr. McGarrigle submitted that the Company had breached Article 2.13(j):

> ***2.13 Information for the Union***
>
> *(j) Any new rules, policies, or procedures implemented by the Employer through the Document Distribution System (DDS) will be provided to the Plant Chair in hard copy written format on an ongoing basis. Where not distributed on the DDS, all new or revised Human Resources policies which affect members of the bargaining unit will be given to the Plant Chairperson in hard copy written format.*

He referred to the "Cascade Industrial Security Briefing" being e-mailed to Mr. Shier on May 30, 2008. He submitted that the document was e-mailed to all employees, and thus it was not provided to Mr. Shier as intended by Article 2.13(j), because Mr. Shier was not provided a "hard copy". He submitted that the document constituted a policy. He referred to the "Cascade Security Manual", and noted that the policy had changed on May 30, 2008 because the number of the visible cameras referenced had increased. He also noted the change of numbers from the "Cascade Aerospace Security Manual" May 10, 2006 revision to the June 16, 2008 revision. Mr. McGarrigle also noted that the June 16, 2008 revision said nothing about surveillance.

Mr. McGarrigle submitted that the Company breached Article 4.01, in particular the second paragraph:

> ***ARTICLE 4 – HUMAN RIGHTS IN THE WORKPLACE***
>
> ***4.01 No Harassment or Discrimination***
>
> ...
> *The Company further commits that no employee covered by this Agreement will be unlawfully interfered with, coerced, or*

> *discriminated against by the Company, its officers or agents, because of lawful activity on behalf of the Union.*

Mr. McGarrigle based this submission on the assertions contained in the Union's June 26, 2008 bulletin entitled "Surveillance Grievance Launched", which, again, he submitted was not challenged. He again submitted that Mr. Shier had been denied a tour of all surveillance locations. He submitted that Mr. Shier had asked for a copy of the surveillance footage, i.e. of the hidden camera in the lunchroom, and not been provided it. He again submitted that an adverse presumption should be drawn because Mr. Lundquist did not testify. Mr. McGarrigle referred to a letter dated July 31, 2008 to him from Mr. Lundquist. This letter was entered as an exhibit as it was included in the Union's Brief of Documents. The July 31, 2008 letter was Mr. Lundquist's response to Mr. McGarrigle's grievance letter to him of June 26, 2008. No viva voce evidence was called regarding the July 31, 2008 letter. It point #4 of Mr. McGarrigle's letter, he accused the Company of:

> 4. *Refusing the Union proper access to the facility to investigate the camera locations, viewing angles, storage, and security procedures in order to ensure that the terms of the Agreement are being adhered to and that the surveillance results are matched toward the specific and appropriate legal ends under the terms of the Agreement and applicable privacy legislation.*

Mr. Lundquist responded to point #4, stating:

> 4) *At this point it has not been established that we have an obligation to disclose this information or that there has been a violation of the agreement. We do not believe there has been violation.*

Mr. McGarrigle submitted that Mr. Lundquist's refusal to disclose information violated Article 4.01 of the collective agreement. He further

submitted that the Company had breached Article 4.01 because it had installed a hidden camera at a location where Union votes were known to take place. He submitted that this was unlawful interference with Union activity; that the Union would reasonably expect this area to be free from surveillance.

Mr. McGarrigle pointed to Article 5.01 of the collective agreement which provides that employees "may only be disciplined for just and reasonable cause." He submitted that an employee could be disciplined for refusing to walk into an area where the inside cameras were located. He submitted that this video surveillance should be deemed to have been surreptitious, until such time as the Union was formally advised. He further submitted that the Company had installed the hidden camera without reasonable cause and without a balancing of interests, as required in the arbitral jurisprudence.

Mr. McGarrigle submitted that the Company had breached the management rights clause of the collective agreement, particularly Articles 8.01(c) and (d) and Article 8.02:

ARTICLE 8 – MANAGEMENT RIGHTS

8.01 Management Rights

The Union recognizes that the Company has the sole and exclusive right to manage the affairs of the business and to direct the working forces of the Company, and without restricting the generality of the foregoing, the Union acknowledges that it is the exclusive function of the Company to: ...

(c) Discharge, suspend or otherwise discipline employees, provided that such discharge, suspension or discipline is for just and reasonable cause;

(d) Make and enforce and alter from time to time reasonable rules and regulations to be observed by the employees; ...

8.02 Consistent with Collective Agreement

The Company agrees that such rights and powers will be exercised in a manner consistent with the terms of this Collective Agreement. Any allegation that the exercising of these rights and powers are in conflict with any provisions of this Agreement shall be subject to the provisions of the Grievance Procedure.

Mr. McGarrigle submitted that the Company had unreasonably applied its surveillance policy in breach of PIPEDA, and that this constituted a breach of Article 23.01:

ARTICLE 23 – SAVINGS CLAUSE

23.01 Extent

Should any clause or provision of the Agreement be declared illegal or in any way conflict with the laws of the Province of British Columbia or Canada or any regulation thereof, both parties agree that this Agreement shall automatically be amended to comply with such law or regulation, if the law or regulation so requires. The remainder of this Agreement shall not be affected thereby and shall remain in full force and effect.

He also referred to Article 23.02:

23.02 Waiver of Provisions

The waiver of any of the provisions of the Agreement or the breach of any of its provisions by either of the parties shall not constitute a precedent for any further waiver or for the enforcement of any further breach.

Presumably, Mr. McGarrigle was referring to both the visible surveillance and the hidden camera. He went on to submit that the Company had breached Section 5(3) of PIPEDA:

DIVISION 1
PROTECTION OF PERSONAL INFORMATION

> *5. (3) An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.*

Mr. McGarrigle referred to the Company's "Employee Handbook". Chapter 2 concerns "Conditions of Employment", and Mr. McGarrigle noted certain provisions from the Company's privacy policy as of May 1, 2003:

> *In accordance with the federal Privacy Act, Cascade Aerospace respects the right of all its employees to privacy with regard to their personal information that is collected, used or disclosed by the company. Cascade Aerospace is responsible for the protection of personal information and the fair handling of it at all times, throughout the company and in dealings with third parties.*
>
> *The designated Privacy Officer is the Manager, Human Resources. ...*
>
> *Cascade Aerospace follows the ten privacy principles....*
>
> *2. Identifying Purposes*
> *The purposes for which personal information is collected shall be identified by Cascade Aerospace at or before the time the information is collected.*
>
> *4. Limiting Collection*
> *The collection of personal information shall be limited to that which is necessary for the purposes identified by the company. Information shall be by fair and lawful means.*
>
> *8. Openness*
> *Cascade Aerospace shall make readily available to individuals specific information about its policies and practices relating to the management of personal information.*

He submitted that the privacy policy related to surveillance. He submitted that the Company's privacy officer was Judy Griff, and that an adverse inference should be drawn because she did not testify at or attend the hearing. He submitted that the Union was not consulted about the visible cameras installed in January 2008, and that this supports the Union's position that the Company violated the privacy policy and applicable legislation (i.e. PIPEDA). He submitted, with respect to the hidden camera, that although PIPEDA would permit the surreptitious collection of information to investigate a breach of the laws of Canada, the surveillance was still illegal because it was conducted in an unreasonable manner, and because the Company did not take into account less privacy invasive alternatives. Mr. McGarrigle suggested that perhaps the Company could have provided for the presence of a supervisor in the lunchroom; but, the point he emphasized was that the Company did not consider other alternatives. Mr. McGarrigle submitted that the Union was not arguing for removal of the cameras, i.e. the inside visible cameras, but for a declaration that these cameras violate PIPEDA, and that the Company should have consulted with the Union.

Mr. McGarrigle then reviewed the testimony of each witness. Through this process, he asserted that:

- when Mr. McGarrigle wrote Mr. Lundquist on December 21, 2007 requesting information in preparation for collective bargaining, the Company had already decided to install inside surveillance cameras, and, these cameras were installed two days prior to Mr. Lundquist's response which made no reference to the matter;

- the expansion of surveillance to the inside of the building constituted a new policy;
- the lack of discussion of video surveillance in collective bargaining constituted a Company violation of the collective agreement relating to co-operation with the Union, and the Union's ability to be consulted and ability to pursue its statutory duty of fair representation and to bargain in good faith;
- notwithstanding that Mr. Shier was aware of the inside visible cameras during collective bargaining for the current collective agreement, the onus was on the Company to inform the Union that it was changing its policy;
- the Company "acquiesced" to the fact that vandalism and theft was going to continue and that there was nothing they could do about it, without advising the Union of the problem or seeking the Union's help to obviate the need to install a hidden camera;
- the Company breached Section 5(3) of PIPEDA, and sections 1.09, 1.01, 5.01 and 8.01 of the collective agreement;
- employees were upset about surveillance, i.e. hidden camera surveillance; and, Mr. Shier had dissuaded them from walking off the job;
- the hidden camera in the lunchroom captured employees sitting at tables during breaks, and, the inside visible cameras captured employees working;
- employees would have a reasonable expectation of privacy during break-times, and would not normally expect their lunchroom to be under surveillance;

- deterrence is a common goal in surveillance cases;
- although there was no intent to monitor the video footage unless there were an incident, there was no way to tell if anyone was actually viewing the footage at will;
- although management did not consider that the security manual constituted a policy, it was a policy nevertheless; and, this goes to credibility;
- other incidents of vandalism and theft were more serious than the vandalism and theft associated with the cafeteria vending machines, and the Company acted inconsistently when it set to catch the people responsible and jumped to a hidden camera in the cafeteria;
- one of the reasons for the hidden camera was to monitor union activity, and the Company called no evidence to rebut this;
- the Company should have considered other options which were less privacy intrusive than a hidden camera, and at least should have double-checked to make sure that the camera was solely focussed on the vending machines;
- the Company could have changed the angle of the hidden camera last June when it terminated the people, but it did not care to do so and left the camera as it was until January of this year;
- if the visible surveillance cameras had been installed outside of the building, they would have been just as effective, with less impact on employees;
- adverse inferences should be drawn because the Company did not call Mr. Lundquist in response to testimony from Messrs. Moon and Shier, nor Mr. Sarkis who made the decision to install the hidden

camera; and, that the inference to be drawn was that the ongoing collective bargaining was a factor in the Company not speaking up about the installation of the hidden camera.

Mr. McGarrigle then cited the following authorities: Re Saint Mary's Hospital (New Westminster) -and- Hospital Employees Union (1997), 64 L.A.C. (4th) 382 (D.L. Larson); Re Steels Industrial Products -and- Teamsters Union, Local 213 (1991), 24 L.A.C. (4th) 259 (R.B. Blasina); Re Lenworth Metal Products Ltd. -and- United Steelworkers of America, Local 3950 (1999), 80 L.A.C. (4th) 426 (T.E. Armstrong, Q.C.); Re Lenworth Metal Products Ltd. -and- United Steelworkers of America, Local 3950 (1999), 84 L.A.C. (4th) 77 (T.E. Armstrong, Q.C.); Lenworth Metal Products Ltd. v. U.S.W.A., Local 3950 (2000) 101 A.C.W.S. (3d) 291 (Ont. Div. Ct.); (2000) 29 Admin. L.R. (3d) 258; Re Unisource Canada Inc. -and- Communications, Energy and Paperworkers' Union of Canada, Local 433 (2003), 121 L.A.C. (4th) 437 (S. Kelleher, Q.C.); Communications, Energy & Paperworkers' Union of Canada (CEP) Local 433 -and- Unisource Canada Inc., 2004 BCCA 351; Unreported: June 24, 2004 (B.C.C.A.); Prestressed Systems Inc. -and- Labourers' International Union of North America, Local 625 (2005), 137 L.A.C. (4th) 193 (M. Lynk); Re Ebco Metal Finishing Ltd. -and- International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers' Shopmens' Local 712 (2004), 79 C.L.A.S. 375 (R.B. Blasina); Re Securicor Cash Services -and- Teamsters, Local 419 (Mehta) (2004), 125 L.A.C. (4th) 129 (K. Whitaker); Re Canada Safeway Ltd. -and- United Food and Commercial Workers, Local 401 (2006), 152 L.A.C. (4th) 161 (A.M.S. Melnyk, Q.C.); Re Janes Family Foods -and- United Food and Commercial Workers Union, Local 1000A

(2006), 156 L.A.C. (4th) 304 (L. Trachuk); Re Fraser Surrey Docks Ltd. -and- International Longshore and Warehouse Union, Local 514 (2007), 159 L.A.C. (4th) 72 (C. Taylor, Q.C.); Erwin Eastmond v. Canadian Pacific Railway and Privacy Commissioner of Canada, [2004] F.C.J. No. 1043; Re Cargill Foods (a division of Cargill Limited) -and- United Food and Commercial Workers International Union Local 633 (2008), 94 C.L.A.S. 138 (P. Craven); Re Leon's Mfg. Co. Ltd. -and- Retail Wholesale and Department Store Union, Local 955 (2006), 153 L.A.C. (4th) 155 (B. Pelton, Q.C., G. Cymbalisty, G. Semenchuck, Q.C.); Public Service Alliance of Canada -and- Bank of Canada, C.I.R.B. Decision No. 387 (July 5, 2007); [2007] 148 CLRBR (2d) 66; Re West Park Healthcare Centre -and- Service Employees International Union, Local 1.ON (2005), 138 L.A.C. (4th) 213 (G.J. Charney, J. Sack, R. Filion); Re Gateway Casinos G.P. Inc. -and- United Food and Commercial Workers, Local 401 (2007), 159 L.A.C. (4th) 227 (W.D. McFetridge); Re British Columbia Hydro and Power Authority -and- Canadian Office and Professional Employees Union, Local 378 (2006), 150 L.A.C. (4th) 281 (D.L. Larson).

Mr. McGarrigle submitted that the surveillance of employees in the lunchroom is prohibited, and that declaratory relief would be inadequate, and that the expansion of visible video surveillance to the inside of the building was not reasonable. He submitted that the Company should be ordered to pay damages to members of the bargaining unit (approximately 400 in number) and to the Union. He asked for an order that the Company pay each bargaining unit member $250.00, and pay the Union $5,000, or, in the alternative, something else significant.

In summary, Mr. McGarrigle requested:

1. a declaration that the Company has violated the collective agreement, PIPEDA, and the Canada Labour Code;

2. a cease and desist order going forward with respect to the Company`s failure to co-operate with the Union with respect to surveillance;

3. an order providing the Union full access to investigate the Company`s surveillance program, with respect to all cameras, and particularly the cameras in issue which were installed in January 2008;

4. an order directing the Company to meet with the Union, provide the Union with "applicable information", and discuss with the Union less privacy invasive alternatives which would allow the Company to maintain its CIISD clearances; and, failing resolution on any issue, that this arbitrator remain seized with jurisdiction to determine the issue pursuant to his remedial authority to redress a breach of the collective agreement or applicable legislation;

5. an order directing the Company to mail a copy of this arbitration decision, at its expense, to each member of the bargaining unit;

6. an order that the hidden camera should be removed, or, a declaration that it should never have been there;

7. damages to the Union for infringement of its ability to effectively represent its members;

8. full redress to affected employees including damages;

9. any other make whole orders that this arbitration board deems necessary in all of the circumstances of the case; and,

10. that this arbitrator remain seized with respect to any issues relating to the implementation or interpretation of this arbitration award.

Mr. Csiszar began his argument by first responding to Mr. McGarrigle's final points. Mr. Csiszar submitted that I should decide the case and not defer any issue subject to further discussion between the parties. He submitted that it would not be a due exercise of jurisdiction for an arbitrator to remit the very issue before him back to the parties.

Mr. Csiszar referred to the management rights clause, and he particularly noted Article 8.01(d) which recognizes the Company's exclusive authority to make "reasonable rules and regulations". He submitted that this was different from a requirement to exercise management rights fairly and reasonably.

Mr. Csiszar submitted that there was no evidence of damages suffered or needing redress for bargaining unit employees. He submitted that instead of the Company being liable to the Union for damages, the Union should be liable to the Company. Mr. Csiszar stated that the Company was not

advancing a claim against the Union for damages; however, he submitted, such a claim would be more credible considering the "egregious conduct" of the Union: that the Union had been "lying in the weeds" with respect to the visible inside cameras installed in January 2008; that it now came forward with grandiose claims; and, that it had inflamed the situation with its June 26, 2008 bulletin to its members.

Mr. Csiszar agreed that this is a federal case, and that PIPEDA applies. He noted that the outside perimeter cameras were not put in issue by the Union, and that not all of the cameras installed in January 2008 were in issue. He submitted that this case concerns certain visible cameras installed in January 2008 and the hidden camera in the lunchroom. Mr. Csiszar submitted that the validity of those cameras is supported by the cases to which Mr. McGarrigle referred. He noted that other incidents to which Mr. McGarrigle referred were isolated events, unlike the ongoing vandalism and theft at the vending machines, and hence it would not have been practical to install surveillance cameras in those situations. He submitted that the evidence was that the camera footage was not going to be looked at unless there were further incidents of vandalism and theft. Mr. Csiszar submitted that the circumstances were such as to make it reasonable to conduct surveillance, and that there was a reasonable balancing of interests. He went on to submit several factors in support of this submission.

Mr. Csiszar submitted that the hidden camera in the lunchroom was only installed in reaction to recurring illegal activity. The camera, he submitted, protected property and products in the lunchroom, and it

protected the interests of all users of the lunchroom because toleration of the vandalism and theft would have jeopardized the continuation of cafeteria services and of the presence of the vending machines.

Mr. Csiszar submitted that the scope of surveillance was limited to the vending machines at the north wall of the cafeteria. Mr. Csiszar acknowledged that the hidden camera captured some tables, and he noted that the camera was installed by a contractor, and he conceded it could have been focussed more narrowly on the vending machines, and that this would have been appropriate. However, he submitted, the purpose was solely to monitor the vending machines, and not to monitor employee behaviour other than with respect to the vending machines, and the footage was not viewed nor was it intended to be viewed unless there was an incident.

Mr. Csiszar submitted that this was a high security industry; one more security sensitive than, for example, the grocery stores in some of the cases cited. He noted the Company's contract with the DND, the presence of sensitive and expensive material on site, and access to the airport runway and to airplanes. He submitted that the Company must maintain a level of security and that it must have employees who can be trusted. He submitted that there have been surveillance cameras on site since day-one (i.e. the outside perimeter cameras.) With respect to the cameras presently in issue, these would be commensurate with not tolerating employees who cannot be trusted, and not affording opportunity to steal or do damage.

Mr. Csiszar submitted that the installation of the hidden camera in the lunchroom was a measured response to misbehaviour at the vending

machines, and not a knee-jerk reaction to an isolated event. He submitted that the circumstances were distinguishable from the situations mentioned by Mr. McGarrigle such as the theft of laptops, and damage to the cappuccino machine. He submitted that the action was effective because the persons doing the vandalism and theft at the vending machines were identified, and the illegal activity stopped; and, he submitted, the employee group benefited.

Mr. Csiszar then reviewed the legal principles, citing the following: R.B. Blasina, "Video Surveillance And The Employment Relationship", Personal Information Protection Act Conference 2006, Calgary; The Advocate, Vol. 65, July 2007 p. 447; X v. Y (Z Grievance), [2002] B.C.C.A.A.A. No. 292 (C. Taylor); Re British Columbia Maritime Employers Association -and- International Longshore and Warehouse Union (Canada) and International Longshore and Warehouse Union, Local 500 (Ray Iannattone) (2002), 70 C.L.A.S. 74 (D. Munroe, Q.C.); Re City of Vancouver -and- Canadian Union of Public Employees, Local 15 (2003), 73 C.L.A.S. 370 (C.E.L. Sullivan); Re Extra Foods (Park Royal) -and- United Food and Commercial Workers International Union Local 1518 (Marcel Duhamel) (2002), 71 C.L.A.S. 144 (N.M. Glass); Re Brewers Retail Inc. -and- United Brewers' Warehousing Workers' Provincial Board (1999), 78 L.A.C. (4th) 394 (R.J. Herman); Re Fraser Surrey Docks Ltd. -and- International Longshore and Warehouse Union, Local 514, supra; Re Unisource Canada Inc. -and- Communications, Energy and Paperworkers' Union of Canada, Local 433, supra; Re Pope & Talbot Ltd. -and- Pulp, Paper and Woodworkers of Canada, Local 8 (2003), 123 L.A.C. (4th) 115 (D.R. Munroe, Q.C.); Eastmond v. Canadian Pacific Railway, supra; and, Re

Molson Breweries -and- Brewery, Winery and Distillery Workers Local 300 (Alberto Grievance), Unreported: March 16, 1994 (R.B. Bird, Q.C.).

With respect to the visible cameras which were installed inside the building, Mr. Csiszar submitted that these were reasonable, i.e. met the test for camera surveillance. He submitted that these cameras were a reasonable security measure for the security approval the Company needed for its DND contract. He submitted that this was not challenged, and he noted that Mr. Shier had agreed that he would have no problem with the cameras if they were required. Mr. Csiszar further noted that these cameras were visible and that the Union had not raised any concern at the collective bargaining which was underway at the time these cameras were installed.

Mr. Csiszar then addressed particular submissions which Mr. McGarrigle had made. Mr. McGarrigle said that he had expected Mr. Lundquist to be called and thus that he would have been able to cross-examine him, and therefore an adverse inference should now be drawn. Mr. Csiszar protested that he had told Mr. McGarrigle who he would call. He asserted that Mr. McGarrigle had full opportunity to call Mr. Lundquist himself.

Mr. Csiszar submitted that Article 1.09 of the collective agreement, "Co-operation", was a general clause relating to "maintaining safe and efficient and uninterrupted production" in the plant. He submitted that this provision did not apply to the present case. He also referred to the management rights clause, Article 8.01, particularly the right to make "reasonable rules and regulations". He submitted that the enumerated

matters under Article 8.01 remained solely with the Company, and that Article 1.09 did not apply.

Regarding Article 2.13(j), Mr. Csiszar submitted, the Security Manual and the "Cascade Industrial Security Briefing" had not been implemented through the DDS system, nor were these human resources policies. Mr. Csiszar submitted that Article 2.13(j) simply did not apply.

Mr. Csiszar objected to Mr. McGarrigle asserting as fact statements made in a written document, without viva voce supporting evidence. Mr. Csiszar submitted that Mr. McGarrigle was wrongly relying upon the documents for the truth of their contents.

Mr. Csiszar submitted that Article 2.10(a) of the collective agreement concerned "Union Representatives' Hours", and the right of the Plant Chairperson to have free access to the premises and to attend meetings. He submitted that there was no evidence which would relate this provision to this matter; and, he submitted similarly that Article 1.05, "Union Access to Facility" was not applicable. Mr. Csiszar further submitted that it was unfair for the Union to seek to rely on these provisions in final argument without having presented any evidence. Mr. Csiszar further submitted that Article 1.03, "No Other Agreement", was not applicable; and, that this was a policy grievance and not an individual grievance, and that the Company was not arguing waiver.

Mr. Csiszar submitted that Article 1.01, "Bargaining Recognition", was a common provision found in collective agreements. He submitted that

if the provision stood for what Mr. McGarrigle was arguing, i.e. about the Company having to meet and consult with the Union, then the management rights clauses in collective agreements across the country would be usurped. He submitted that this provision did not apply in the present circumstances.

Mr. Csiszar submitted that Article 4.01, "No Harassment or Discrimination", was not even remotely applicable. He submitted that it provided a common workplace harassment procedure. Mr. Csiszar commented that the Union would seek participation in the Company's efforts to stop vandalism and theft, and yet would not have co-operated with the Company by revealing the violator. In effect, he submitted, the Company would not be able to find out, on its own, who the dishonest people were.

Mr. Csiszar submitted that Mr. McGarrigle's argument regarding Article 5.01, "Just Cause", did not make sense. Mr. McGarrigle had stated that if an employee were to refuse to walk by one of the inside cameras, then he could be disciplined. Mr. Csiszar submitted that concept could apply to any camera, and there was no evidence or any sense that any of the visible cameras were a concern to any of the employees.

Mr. Csiszar submitted that Article 23.01, "Savings Clause", was not applicable here. The purpose of the Article, he submitted, was to preserve the balance of the collective agreement should any of the provisions be found to be illegal. Mr. Csiszar also submitted that Article 23.02, "Waiver of Provisions", was not being argued by the Company, although the

Company would note that the Union was aware of the presence of the visible cameras installed in January, 2008.

Mr. Csiszar submitted that PIPEDA incorporated the principles which were established by arbitrators in surveillance cases, and that there was no breach. Mr. Csiszar noted that the Union was not saying that surveillance was unreasonable per se, but that the Company should have taken less invasive measures. He submitted that the Union had not been able to suggest any practical alternative (to the hidden camera in the lunchroom), which would have assisted in identifying the perpetrators of the vandalism and theft. Placing a supervisor in the cafeteria would have been impractical, he submitted.

Mr. Csiszar submitted that if anyone owed anyone damages, they should go the other way, i.e. the Union should pay the Company. Regarding the visible cameras installed in January, 2008, Mr. Csiszar submitted that the Union knew of them during collective bargaining and chose not to address the matter. These cameras were not a concern, he submitted; and, that the Union did not raise any issue about them, is indicative of the reasonableness of the presence of these cameras, and, that these cameras were perceived as a reasonable exercise of management rights. Regarding the hidden camera in the lunchroom, Mr. Csiszar referred to Mr. Shier's testimony about union members being unhappy; and being further upset after the Union's bulletin of June 26, 2008 went out. Mr. Csiszar noted that the bulletin referred to the Company using "hidden cameras", which was untrue. He also noted that the bulletin expressed the purpose as aimed at "allegations against a bargaining unit member", and did not explain that the

purpose was to investigate vandalism and theft. Mr. Csiszar submitted that the bulletin was completely misleading and inaccurate. He noted that the bulletin went on to suggest that there were other hidden cameras around. He submitted that it was no wonder employees were upset if that was the message they were getting.

Mr. Csiszar submitted that the visible cameras installed in January 2008 were a part of a plan submitted to CIISD for broader protection of the property. He noted that Mr. McGarrigle had submitted that one of the reasons for the hidden camera was to monitor union activity. Mr. Csiszar submitted that was not the evidence, and that was not true. Mr. Csiszar noted that Mr. McGarrigle acknowledged that another reason was to catch the culprit, but that Mr. McGarrigle was then critical of the Company for not being consistent with how other cases were handled. Mr. Csiszar submitted that the explanation was clear; that the other situations were isolated events, and here the problem was chronic, and, still there was significant delay before the Company took this step.

Mr. Csiszar again asserted the impracticality of any of the Union's alternative suggestions, except he did concede to the suggestion that the focus of the hidden camera should have been solely on the vending machines. He submitted that this had been the intent, but that the installation was done by a contractor, and had to be done at a time when no one was present.

Mr. Csiszar referred to, and also relied on, the authorities submitted by Mr. McGarrigle. He noted that Mr. McGarrigle had asserted that

damages would deter the Company in future, which, he submitted indicated that the Union was seeking punitive damages. He submitted that aggravated damages could only apply in response to extremely egregious conduct. He submitted that no measure of damages would apply here against the Company, that there was no foundation for it, and that it was the very claim for damages which was extreme. He finally submitted that an arbitral referral back to the parties of any issue presently in dispute would be inappropriate. In support of these last submissions, he additionally cited the following authorities: Re Tillicum Haus Society (Tillicum Haus Native Friendship Centre) -and- British Columbia Nurses' Union, [1997] B.C.L.R.B.D. No. 424; and, reconsideration [2000] B.C.L.R.B.D. No. 278; Re Board of School Trustees of School District No. 38 (Richmond) -and- Canadian Union of Public Employees, Local 716, Unreported: August 28, 1997 (R. Diebolt, Q.C.); and, Coast Mountain Bus Company Ltd. -and- National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada) Local 111, 2009 BCSC 396; Vanc. Reg. No. 5082663.

In rebuttal, Mr. McGarrigle submitted that the Union was not obliged to provide specific evidence to support a claim for damages. He submitted that the law was changing, and that damages for the purpose of deterrence was not the same as punitive damages. He submitted that it was not true that the Union inflamed the situation, but rather that the Company did nothing to alleviate the situation. He noted that the Company did not write to the Union to object to the Union's June 26, 2008 bulletin. In response to the argument that there was no evidence the hidden camera in the lunchroom was used to monitor union activity, Mr. McGarrigle submitted

that not everyone with access to the footage was called to testify. He submitted that the camera could have been used to monitor union activity, and that was enough. He submitted that it was not fair on the part of the Company to say it did not use the camera for that purpose. The fact is, he submitted, that we do not know.

V

There is no dispute that this case falls under federal legislation, and that PIPEDA applies. Messrs. McGarrigle and Csiszar have provided a comprehensive collection of cases for reference. There is no challenge to the principles for which these cases stand, and no need here to add another award reviewing the authorities. The need is to apply the principles in the particular circumstances of this case. The circumstances here are unusual; especially the installation of a hidden camera in a lunchroom, and the workplace being a security-sensitive location.

In May, 2008 the Company had a hidden video camera installed in the lunchroom. The camera was installed in support of the Company's interest in identifying the person or persons who were vandalizing and stealing product from certain vending machines located there. It had an outside contractor do the installation, realistically which had to be done at a time when no one else would be present to see. The camera covered a wide angle such that a view of several tables would also be captured. One of the tables was used by the Union as a balloting table whenever the Union held lunchroom meetings where members would be voting on some matters. These would not be closed meetings exclusive to union members, because

others would be present, or walking in and out; nevertheless, the camera permitted observation beyond what was necessary for its purpose, and covered an area where there would be a most reasonable expectation of freedom from surveillance. Management would not actively monitor the images captured, but would look to the footage only if there were another incident of vandalism and theft. There was no evidence from which one could conclude that anyone in management did monitor the camera or review any footage until after an incident occurred in early May 2008, within a week of installation. That was a review of the footage for the purpose of identifying the vandal and thief. Similarly, there was no evidence from which one could conclude that anyone in management did monitor the camera or review any new footage after the two employees were terminated, and a contractor's employee was banned. The hidden camera was removed in January, 2009 as part of the settlement of the Grievor's case.

The Union did not become aware of the hidden camera in the lunchroom until early June 2008, at an investigation meeting involving the Grievor. When Mr. Shier, the Union's Plant Chairperson, asked Mr. Lundquist, the Company's Director of Human Resources, if there were any more hidden cameras, Mr. Lundquist replied, "I'm not going to tell you that."

What evolved was not only the grievance against discharge, which has now been resolved, but also a policy grievance regarding surveillance i.e. the present case. This policy grievance was an expanded grievance, because the Union went on to complain about the visible security cameras

which had been installed in January 2008, and the Union went on to personalize the grievance to itself. It revisited the exchange of information preceding 2008 collective bargaining, and complained against the Company about non-co-operation, about undermining its bargaining agency, about interference with union activity, and, it asserted, in effect, that recognition for its bargaining agency required the Company (at least within this context) to consult with the Union before it could exercise management rights.

At issue, at the core of the policy grievance, is the hidden camera in the lunchroom. In Eastmond, supra, the federal Privacy Commissioner had posed a four-part to test to determine whether the video surveillance there in question complied with PIPEDA, particularly Section 5(3):

1. Is the measure demonstrably necessary to meet a specific need?

2. Is it likely to be effective in meeting that need?

3. Is the loss of privacy proportionate to the benefit gained?

4. Is there a less-privacy invasive way of achieving the same end?

Lemieux J. of the Federal Court of Canada affirmed the same four-question test, but disagreed with the Privacy Commissioner's view of the facts. I intend to consider these same questions; and, I am mindful of the arbitral authorities which hold that surreptitious video surveillance must be based on more compelling circumstances than would overt surveillance. Although privacy rights are not absolute, employees are entitled to expect privacy in

certain contexts, e.g. while having their lunch, or going to the washroom; and, video surveillance is not acceptable as an ordinary method for supervising employees at their work. The need for surveillance must be reasonable and sensitive to the balance of interests of the employer and the persons affected.

Included in the first question, I would think, is not only whether the measure was demonstrably necessary, but also whether the specific need itself was reasonable. The need in this case was more specific than merely ending a pattern of vandalism and theft. The specific need was to identify those responsible for the misconduct. The malfeasance was occurring at times when the catering company's employees would be gone, which does not necessarily mean that there never would have been witnesses. However, were it not for the video surveillance, the Company would forfeit its authority to the conscience of the guilty party, or to the conscience possibly of any witness who could choose to turn a blind eye to the event. The gravity of damage or the measure of theft in any single incident could be minor, but vandalism and theft are serious matters which put into question the maturity and the trustworthiness of the person(s) involved. These are qualities which any employer would require of its employees; and particularly so here, considering the location and nature of the Company's business. Furthermore, the problem had become chronic. Deterrence would certainly be a desirable goal, but, not enough. The Company wanted to actually identify whomever was guilty. This in itself was an entirely reasonable need and the measure was manifestly necessary to meet that need. I would answer the first question in the affirmative.

The second question – the likelihood of the measure to be effective in meeting that need – I would also answer in the affirmative. The camera was hidden, and the conduct was ongoing; and so, it should be just a matter of time before someone was caught. Mr. McGarrigle, for the Union, submitted that the Company had acted inconsistently because there were other events of theft or damage where no video surveillance was instituted; and, no one was caught. Those were isolated incidents, i.e. non-repetitive events, and surreptitious video surveillance would not likely have been effective. Had the Company instituted surreptitious video surveillance in those cases, I would think the Union would have objected there too. Furthermore, were the circumstances similar, which they were not, one could not conclude that the doctrine of estoppel or waiver applied; nor did Mr. McGarrigle so argue.

The third and fourth questions are more difficult to answer. The Union would object to any camera in the lunchroom, hidden or visible. The very notion of a camera in the lunchroom was intolerable. Indeed, adjudicators have been keen to protect against incursion into a lunchroom, and there do not appear to be any reported cases where a camera was installed right in there. At the same time, privacy rights are not absolute, and Section 7(1)(b) of PIPEDA would permit hidden video surveillance in a case such as this:

DIVISION 1
PROTECTION OF PERSONAL INFORMATION

7. (1) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may collect personal information without the knowledge or consent of the individual only if...

(b) it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the

> *accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province; ... .*

Fear of vandalism and theft naturally invites watchfulness. Therefore, an employee's commission of vandalism and theft would constitute a serious disservice not only to one's employer, but also to one's fellow employees. This is particularly so when the misconduct occurs at a location where one's fellow employees eat, and where they have every right to expect not to be watched. Here, the vending machines were located in the lunchroom – which itself would seem appropriate – and hence the lunchroom was the location of the malfeasance. Given the location of the vending machines, the demonstrable necessity for surreptitious video surveillance, and the likelihood of it being effective, it would not seem improper to locate a hidden camera in the lunchroom, provided measures were taken toward limiting the scope of surveillance to the problem area, and no more.

Unfortunately, the installer provided for a wider angle of coverage than necessary for monitoring the vending machines. Several tables at which employees eat were within the camera's zone of surveillance, including one table which the Union used for balloting at lunchroom union meetings. There was no evidence to the effect that this was intended by the Company, or later found to have been a desirable collateral benefit. However, one must come to the conclusion that through carelessness, and possibly just inadvertence, this scope of surveillance was tolerated.

Mr. McGarrigle submitted that the camera was installed, in part, in order to monitor Union activity, and balloting. Because it was careless, the Company has left itself open to this most-serious charge. However, there was no evidence that the camera was intended for such a purpose, nor used for such a purpose, nor did the evidence provide a sense of anti-union animus. I draw my conclusions based on the evidence presented, and I would blame the Company for carelessness, and no more.

Mr. Csiszar called Messrs. Toby and Lusk as witnesses; and, I would think that Mr. McGarrigle could have had other management people summonsed and he could have sought to cross-examine them as witnesses adverse in interest. Furthermore Mr. McGarrigle himself played a participatory role, and he did not testify. However, I draw no adverse inference either way. Equally, I have taken no adverse inference which would lead me to find as a fact any assertion made in any letter or bulletin, which assertion was not made under oath or affirmation, and subject to cross-examination.

Returning to the third and fourth questions from Eastmond, supra, I would conclude that the loss of privacy was not proportionate to the benefit gained (third question), but only because the hidden camera captured an area of the lunchroom beyond the vending machines. I would also conclude that there was a simple and less privacy-invasive way of achieving the same end (fourth question); i.e. by limiting the scope of the camera to the vending machines.

In sum, I find no wrongdoing by the Company for instituting hidden video surveillance aimed at the vending machines in the lunchroom, but that the Company, through carelessness, went too far by permitting surveillance beyond what was necessary. Regardless that the camera was not intended nor used for improper purpose, the video surveillance in the lunchroom transgressed PIPEDA and amounted to an excessive exercise of management rights insofar as the surveillance captured more than the vending machines. I will be providing qualified declaratory relief to the Union. I would also advise that it should not now be presumed that I would have declared the video evidence inadmissible for the purpose of the discharge grievance had the Grievor's case not been settled; but, that is now a moot issue.

Regarding the inside cameras installed in January 2008, these were a part of a plan or program proposed by the Company pursuant to a security audit by the CIISD. The proposals were intended to upgrade security. The cameras were not formally requested in writing by the CIISD, but were suggested verbally by the FISO, and were later accepted by the CIISD. The Company is required to maintain certain security standards satisfactory to the CIISD in order to maintain its contract with the DND. It is this contract which provides most of the Company's business, and hence it is significant to the work available for the employees. The facility is also a potential access route to the airport runway at Abbotsford. In sum, this is a security-sensitive facility; and, the cameras installed in January 2008 were an extension of the camera security system already in existence, the difference being that these cameras were inside the building.

Like the outside cameras, the inside cameras are visible. Like the outside cameras, they would capture employees working from time to time, but more so. Like the outside cameras, they serve as a security measure, and, are not intended or used as a supervisory tool to monitor the employees' work. That there is work done within the scope of camera coverage is a collateral circumstance of little import in the mix of circumstances underlying the presence of both the outside and inside cameras.

Unlike the outside cameras, the inside cameras are not discernable to a stranger to the facility, until it is too late. Had the Company installed additional cameras outside, these would also capture an image of the stranger, but would not be as effective. The Company could have posted a security guard to stand at those locations inside, but that would not be less privacy-invasive.

The presence of the inside cameras would have or should have been known to the employees of the Company, including the members of the Unions' collective bargaining committee. Mr. Shier, Plant Chairperson, was certainly aware. No employee complained; nor did the Union's bargaining committee complain when there was good opportunity to do so at the bargaining table when a new round of negotiations was just getting underway. These were not serious excuses when Mr. Shier explained that he did not know whether the cameras were real or fake, and that he was otherwise too preoccupied with other matters at the bargaining table. Mr. McGarrigle anticipated that the Company would argue waiver, and he therefore submitted that the doctrine of waiver did not apply. Mr. Csiszar

stated that the Company was not arguing waiver, and he submitted that the lack of complaint would simply indicate that the people at the facility accepted the cameras as reasonable. I would agree with both Messrs. McGarrigle and Csiszar: if the cameras are in breach of PIPEDA, the doctrine of waiver cannot apply; and, the lack of complaint, particularly by the collective bargaining committee would be circumstantial evidence indicative of the subjective acceptance of the cameras as reasonable.

If the cameras installed in January 2008 are in breach of PIPEDA, then the Company has overstepped its management rights under the collective agreement. I have no difficulty determining that issue, in consideration of the authorities submitted, and applying the four questions from Eastmond, supra, to the factual circumstances of this case. At the same time, my exercise of jurisdiction would not oust the jurisdiction of the federal Privacy Commission, which I would consider the preferable body for considering a matter such as this. Indeed, in Eastmond, supra, which was concerned with overt video surveillance in the mechanical facility at Canadian Pacific Railway's Toronto yard, Lemieux J. held that the essential characteristic of the dispute was a complaint under PIPEDA. He found that the dispute did not arise from the collective agreement, and that an arbitrator would not have jurisdiction. I would think that I would have concurrent jurisdiction pursuant to Section 60(1)(a.1) of the Canada Labour Code, R.S.C. 1985, c. L-2, which empowers an arbitrator to "interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is a conflict between the statute and the collective agreement." In any event, in the present case, the dispute was submitted directly to arbitration; and, there was no objection taken to my jurisdiction.

The video surveillance in issue now is overt; and, its purpose is not to monitor production, but to upgrade the Company's security system. I agree with Arbitrator Taylor's observation in Fraser Surrey Docks, supra, p. 112, that "PIPEDA mandates a context-sensitive balancing of interests." The DND contract, the CIISD audits, the location of the business at an airport, and the very nature of the business regardless of whether work is being done on military or civilian aircraft, each are powerful circumstances supporting video surveillance. Prima facie, these are circumstances, in the words of Section 5(3) of PIPEDA, "that a reasonable person would consider are appropriate...."

Applying the four-part test, I would firstly conclude that the inside cameras installed in January 2008 were demonstrably necessary as part of the company's plan to upgrade its security in accordance with the advice given it by the CIISD. I would conclude that the cameras were likely to be effective in meeting their need; and, that the loss of privacy is proportionate to the benefit gained. I would also conclude that there would not be a less privacy-invasive way of achieving the same end. I therefore dismiss the Union's complaint insofar as it encompasses the inside cameras installed in January 2008.

Mr. McGarrigle did not point to any provision in PIPEDA that would have required the Company to give the Union, or the employees, formal notice of this video surveillance. Indeed, the four-part test expressed in Eastmond, supra, does not contain a requirement for notice. Mr. McGarrigle submitted that this video surveillance should be deemed to have

been surreptitious until such time as the Union is formally advised. This would artificially obligate the Company to a higher standard for justification than the substance of the circumstances would require. This was not surreptitious video surveillance, and the Union and the employees must be taken to have been aware of it. If the lack of formal notice is a problem, that now cannot be taken as a serious complaint when the Union's collective bargaining committee did not ask one question about cameras in the collective bargaining that was going on at the time. This is not to say that the Union has waived its rights; but, that the notice question is severable, and, that it is now moot and not material to the substance of the dispute.

Mr. McGarrigle submitted that the Company had breached or offended a number of provisions of the collective agreement. He emphasized a lack of co-operation with the Union, and that the Company had made the Union look ineffective. He went back to pre-collective bargaining communications between the parties in December, 2007. The current collective agreement was concluded and ratified in April, 2008. Mr. McGarrigle particularly referred to Articles 1.01, 1.03, 1.09, 2.10(a), 2.13(j), 4.01, 8.01, 8.02, 23.01, and 23.02 of the collective agreement. This was a massive expansion of a policy grievance at whose core was a hidden camera in the lunchroom. I accept Mr. Csiszar's submissions with respect to the interpretation/application of the various provisions of the collective agreement; and, with one exception, I do not find that these provisions apply. Furthermore, the Union's complaints, other than the one exception, have been overtaken by later events such as the conclusion of the present collective agreement, or are trivial or moot.

I do uphold the Union's complaint insofar as the hidden camera in the lunchroom, through Company carelessness, was permitted to capture images of employees unrelated to the Company's concern about vandalism and theft. Considering the provisions of the collective agreement, I would conclude that the Company thereby exceeded the due application of its management rights and was therefore in breach of Article 8.01 of the collective agreement. This is the aforementioned exception.

Mr. McGarrigle vigorously argued that damages should be paid by the Company to the Union, and to all the employees in the bargaining unit. He submitted further that the Company should be ordered, at its expense, to provide all employees with a copy of this arbitration award.

When Mr. Shier was informed by Mr. Lundquist about the hidden camera in the lunchroom, he asked if there were any others. Mr. Lundquist did not testify. Mr. Shier testified, "He looked at me, and said 'I'm not going to tell you that.'" In fact, there were no other hidden cameras; and, by that time Mr. Lundquist could have, and probably should have told him that. The sense received from the hearing of Mr. Shier's testimony was that Mr. Lundquist was surprised by the question and hesitated about how to answer it; and, he took a decision to not answer it.

The Union has chosen to emphatically characterize the events as indicative to the employees of union ineffectiveness. First of all, the Company had been within its rights to install a hidden camera in the lunchroom for the purpose of identifying whomever was vandalizing and stealing from the vending machines. Next, the Union's fundamental role is

to represent the employees in the bargaining unit; it is not a co-participant in the management process. The Company need not have consulted with it prior to installing the hidden camera, and the Company need not have sought its approval or its assistance in its effort to deter or identify any wrongdoer. At the same time, while the Union ought not to encourage or condone unlawful activity such as vandalism and theft – and the evidence was that it would not – one would expect it to be mindful of not drawing itself into a conflict of interest. This could be a particular concern where criminal activity is alleged against a bargaining-unit member, and where I suspect a shop steward or union business agent does not have anything akin to solicitor-client privilege. In sum, the Union manifests its effectiveness by representing employees in collective bargaining and through the grievance procedure; and indeed, a grievance was filed.

Mr. Shier expressed his offence and his self-perceived ineffectiveness to fellow employees, and the Union put out a bulletin which Mr. Csiszar correctly described as misleading and inaccurate. Although Mr. Shier was prudent and responsible when he discouraged employees from their talk of walking out, he and the Union had also aggravated their discontent.

The Union included the inside visible cameras in the policy grievance, although the Union's June 26, 2008 bulletin was far from clear about advising employees that it was doing so. The inside cameras had not been a subject of complaint by the employees, or before by the Union. The Union did not complain about all of the visible inside cameras, nor did it complain about the outside cameras. Yet, all of these cameras are units in a camera-surveillance system which is audited by the CIISD and which

contributes to the Company's ability to maintain its very significant contract with the DND. If the inside cameras were to breach PIPEDA, so likely would the outside cameras, regardless that less time was spent by employees working within view of those cameras, or that those cameras were installed years ago when the facility first opened.

Now, having heard the case, I would think that, apart from obtaining qualified declaratory relief, the Union substantially had already won the policy grievance back on January 8, 2009 when the Company conceded that it would remove the hidden camera from the lunchroom. It is arguable, and indeed Mr. McGarrigle did submit, that damages should be due at least because the Company did not remove the hidden camera sooner. There was no evidence however that the camera was used for an improper purpose, nor that further footage was viewed after the terminations. Considering all of the circumstances, I will not be ordering damages, nor ordering the Company to provide a copy of this award to all the employees in the bargaining unit.

In conclusion, I make the following declarations:

1. the Company's decision to install a hidden camera in the lunchroom was for the sole purpose of identifying whomever was responsible for the vandalism and theft at the vending machines; and, this decision was not an abuse of management rights, nor did it violate federal privacy legislation, PIPEDA;

2. the hidden camera, however, was carelessly installed with an angle of view which would also cover employees engaged in lawful private activity including participation in union activity; and, although the Company did not use the camera for improper purpose, by this carelessness the Company exceeded its management rights, and breached PIPEDA; and,

3. the installation of the visible inside cameras in January 2008 amounted to a reasonable extension of the camera surveillance system, as part of the Company's upgrade of its security system.

Dated at Burnaby, British Columbia this 3rd day of July, 2009.

Robert B. Blasina

Robert B. Blasina
Arbitrator