Influence of *Oakes* Outside the *Charter*, Specifically Labour Arbitration Jurisprudence

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This article explores the influence of *R v Oakes* in non-*Charter* jurisprudence, specifically in labour arbitration law. It reviews how labour arbitrators have adopted an analytical framework inspired by *Oakes*, when assessing the reasonableness of employer conduct vis-à-vis the employee. Specifically, the article focuses on assessing the reasonableness of employer policies, rules or practices that interfere with employee privacy rights. The article begins with an overview of the *Oakes* test and then reviews some of the sources of employee privacy rights. It illustrates how arbitrators are using an *Oakes*-like analysis in the balancing of rights in two specific contexts that arise in labour arbitration jurisprudence: 1) the use of video surveillance of employees conducted by employers and its admissibility at arbitration hearings; and 2) employers' rights to access employee medical information. The article concludes that the *Oakes* framework is an important guide for labour arbitrators in striking the right balance between employee privacy rights and employer's interests. Specifically, the *Oakes* framework requires employers to justify any compromise of employee privacy rights by demonstrating that: the compromise of privacy rights is for a pressing and substantial objective; the means used are rationally connected to the objective; the means used minimally impair employee privacy rights; and there is overall proportionality between the objective of the employer and the means used.

Cet article se penche sur l'influence de l'arrêt *R c Oakes* dans la jurisprudence non liée à la *Charte*, et en particulier en matière d'arbitrage en droit du travail. Il examine en outre la manière dont les arbitres en droit du travail ont adopté un cadre analytique inspiré par l'arrêt *Oakes*, lorsqu'il s'agit d'évaluer le caractère raisonnable de la conduite d'un employeur vis-à-vis de son employé. Cet article traite plus particulièrement du caractère raisonnable des politiques, des règles ou des pratiques de l'employeur qui empiètent sur les droits de l'employé à sa vie privée. L'article débute par une vue d'ensemble du critère formulé dans l'arrêt *Oakes* pour passer ensuite en revue les sources des droits de l'employé à la vie privée. Il illustre la manière dont les arbitres recourent à une analyse de type de celle dans *Oakes* en vue d'équilibrer les droits en présence dans deux contextes propres à la jurisprudence relative à l'arbitrage en matière de conflits de travail : 1) le recours par des employeurs à des caméras afin de surveiller leurs employés et son admissibilité dans le cadre d'audiences d'arbitrage ; et 2) les droits de l'employeur à l'accès aux renseignements médicaux de ses employés. L'article conclut que le cadre inspiré de l'arrêt *Oakes* constitue un guide important pour les arbitres en droit du travail lorsqu'ils cherchent à atteindre le juste équilibre entre les droits de l'employé à la vie privée et les intérêts de l'employeur. Le cadre de l'arrêt *Oakes* exige de l'employeur qu'il justifie toute atteinte portée aux droits de l'employé à sa vie privée en faisant la preuve que : la violation des droits à la vie privée vise un objectif pressant et important ; les moyens utilisés pour ce faire ont un lien rationnel avec l'objectif poursuivi ; les moyens utilisés ne portent qu'une atteinte minimale aux droits de l'employé à sa vie privée ; et il existe une proportionnalité globale entre l'objectif visé par l'employeur et les moyens dont il se sert pour l'atteindre.

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I. INTRODUCTION

On February 9, 2012, at the *Ottawa Law Review*'s Annual Symposium commemorating the twenty-fifth anniversary of *R v Oakes*,[1] I was assigned to the panel, "Section 1: A Feminist in the Egalitarian Critique." In preparing for the Symposium, I realized something quite remarkable: I am a big fan of the *Oakes* test and feel like I use it in the practice of law, though not regularly in *Charter*[2] litigation. Particularly, I have not used the *Oakes* test in any section 15 litigation. I realized that the primary comment I can make about section 1 from an egalitarian and feminist perspective is that it is not used. That is to say, in terms of promoting equality rights through section 15 of the *Charter*, the likelihood of a claimant establishing a breach of section 15, and actually putting the onus on the government to justify that breach under section 1, has become increasingly remote. This is because of the gradual evisceration of section 15 by the Supreme Court of Canada, first in *R v Law*,[3] then in *R v Kapp*,[4] and most recently in *Withler v Canada (Attorney General)*.[5]

So the question became: why am I a fan of the *Oakes* test when I rarely use it in *Charter* litigation? I came to realize that the *Oakes* test is applied consciously and unconsciously in labour law and, in particular, in balancing employees' privacy rights with management's interest in their business. Therefore, on the occasion of the twenty-fifth anniversary of *Oakes*, I discussed the influence *Oakes* has had on the development of privacy law in the employment context, with a particular focus on

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1 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes* cited to SCR].

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

3 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1.

4 *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483.

5 *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396. See Jennifer Koshan & Jonnette Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011) 16:1 Rev Const Stud 31 (for a well-reasoned analysis of why the recent section 15 jurisprudence does not advance equality).

two areas: video surveillance of employees and requests for medical information. This influence of *Oakes* on the development of the law outside of *Charter* litigation is not something new. For instance, in its recent decision of *Doré v Barreau du Québec*[6] the Supreme Court of Canada specifically melded the *Oakes* test into a notion of reasonableness in the application of the *Charter* to judicial review of administrative tribunals. However, the scenarios discussed below take the *Oakes* test one step further away from the *Charter* and take its values into another area of law completely.

Prior to the *Charter*, labour arbitrators recognized that employees did not give up their privacy when they went to work. However, they also recognized that employers could encroach on privacy for various business reasons. The *Charter*'s robust jurisprudence on the constitutionally protected right to privacy has influenced and strengthened the common law value and right of privacy for employees. The balancing that must occur in the workplace between this employee right and employers' business interests lends itself to the *Oakes* approach to balancing. These two themes will be the focus of the discussion below.

II. *OAKES* TEST

Much has been written about *Oakes* and I have nothing to contribute to the academic commentary about the development and application of the *Oakes* test in *Charter* litigation, especially as applied by the Supreme Court of Canada.[7] The strength of *Oakes* lies in its enduring framework for assessing the reasonableness of actions by a powerful actor in relation to a powerless actor—the government to its citizens, or employers to employees. The enduring legacy of *Oakes* lies in its continued existence as a useful test for balancing rights in the face of all of the criticism it has endured.

Section 1 of the *Charter* guarantees "the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[8] In *Oakes*, Chief Justice Dickson provided a framework for applying section 1. He noted two significant contextual factors. First, section 1 contains both the constitutional guarantee of rights and the criteria against which the limits on rights must be measured. Second, section 1 also recognizes the fundamental importance of the free and democratic society that is Canada, the essence of which includes "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide

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6 *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*].

7 Much of the commentary has been critical in terms of the weakening of the Oakes test. See Errol Mendes, "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1" in Gérald-A Beaudoin & Errol Mendes, eds, *Canadian Charter of Rights and Freedoms* (Markham, Ont: LexisNexis Canada, 2005) 165; Christopher D Bredt & Adam M Dodek, "The Increasing Irrelevance of Section 1 of the Charter" (2001) 14 Sup Ct LRev (2d) 175; Sujit Choudhry, "So What is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 SCLR (2d) 501.

8 *Charter*, *supra* note 2, s 1.

variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."[9] Next, Chief Justice Dickson noted the evidentiary burden on the party seeking to uphold the violation of rights.

There are two key elements to the *Oakes* test: the objective and the proportionality test. With respect to the objective, it must be of "sufficient importance to warrant overriding a constitutionally protected right or freedom,"[10] which at minimum means "that an objective [must] relate to concerns which are pressing and substantial .... [T]he proportionality test will vary depending on the circumstances,"[11] but is comprised of three components. The first aspect requires that "the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective."[12] The second aspect of the test requires that the means "should impair 'as little as possible' the right or freedom."[13] The third aspect is an overall balancing; "there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective ...."[14]

So how does a test that is designed to permit the courts to review whether governments have justification to violate constitutionally-guaranteed rights and freedoms apply to labour and employment law? Labour arbitrators are tasked with deciding disputes under collective agreements. They have much experience in reviewing employers' decisions in the context of a written document setting out the rights of employees (collective agreements) and in assessing whether an employer's actions (or inactions) are a violation of the collective agreement. Labour arbitrators are in the business of balancing the employer's or business' interests against the specific rights guaranteed in a collective agreement. Further, labour arbitrators will assess employer policies on a number of bases, including whether an employer policy is reasonable. Like the courts under the *Charter*, arbitrators have grappled with how to apply this concept of reasonableness for many years. In *Lumber & Sawmill Workers' Union, Local 2537 and KVP Co Ltd*,[15] the founding case in this area, the arbitration board held that the employer policy of discharging an employee who was subject to more than one garnishee order was unreasonable. Without using the language of *Oakes*, that arbitration board found that the policy had no relation to the grievor's ability to do the work (rational connection), and that the penalty was disproportionately severe for the breach of the rule (proportionality).

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9 *Oakes*, *supra* note 1 at 136.
10 *Ibid* at 138, citing *R v Big M Drug Mart*, [1985] 1 SCR 295 at 139, 60 AR 161.
11 *Ibid* at 138-39.
12 *Ibid* at 139.
13 *Ibid*.
14 *Ibid* [emphasis in the original].
15 *Lumber & Sawmill Workers' Union, Local 2537 and KVP Co Ltd* (1965), 16 LAC 73 [*KVP*].

While section 1 is not a perfect fit to these other circumstances (for instance, the requirement of "prescribed by law" does not apply), many aspects of *Oakes* are applicable. The actual test focusing on both objective and means, and the evidentiary burden being on the party violating the right, are obvious examples to be discussed below. But even the fundamental values of a free and democratic society articulated by Chief Justice Dickson—the recognition of human dignity as a key value of our society—have significance when looking at privacy rights of employees. While assessing reasonableness is not new for arbitrators, *Oakes* has provided an analytic framework for what was happening, and in doing so, brought more precision to balancing in labour law.

III. PRIVACY RIGHTS OF EMPLOYEES

Employees' rights to privacy may not be formally constitutionalized, but arbitrators have long recognized that employees do not give up their right to privacy by coming to work. In one early (pre-*Charter*) leading case challenging an employer's search of all employees' lunch pails, purses and parcels as part of an audit of the employer's business, the arbitration board found that employees had a right to privacy in their personal property:

> The preservation of the right of privacy with respect to personal effects ought to be jealously preserved....This right of privacy should not be invaded except where there is the clearest provisions in the contract of employment or the collective agreement to the contrary, except of course where there is a real and substantial suspicion that an individual is guilty of theft.[16]

The right to privacy was recognized as so fundamental that it was not necessary to have it referred to in the collective agreement. However, the right could be breached if the parties agreed to it in the collective agreement in clear language or on reasonable grounds. Remarkably, this case also found the employer's intention was irrelevant—it was the effect on privacy of employees that was significant.

Other early arbitration cases have dealt with this issue as well. One case gave us the often-cited proposition, "It is well established that persons do not by virtue of their status as employees lose their right to privacy and integrity of the person."[17] Another case recognized the importance of privacy to "preserving and nurturing the historically fragile concept of human dignity"[18] in the face of the de-humanizing

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16 *Amalgamated Electric Corp Ltd (Markham) and International Brotherhood of Electrical Workers, Local 1590* (1974), 6 LAC (2d) 28 at 32.

17 *Monarch Fine Foods Co Ltd and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647* (1978), 20 LAC (2d) 419 at 421.

18 *Puretex Knitting Co Ltd and Canadian Textile and Chemical Union* (1979), 23 LAC (2d) 14 at 29.

effects of electronic surveillance, and balancing that with the efficiencies and needs of the employer.[19] And another case illustrates an early attempt to address how to balance these rights.[20] These cases demonstrate how employee privacy rights were well recognized prior to the *Charter*. Outside the arbitral and *Charter* context, it has been argued that the right to privacy, or aspects of it, have long been recognized by the common law.[21] As well, the Ontario Court of Appeal has recently recognized a right to privacy in *Jones v Tsige*.[22]

Elsewhere, I have argued that privacy has been recognized as a fundamental human right through various statutory instruments and the *Charter*.[23] Many aspects of the law clearly recognize that privacy is important to essential human dignity—a key *Charter* value. The common law (both arbitral and otherwise) is evolving consistently with *Charter* values. Since the *Charter*, the argument for protection of employee privacy rights has become stronger, even in a private sector environment. As such, when an employee's privacy must be compromised in the employment context, what better way to assess the reasonableness of the infringements on privacy than through the *Oakes* analysis? This influence and relevance of *Oakes* is illustrated in the context of video surveillance and access to employees' medical information.

IV. ADMISSIBILITY OF VIDEO SURVEILLANCE

A starting point for an analysis of the development of arbitral jurisprudence is *Doman Forest Products Ltd, New Westminster Division and International Woodworkers, Local 1-357*,[24] where Arbitrator Vickers had to make a ruling on the preliminary issue of whether the employer's covert surveillance of an employee, who was suspected of abusing sick leave, was admissible evidence. Citing jurisprudence under section 8 of the *Charter*, Arbitrator Vickers noted that he was not dealing with the state's breach of an individual's privacy right, but that he needed to relate those values to the private dispute between the employer and employee, whose terms and conditions of employment were governed by a collective agreement.[25] He noted that the *Privacy Act*[26] in British Columbia also reflected *Charter* values.[27]

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19 *Ibid* at 30.

20 *Board of Governors of Riverdale Hospital and Canadian Union of Public Employees, Local 43* (1977), 14 LAC (2d) 334 at 338.

21 See generally Dale Gibson, ed, *Aspects of Privacy Law: Essays in Honour of John M Sharp* (Toronto: Butterworths, 1980).

22 *Jones v Tsige*, 2012 ONCA 32, 108 OR (3d) 241.

23 Ritu Khullar & Vanessa Cosco, "Conceptualizing the Right to Privacy in Canada" (Paper delivered at the Canadian Bar Association's National Administrative Law, Labour & Employment Law and Privacy & Access Law Conference, 27 November 2010), online: <http://www.cba.org/cba/cle/PDF/adm10_khullar_paper.pdf>.

24 *Doman Forest Products Ltd, New Westminster Division and International Woodworkers, Local 1-357* (1990), 13 LAC (4th) 275 [*Doman Forest*].

25 *Ibid* at 279.

26 RSBC 1979, c 336.

27 *Doman Forest*, *supra* note 24 at 281.

Arbitrator Vickers concluded he could not rule on the admissibility of the video surveillance without hearing evidence that would address the balancing of interests: the employee's right to privacy and the employer's right to investigate what it might consider to be an abuse of sick leave. In order to properly balance the interests, questions that had to be answered included:

> (1) Was it reasonable, in all of the circumstances, to request a surveillance?
> (2) Was the surveillance conducted in a reasonable manner?
> (3) Were other alternatives open to the company to obtain the evidence it sought?[28]

While Arbitrator Vickers did not refer to section 1 of the *Charter* or *Oakes*, the above questions echo the *Oakes* test. Question one addresses the purpose and rational connection—what was the purpose of the surveillance and would the surveillance achieve that purpose? Question two focuses generally on the means used. Question three reframes the minimal impairment analysis by asking what other options the employer had to achieve its objective.

Arbitrators in jurisdictions without a statutory cause of action for breach of privacy, such as Ontario, have followed the approach in *Doman Forest*. As in that case, the arbitrators balance interests and rights and adapt those questions to the analysis of the admissibility of surveillance video. For instance, in *Toronto Transit Commission and ATU, Loc 113*,[29] another case dealing with an allegation of sick leave abuse, the arbitration board accepted that there was a right to privacy for employees from both pre-*Charter* arbitral jurisprudence and from *Charter* jurisprudence influencing the common law. In discussing the balancing test articulated in *Doman Forest*, the arbitration board added another nuance: the consideration of what aspect of privacy has allegedly been breached and the employer's interest. While this approach does not refer to *Oakes*, it gives the balancing a precision akin to *Oakes*.

Well-respected Arbitrator Lynk summarized the trend to recognizing privacy and balancing interests in Ontario:

> The general right of an employee to some degree of privacy has been recognized by labour arbitrators with sufficient regularity and volume in recent years to be now considered as forming part of the "common law" of the unionized Ontario workplace. This entitlement is not absolute, for it always must be weighed against the employer's

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28 *Ibid* at 282. Other arbitrators have subsumed question three into question two so that one question focuses on the objective being reasonable and the second on the means being reasonable. See e.g. *Steels Industrial Products and Teamsters Union, Local 213* (1991), 24 LAC (4th) 259.

29 *Toronto Transit Commission and ATU, Loc 113* (1999), 95 LAC (4th) 402.

> legitimate interests. But, in a range of workplace circumstances, arbitrators have said that the creation of the employment relationship does not remove an employee's general ability to assert certain deeply personal interests that go to privacy, individual autonomy and human dignity. Accordingly, arbitrators have regularly identified a private personal interest of the employee as an important entitlement to protect when considering challenges by unions and employees to employer policies, directions or actions....[30]

However, this view is not without its detractors. Several well-respected Ontario arbitrators have said that there is no general employee right or entitlement to privacy unless it can be found in an express contractual or statutory right.[31] These arbitrators have been very critical of those that have found such a right in Ontario, arguing that it is based upon either a "legal fiction or a misunderstanding."[32] Even amongst arbitrators in Ontario that accept that a right to privacy exists, two types of tests have developed for determining whether the surveillance evidence should be admitted in the arbitration hearing. The first line of cases identifies a relevance test. That is, if the surveillance is relevant to the issue in dispute (which it often will be) then it should be admitted, absent a "strong and compelling reason."[33] The second test applied is the reasonableness test. Arbitrator Lynk takes the reasonableness test, as defined in *Doman Forest*, and other cases and refines it in the following way:

> 1. A 'reasonableness' test will examine: (i) whether the employer had a reasonable basis to engage in the covert surveillance; *and* (ii) whether the surveillance was conducted in a reasonable manner.
> 2. Part of the inquiry will consider whether the employer had other reasonable alternatives to employ before engaging in the covert surveillance. The employer will not have to demonstrate that *all* other possibilities were exhausted before turning to the surveillance, but, as a factor in considering the reasonableness of the surveillance, it would have to explain why some readily available and less intensive methods could not have accomplished the same goal.
> 3. Reasonableness will be measured on an objective standard.

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30 *Prestressed Systems Inc and LIUNA, Loc 625* (2005), 137 LAC (4th) 193 at 203-4 [*Prestressed Systems*].

31 See e.g. *Canadian Timken Ltd and USWA, Loc 4906* (2001), 98 LAC (4th) 129. See also *Kimberly-Clark Inc and IWA—Canada, Loc 1-92-4 (Re)* (1996), 66 LAC (4th) 266; *Transit Toronto Commission and ATU, Loc 113 (Fallon) (Re)* (1999), 79 LAC (4th) 85.

32 *Prestressed Systems*, *supra* note 30 at 206.

33 *Johnson Matthey Ltd and USWA, Loc 9046 (Murray) (Re)* (2004), 131 LAC (4th) 249 at 251.

> 4. What is reasonable will depend on the context. This would normally include considering such factors as: the basis of the employer's suspicion of the employee; the nature of the potential harm to the employer's enterprise; the degree of impairment to the trust factor; the alternatives available to obtain the required information; and the degree of intrusion caused by the particular surveillance method.[34]

The onus is on the employer to justify the invasion of the employee's privacy, and the failure to do so could result in the exclusion of the surveillance evidence that the employer is seeking to rely upon. Arbitrator Lynk's conceptualization of reasonableness does not refer to section 1 of the *Charter* but clearly gathers inspiration from the *Oakes* test. Arbitrator Lynk captures the elements from *Doman Forest*'s three questions in parts one and two of the test articulated above. Parts three and four add the requirement of objective standard and specific questions to assess reasonableness, which echo the minimal impairment and overall proportionality aspects of *Oakes*. So, for instance, if an employee is absent from work for three days of sick leave, and it is the first time they are sick, it may not be reasonable to order covert surveillance of their absence in case there is abuse of sick leave. Similarly, even if there is a suspicious pattern of absences, a less intrusive means of confirming the legitimacy of an absence might be for the employer to request a more substantial medical report explaining the absences.

The development of privacy legislation in the private sector has brought another layer of analysis in some jurisdictions. In Alberta, the argument for privacy rights is bolstered by the *Personal Information Protection Act*,[35] which protects the privacy of personal information (including personal employee information) in the private sector, and to some extent in the *Freedom of Information and Protection of Privacy Act*,[36] which governs the public sector.[37] For instance, in Alberta, an early investigation report of the company RJ Hoffman Holdings Ltd dealt with video surveillance by looking to the notions of reasonableness in arbitral jurisprudence and incorporating these notions into the analysis under *PIPA*.[38] *PIPA* governs the collection of personal information, which is information about an identifiable individual. Personal employee information is information about an individual who is an employee and can only be collected by the organization if it is required for

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34 *Prestressed Systems*, *supra* note 30 at 210-11 [emphasis in the original].

35 SA 2003, c P-6.5 [*PIPA*].

36 RSA 2000, c F-25 [*FOIP*].

37 See *ATU, Loc 569 v Edmonton (City)*, 2004 ABQB 280, 238 DLR (4th) 81.

38 Alberta Information and Privacy Commissioner, *Report of an Investigation into Collection and Use of Personal Employee Information without Consent*, No P2005-IR-004 (Alberta: OIPC, 13 May 2005) online: Office of the Information and Privacy Commissioner of Alberta <http://www.opic.ab.ca> [Hoffman Holdings Report].

"establishing, managing, or terminating" the employment relationship.[39] *PIPA* prohibits the collection and use of personal information about an individual if that individual has not provided consent, unless the purpose for which the information is being collected or used is reasonable (or if an enumerated exception to the requirement to obtain consent applies).[40]

RJ Hoffman Holdings Ltd operated oil field maintenance services that employed over 100 people and had millions of dollars' worth of equipment. Video surveillance cameras were installed throughout the work sites. A non-unionized employee filed a complaint alleging that the employer had used the surveillance videos to intercept private verbal communication between the complainant and another employee, which it then used to fire him. The investigator found there was no audio, zoom or pan capability on any of the cameras. The cameras only recorded when movement was detected. Videotape was stored for one month and then automatically erased. The footage could be viewed through the internet by entering a password unique to the company and then viewing the images on a computer. Only one person in the company had access to the password. The reasons the video cameras were installed were for safety, security, loss prevention and employee performance management. The issue to be determined was whether the personal information being collected and used was "reasonable for the purposes for which the information is being collected."[41] The word "reasonable" is defined in *PIPA* as "what a reasonable person would consider appropriate in the circumstances."[42] In order to determine the meaning of reasonableness, the adjudicator reviewed arbitral and other jurisprudence to develop the reasonableness test and apply it to the admissibility of video surveillance.

The Hoffman Holdings Report also referred to jurisprudence under the federal private sector privacy legislation, the *Personal Information and Protection of Electronic Documents Act*[43] and, specifically, *Eastmond v Canadian Pacific Railway et al*.[44] While the court in that case reversed the Privacy Commissioner's decision on other grounds, it did accept its four-part test to assess whether surveillance was reasonable:

1) Is the measure demonstrably necessary to meet a specific need?
2) Is it likely to be effective in meeting the need?
3) Is the loss of privacy proportional to the benefit gained?
4) Is there a less privacy-intrusive way of achieving the same end?[45]

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39 *PIPA*, *supra* note 35, s 1(j)-(k).
40 *Ibid*, ss 2, 15, 18.
41 *Ibid*, ss 15(2)(a), 18(2)(a).
42 *Ibid*, s 2(b).
43 SC 2000, c 5.
44 *Eastmond v Canadian Pacific Railway et al*, 2004 FC 852, 254 FTR 169 [*Eastmond*].
45 Hoffman Holdings Report, *supra* note 38 at para 31, cited in *Eastmond*, *supra* note 44 at para 127.

Ultimately, in the Hoffman Holdings Report, a three-part test was adopted:

a) Are there legitimate issues that the organization needs to address through the surveillance?
b) Is the surveillance likely to be effective in addressing these issues?
c) Was the surveillance conducted in a reasonable manner?[46]

Applying the test, the report found that the surveillance was reasonable for the purposes of safety, security and loss prevention, but the collection of employee information through constant video monitoring was *not* reasonably required for the purposes of employee performance management. This test has been applied consistently in Alberta under *PIPA*, both in non-employment situations[47] and the employment context.[48] The balancing of rights approach's focus on objectives and means echoes the approach in *Oakes*.

The Office of the Privacy Commissioner of Canada used a similar analytical framework when it published "Guidance on Covert Video Surveillance in the Private Sector,"[49] with, again, no explicit reference or acknowledgement of *Oakes*. In this document, the federal Privacy Commissioner rearticulated the fact that *PIPEDA* governs covert surveillance in the course of commercial activity, or by a federally-regulated employer, and it must conform to certain requirements. The starting point is purpose; what is the reason for collecting an individual's personal information through covert video surveillance? The document lists the following factors regarding purpose:

1) Demonstrable, evidentiary need: In order for an organization's purpose to be considered appropriate under *PIPEDA*, there must be a demonstrable, evidentiary need for the collection ....
2) Information collected by surveillance achieves the purpose: The personal information being collected by the organization must be clearly related to a legitimate business purpose and objective. There should be a strong likelihood that collecting the information will help the organization achieve its stated objective ....

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46 Hoffman Holdings Report, *supra* note 38 at para 35.

47 See Alberta Information and Privacy Commissioner, *Lindsay Park Sports Society, registered as Talisman Centre (trade name), operating as Talisman Centre for Sport and Wellness*, No P2006-008 (Alberta: OIPC, 14 March 2007) online: Office of the Information and Privacy Commissioner of Alberta <http://www.opic.ab.ca>.

48 See Alberta Information and Privacy Commissioner, *Canavista Enterprises Ltd*, No P1404 (Alberta: OIPC, 10 November 2011) online: Office of the Information and Privacy Commissioner of Alberta <www.opic.ab.ca>.

49 Privacy Commissioner of Canada, *Guidance on Covert Video Surveillance in the Private Sector* (Ottawa: OPC, May 2009) online: Office of the Privacy Commissioner of Canada <http://www.priv.gc.ca/information/guide/index_e.asp>.

> 3) Loss of privacy proportional to benefit gained: …the balance between the individual's right to privacy and the organization's need to collect, use, and disclose the personal information. An organization should ask itself if the loss of privacy is proportional to the benefit gained ….[50]

The jurisprudence under private sector privacy legislation is now re-influencing arbitral jurisprudence and reinforcing the notion that employees' privacy rights must be considered when determining whether an employer's video surveillance of employees should be admitted as evidence at arbitration hearings.[51] Without referring to section 1 of the *Charter* or *Oakes*, it is clear that this framework inspires adjudicators when balancing individuals' privacy rights with the interests of employers or other organizations in conducting video surveillance.

V. EMPLOYEE MEDICAL INFORMATION

The clash between employees' privacy rights and an employer's business interests also arises in the context of an employer's request for information about an employee's medical condition. This can manifest in a number of different contexts, such as: requests for medical substantiation of absences; requests for details about medical conditions, including diagnosis and treatment; requests for signed consent forms to permit the employer to communicate directly with the health care provider, including by phone; and requests for the employee to attend at a company doctor. In a unionized workplace, of course, the collective agreement can provide an outline of what the employer is entitled to in this regard. However, more often than not, the collective agreement is silent, particularly regarding the details as to what types of employee medical information employers are entitled.

In a leading case, *Peace Country Health v the United Nurses of Alberta*,[52] Arbitrator Sims provided a summary of case law to-date from across the country on this topic, as well as an analytical framework for dealing with issues of employer access to employee medical information. This analytical framework is explicitly drawn from *Oakes*. The case involved the balancing of several competing interests: employee privacy, the employer's right to manage and the collective agreement's integrity. "These interests must be balanced, but in a structured and rational way."[53]

In *Peace Country*, the union was challenging a new type of medical consent form that the employer had introduced as part of its new medical management model. The form permitted the employer to play a role in "medically manag[ing]

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50 *Ibid*.

51 See e.g. *Ebco Metal Finishing Ltd and IABSRI, Shopmens' Loc 712 (Re)* (2004), 134 LAC (4th) 372; *Canada Safeway Ltd and UFCW, Loc 401 (Owre) (Re)* (2006), 152 LAC (4th) 161.

52 *Peace Country Health v the United Nurses of Alberta*, [2007] AGAA no 17 (QL) (Arbitrator: Andrew C L Sims) [*Peace Country*].

53 *Ibid* at para 106.

injured [and] ill employees back to work in the safest and most timely fashion ...."[54] The medical consent form required the employee to provide information regarding: the date of the injury or illness; when it was first known, including details of the symptoms, the cause and where it occurred; all treating physicians and other health care providers; the tests the employee received; and where the tests were located. The form also required employees to signoff authorization for any health care provider to disclose information (verbally, in writing or in person) about their patient's "current" medical condition to the Occupational Health and Safety Department of the employer. The form then also asked the employee to consent to having the attending physician provide the employer with the date of treatment or reassessment, a description of the mechanism of injury or illness, the tests ordered, the diagnosis, the prescribed treatment and the date of expected return to work with modified or full-time duties.

Arbitrator Sims first analyzed the source of privacy rights for employees and, in doing so, provided a review of arbitral case law discussing employee privacy rights in the context of medical information. However, his starting point was the *Charter*, and he noted, "Privacy is one of the values underlying the protections in the *Canadian Charter of Rights and Freedoms*. Because of that, and also because privacy is a fundamental Canadian value, it imbues the development of the common law and, as a subset of that law, the law of employment developed through arbitration."[55] Interestingly, Arbitrator Sims then cited one of the leading cases on privacy from the Supreme Court of Canada, *R v Dyment*,[56] to articulate the underlying value of privacy.[57] He noted that privacy has been linked to liberty and personal autonomy under some of the *Charter* jurisprudence.[58] He concluded that privacy "is just one aspect of the various values that surround and support the concept of human dignity based on personal autonomy; that is the right to make free choices for one-self within ones [*sic*] personal sphere,"[59] However, the right does have to "be balanced against ... other sufficiently pressing values."[60]

Arbitrator Sims then reviewed the management rights and the employer's interest at issue, and again reviewed leading arbitral case law in this area. The case law all emphasized that employer policies must be reasonable. He concluded:

> [I]t appears what arbitrators are doing, albeit not expressly, is to analyze reasonableness in a similar way to the proportionality test set out for charter [*sic*] questions in *R. v. Oakes* .... This is helpful, not to force a management versus employee rights question into a "charter [*sic*] mould", but because what the Court provided in *Oakes*

54 *Ibid* at para 6.
55 *Ibid* at para 118 [emphasis added].
56 *R v Dyment*, [1988] 2 SCR 417, 73 Nfld & PEIR 13.
57 *Peace Country*, *supra* note 52 at para 119.
58 *Ibid* at para 121.
59 *Ibid* at para 123.
60 *Ibid*.

> was a sensible breakdown of the factors that can contribute to what is "reasonable." The term "a reasonable balance" is simply too vague on its own. Breaking the question down into separate questions allows an analysis more sensitive to the interests and options at play.[61]

In applying this analysis to the employer policy at issue (and specifically to the medical consent forms), Arbitrator Sims concluded that the policy objectives were unreasonable to the extent that they purported to make the employer part of the employee's health management team. Rather, the decisions relating to health care are so private that the employer's desire to help manage the employee's health care does not meet the test. He also noted the difference between requiring medical confirmation for sick leave and requiring medical information to fulfill the duty to accommodate. It is necessary to analyze the purpose of seeking the information in order to determine what type of information would be minimally intrusive on an employee's privacy rights, but still meet the employer's needs. For instance, in a duty to accommodate case, the employer would typically need to know an employee's return-to-work date, restrictions or limitations on the ability to work and whether the restrictions are temporary or permanent. Usually, it would not be necessary for an employer to know the exact diagnosis or the tests taken by the employee. Lastly, he also noted that the employer's direct access to health care providers was also unreasonable.

Arbitrator Sims' analysis was followed in *Federated Cooperatives Ltd and General Teamsters Local 987 (Re)*,[62] where the collective agreement language was interpreted restrictively so that it could not compel an ill employee to be assessed by a company doctor. Such an examination would be an unreasonable intrusion on the privacy rights of the employee in that context.

In the context of challenging random employer drug and alcohol testing policies, arbitrators have also adopted a balancing of interests approach. Again, without specifically citing *Oakes*, the language of the tests imbues the analysis. For instance, it would be necessary for an employer to prove that random drug and alcohol testing actually furthers the objective of a safe workplace.[63] Arbitrators have also required employers to establish that the privacy rights of employees were minimally impaired and that there was an overall proportionality or balance to the aims of the policy and the breach of rights.[64]

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61 *Ibid* at paras 144-45.

62 *Federated Cooperatives Ltd and General Teamsters Local 987 (Re)* (2010), 194 LAC (4th) 326.

63 *Trimac Transportation Services – Bulk Systems and TCU (Re)* (1999), 88 LAC (4th) 237 at 269-70.

64 *Canadian National Railway Co and CAW-Canada (Re)* (2000), 95 LAC (4th) 341 at 367-69; *Imperial Oil Ltd and CEP, Loc 900 (Re)* (2006), 157 LAC (4th) 225 at paras 92-101, aff'd (2008) 234 OAC 90, 169 LAC (4th) 257 (Ont SCJ), aff'd 2009 ONCA 420, 96 OR (3d) 668; *Local 143 of the Communications, Energy and Paperworkers Union of Canada v Goodyear Canada Inc*, 2007 QCCA 1686 at paras 15-30, 167 ACWS (3d) 94 (though this case was decided in the context of the Quebec *Charter of human rights and freedoms*, RSQ c C-12, with its own justificatory regime). The decision in Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp and Paper, Ltd, 2013 SCC 34, which was released after this article was written, but prior to final publication, confirms this approach.

For years, arbitrators have been struggling with how to balance employer's interests with the employee's privacy rights in their medical information. This relates to: the medical examinations by company doctors; the provision of medical information, such as a diagnosis, in order to be able to claim sick leave benefits or to be accommodated when returning to work after a disability; and the types of medical consent forms employers require employees to sign. What Arbitrator Sims did in *Peace Country* was summarize and analyze all of the decisions in this area and explicitly incorporate the *Oakes* test to assist in providing structure and precision to the balancing required.

VI. CONCLUSION

An early article on section 1 of the *Charter* outlined some of the options open to lawyers and judges as they worked on developing an approach to section 1.[65] It identified four levels of scrutiny of government action that had been elaborated by jurists and scholars: 1) the "reasonable relationship" doctrine; 2) the "compelling state interest" doctrine; 3) the "means-orientated test with a bite" doctrine; and 4) the "sliding-scale" doctrine.[66] The article suggested that Canadian jurists would have to make some difficult choices in the early days of *Charter* jurisprudence to give meaning to section 1.

The *Oakes* test, when initially enunciated, appeared to demand a high level of scrutiny by the courts, of government action that violated constitutional rights and freedoms. Put another way, the government would be held to a high standard to justify its actions. While the evolution of *Oakes* in the constitutional context and the development of different levels of scrutiny within *Oakes* may have lowered the levels of scrutiny applied to government action, that is not necessarily the case in the workplace. Labour arbitrators have built on their own early case law recognizing privacy of employees, and have embraced the *Charter* values of privacy and protection of human dignity to bolster recognition of employee privacy in the workplace. In determining how to balance employee privacy rights against an employer's business interests, labour arbitrators have been inspired, both implicitly and explicitly, by the analytical framework in *Oakes*. Labour arbitrators too are forced to consider the level of scrutiny applicable to an employer's action. To what standard are employers held to justify violating employee privacy?

Pre-*Charter* jurisprudence shows that labour arbitrators were already engaging in the balancing act of deciding when an employer's policies or actions were reasonable. The *Charter* and *Oakes* reaffirm the important value and right of privacy for all employees, and provides the analytic framework for a high level of

65 William E Conklin, "Interpreting and Applying the Limitations Clause: An Analysis of Section 1" (1982) 4 Sup Ct L Rev (2d) 75.

66 *Ibid* at 78-81.

scrutiny when considering whether an employer has justified its action. It should be applied in all contexts requiring balancing, for instance in the debate over when drug and alcohol testing is appropriate in the workplace.

The Supreme Court of Canada has recently said that it would be wrong to incorporate an *Oakes* analysis into the common law when the law is being developed consistent with *Charter* values.[67] However, it also acknowledged that the "justificatory muscles" of *Oakes* are balance and proportionality.[68] By the same token, it is instructive to note Justice McIntyre's prescient comments in *RWDSU v Dolphin Delivery Ltd*[69] about the application of the *Charter* to private disputes and the common law:

> [W]here no act of government is relied upon to support the action, the *Charter* will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the *Charter* is far from irrelevant to private litigants whose disputes fall to be decided at common law.[70]

The values captured by *Oakes*, such as the importance of human dignity and the high standards of justification when human dignity is compromised, have influenced labour arbitrators and privacy commissioners in this rapidly evolving area of the law—privacy.

The "justificatory muscles" of balance and proportionality from *Oakes* have permitted labour arbitrators to scrutinize employer's decisions that have an impact on privacy. The questions posed by arbitrators do not always exactly mirror the test in *Oakes*, but the intent is the same: how to assess the conduct of a powerful actor who has violated the privacy of a powerless actor, and whether the violation is justifiable in a workplace where the essential human dignity of the employee is to be protected. Chief Justice Dickson recognized the fundamental importance of work to an individual's sense of identity, self-worth and emotional well-being.[71] If the *Oakes* test assists labour arbitrators in protecting employees' self-worth by ensuring that their privacy is not unreasonably violated, then that is a legacy of *Oakes* worth celebrating.

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67 *Doré*, *supra* note 6 at paras 24-42.

68 *Ibid* at para 5.

69 *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174 [*Dolphin Delivery* cited to SCR].

70 *Ibid* at 603.

71 *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 368, 38 DLR (4th) 16 (and cited with approval by a majority of the Supreme Court of Canada many times). See e.g. *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986, 91 DLR (4th) 491; *K Mart Canada Ltd v UFCW, Local 1518*, [1999] 2 SCR 1083, 176 DLR (4th) 607.