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The “Granny Cam”: the good, the bad, and the law

BY ERIN KUZZ AND GERALD GRIFFITHS

At least four U.S. states have passed laws permitting residents in long-term care facilities to maintain surveillance cameras in their rooms. But what is the law in Canada? Are “Granny Cams” permissible? What are the competing interests, benefits and risks? Lawyers Erin Kuzz and Gerald Griffiths gave an interesting and informative presentation on this topic at this year’s OLTC convention, and share their perspective with *Long Term Care Today* readers.

Video surveillance of resident abuse in North American long-term care homes has made for shocking headline news. It has also inspired fierce debate about the use of covert cameras, often referred to as “Granny Cams.” Some argue the Granny Cam is necessary to deter resident abuse as well as to defend against frivolous and unfounded allegations of abuse. Others say it represents an unnecessary and illegal breach of resident and employee privacy.

Regardless of your point of view, use of a Granny Cam engages the interests of a variety of parties and a range of Ontario and Canadian laws. This article will identify those interests and laws, and offer best practices for long-term care operators.

GRANNY CAM USE — THE DEBATE

Industry groups and privacy rights activists have fiercely debated for and against the Granny Cam. Interestingly, there is no obvious line separating those in favour and those opposed to the technology. One might assume residents and families would be in favour, whereas health-care workers and their employers would be opposed. But this is not the case, as the two sides of the debate include representatives of all parties.

Advocates in favour point to the peace of mind a Granny Cam can provide a family by deterring resident abuse, neglect and theft,¹ a worker by protecting him/her against a false accusation, and an employer by providing objective, accurate information on which to operate its business.

Those opposed to the Granny Cam argue it represents a breach of privacy, promotes lack of trust, and negatively impacts employee motivation. Organized labour has long fought against the use of any form of surveillance in the workplace on the basis it threatens the important role of active management. Opponents also argue the Granny Cam will encourage litigation which, in turn, will cause an increase in insurance premiums of home operators.² On the other hand, some U.S. nursing homes have reported a



significant reduction in insurance premiums as a result of installing Granny Cams, with one Florida nursing home reporting an annual drop from \$57,000 to \$10,000.³

ARE GRANNY CAMS LEGAL IN ONTARIO?

Unlike in the United States where four states have passed laws relating to the use of the Granny Cam in a long-term care home,⁴ no such legislation exists in Ontario. That said, the *Long-Term Care Homes Act*,⁵ *Personal Information and Protection of Electronic Documents Act*,⁶ and *Personal Health Information Protection Act*,⁷ as well as the *Criminal Code*,⁸ common law and the concept of “reasonable expectation of privacy” in a unionized workplace, are each engaged by the use of a Granny Cam.

Navigating these laws can be difficult. Some apply to all forms of Granny Cam use. Others apply depending upon who uses the technology and whose privacy interests are affected. Let’s look at the potential impact of each of these laws as they apply generally, and then look at the laws which apply specifically to a long-term care home.

LAWS OF GENERAL APPLICATION

CRIMINAL LAW

The *Criminal Code* applies across Canada, and prohibits certain types of recordings, including an audio recording of a private communication made without the consent of at least one of the parties to the conversation.⁹ The *Criminal Code* also prohibits “voyeurism” which is the covert surveillance of a resident in his/her room where nudity or sexual activity is captured.¹⁰ The exception is where the recording is made for the “public good” and

may include the installation of a camera in response to a specific concern of abuse or theft.

To avoid inadvertently committing a criminal offence, a best practice is to ensure, wherever possible, there is consent of the informed resident, and the audio component of the recording is turned off.

COMMON LAW

Historically, our courts have not recognized a self-standing right to privacy in Ontario. However, this changed in 2012 when the Ontario Court of Appeal recognized a new, but limited, tort of invasion of privacy called “intrusion upon seclusion.” This tort has five elements: (i) there must be intentional or reckless conduct; (ii) that invades a person’s private affairs; (iii) without lawful justification; (iv) in a manner that is highly offensive to a reasonable person; and (v) which causes distress, humiliation or anguish.¹¹

The tort is intended to address egregious invasions into the most private issues such as health and financial information.¹² And while this tort is still in its infancy, a targeted recording undertaken in good faith, for the purpose of protecting a resident, is unlikely to be captured by this tort.

The Personal Information Protection and Electronic Documents Act (PIPEDA)

In Ontario,¹³ PIPEDA governs the collection, use and disclosure of personal information in a commercial activity. Generally speaking (there are exceptions), the individual about whom the personal information is collected, used or disclosed, must consent to such activity.

PIPEDA does not apply to a long-term care home’s collection of personal information of employees. However, long-term care homes can have obligations under PIPEDA in relation to several types of individuals, including residents, their family members and guests at the home. Where a video camera may capture personal information about any of these latter individuals, consent may be required, and could be obtained by specifically asking a resident for permission or installing signs above the home entrance advising guests they may be subject to covert surveillance.

Where a Granny Cam is installed by a resident or family member, PIPEDA is unlikely to apply because: (a) PIPEDA only applies to personal information collected “in the course of a commercial activity,”¹⁴ and (b) PIPEDA does not apply to personal information collected “for a personal or domestic purpose.”¹⁵ In analyzing whether surveillance is “commercial” or for a “personal or domestic purpose,” adjudicators have focused on the specific purpose for which the surveillance was initiated, and its intended use. On this basis, a video recording by a private person for personal interest or even in the context of litigation has generally been considered to lack a “commercial character.”¹⁶

Even where PIPEDA does apply, consent is not required where: (a) the knowledge of the person subject to the

surveillance would compromise the availability of the footage; and (b) the surveillance is carried out reasonably for purposes related to investigating an illegal activity.¹⁷

Finally, guidelines established by the Privacy Officer of Canada (the body overseeing compliance with PIPEDA) state an organization conducting covert video surveillance should have policies in place which govern how and when surveillance will be conducted.¹⁸

LAWS THAT SPECIFICALLY APPLY TO A HOME

Long-Term Care Homes Act (LTCHA)

The LTCHA contains a Residents’ *Bill of Rights*¹⁹ which applies like a contract between the resident and home.²⁰ The *Bill of Rights* places certain privacy obligations on the home in relation to its residents, including that every resident has the right to “privacy in treatment and in caring for his or her personal needs,” “to communicate in confidence...and consult in private,” as well as to “meet privately...in a room that assures privacy.”²¹

Privacy rights under the *Bill of Rights* are not absolute, and consent to intrude upon privacy can be obtained from a resident. A home seeking to install a camera should therefore ensure it has obtained consent from any affected resident or his/her authorized decision-maker.

Similarly, if a home is aware of the installation of a camera by a resident or a resident’s family member, the home may be obligated to take steps to protect the privacy rights of other residents under the *Bill of Rights*. This may include raising the issue with affected residents to confirm they consent to the continued use of the Granny Cam.

Personal Health Information Protection Act (PHIPA)

PHIPA requires a resident’s consent to collect, use or disclose his or her “personal health information.”²² This term is broadly defined²³ and includes records that relate to an individual’s physical or mental health or the providing of care to that individual. To obtain or use a recording that includes this type of information, a home should obtain consent from the resident or authorized decision-maker.²⁴

EMPLOYEE PRIVACY RIGHTS

Our courts have not yet recognized a self-standing right to privacy in relation to surveillance of a non-unionized employee while at work. Invasive workplace surveillance was found to be a contributing factor to a finding of constructive dismissal in one case;²⁵ however, the court in that case clearly stated that video surveillance of a non-unionized employee is not prohibited in Ontario.²⁶

The situation is different in a unionized setting. Arbitrators have found that a unionized employee has an expectation of privacy such that only a “reasonable” installation of a camera is permissible (e.g., in response to a specific problem such as theft or abuse). To this end, an arbitrator will evaluate the purpose of the surveillance, availability of alternative, less intrusive forms of information gathering, location of the camera (e.g., what information is gathered), duration of recording, and who has access to the footage.

IS VIDEOTAPE EVIDENCE ADMISSIBLE IN COURT OR AT ARBITRATION?

Just because videotape evidence may be “legal” to obtain does not mean the evidence is admissible in court or at arbitration. Similarly, illegally obtained video evidence may still be admitted in court where the evidence is relevant and an accurate depiction of what occurred.²⁷

In the unionized context, grievance arbitrators have adopted two approaches to determine whether videotape evidence is admissible. The “relevance” standard adopted by courts, and the “reasonableness” standard which assesses whether the surveillance was reasonable in the circumstances, applying the factors identified above (the purpose of the surveillance, availability of alternative, less intrusive forms of information gathering, location of the camera, duration of recording, and who has access to the footage).

TIPS AND BEST PRACTICES

Whether, when and how to employ a Granny Cam is not a straightforward answer. Many privacy laws are new or evolving as quickly as the surveillance technology itself. As homes navigate these challenging issues, the following are offered as tips and best practices.

Where a Granny Cam is installed by a home:

1. The Granny Cam should not audio record in violation of the *Criminal Code*. Where the audio is turned on, consent of one party to any conversation is required.
2. The Granny Cam should be targeted to capture specific conduct and used in the least intrusive manner possible. This includes positioning the camera to avoid capturing any nudity or sexual activity.
3. The home should have in place policies governing how and when a Granny Cam will be used.
4. Signs should be prominently posted advising individuals they may be subject to surveillance.
5. If the camera is in a resident’s room, consent should be obtained of a resident and any roommate captured by the Granny Cam.

Where a Granny Cam is installed by a resident or family member:

1. Such use is not prohibited, provided the Granny Cam is not used in a criminal or egregious manner such that it constitutes “intrusion upon seclusion.”
2. A home must be mindful of the impact on other residents.

3. If the home is aware the surveillance intrudes upon another resident's privacy protected under the *Bill of Rights*, the home should take steps to confirm the resident's consent to the surveillance.

To learn more and for assistance addressing privacy and surveillance issues in a long-term care or related home, contact a member of Sherrard Kuzz LLP. The information contained in this article is provided for general information purposes only and does not constitute legal or other professional advice. Reading this article does not create a lawyer-client relationship. Readers are advised to seek specific legal advice from Sherrard Kuzz LLP (or other legal counsel) in relation to any decision or course of action contemplated.

1. Toben, Bradley J.B. and Matthew C. Cordon. "Legislative Stasis: The Failures of Legislation and Legislative Proposals Permitting the Use of Electronic Monitoring Devices in Nursing Homes" (2007) 59 *Baylor L. Rev.* Vol. 3 675 at 698 [*Baylor*].

2. *Ibid.* at 695.

3. *Ibid.* at 696.

4. Texas, New Mexico, Maryland and Oklahoma require consent of the resident and any affected roommate to install a Granny Cam.

5. S.O. 2007 c.8 [the "LTCHA"].

6. S.C. 2000 c. 5 ["PIPEDA"].

7. S.O. 2004, c. 3 ["PHIPA"].

8. R.S.C. 1985, c C-46.

9. *Criminal Code* at s. 183.1 and 184.

10. *Criminal Code* at s. 162.

11. *Jones v. Tsige* (2012), 108 OR (3d) 241at para. 71 [*Jones v. Tsige*].

12. *Ibid.* at para. 72.

13. This may differ in other provinces.

14. PIPEDA at paragraph 4(1)(a).

15. PIPEDA at paragraph 4(2)(b).

16. See e.g. *State Farm Mutual Automobile Insurance Co. v. Canada (Privacy Commissioner)*, [2010] F.C.J. No. 889; *Ferenczy v. MCI Medical Clinics et al.*, [2004] O.J. No. 1775.

17. PIPEDA at paragraph 7(1)(b).

18. Office of the Privacy Commissioner of Canada Reports and Publications. "Guidance on Covert Video Surveillance in the Private Sector. Online: <http://www.priva.gc.ca/information/pub/>.

19. *Supra*, note 3 at s. 3 (the "Bill of Rights").

20. *Bill of Rights*, *supra* note 5, at section 3(3).

21. *Bill of Rights*, *supra* note 5, at section 3(1).

22. The form of consent may vary and some exceptions do apply to this requirement.

23. PIPEDA at s. 7(1).

24. PHIPA at s. 29.

25. *Colwell v. Cornerstone Properties Inc.*, 2008 CanLII 66139 (ON SC).

26. *Ibid.* at para. 30.

27. *R. v. Nikolovski*, [1996] 3 S.C.R. 1197; *R. v. Jamieson*, [2004] O.J. No. 1780 (S.C.J.). [LTCI](#)



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