BC BUILDING TRADES
WE BUILD BC™

209 - 88 Tenth Street
New Westminster, BC
V3M-6H8

T 778.397.2220
F 778.397.2250

bcbuildingtrades.org

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VIA EMAIL: policy@worksafebc.com

Negar Jalali
Senior Policy & Legal Advisor
Policy, Regulation and Research Division
Workers' Compensation Board
P.O. Box 5350, Station Terminal
Vancouver, British Columbia
V6B 5L5

Dear Negar Jalali:

RE: Response to Surveillance Policy Discussion Paper

The BC Building Trades appreciates the opportunity to provide feedback on the Workers' Compensation Board's proposed surveillance policy.

The BC Building Trades represents over 35,000 unionized building and construction workers throughout British Columbia and the Yukon Territories. Our members, men and women who represent every ethnic group and cultural background, are glaziers, ironworkers, electricians, piledrivers, operating engineers, cement masons, sheet metal fabricators and much more. Each and everyone of our members values their privacy and takes the issue of surveillance extremely seriously.

Long before the publication of George Orwell's dystopian novel *1984* which spoke to the dangers of government control, the citizenry of western liberal democracies fiercely fought for and guarded their rights to privacy. It is no coincidence that the legal rights set out in the *Canadian Charter of Rights and Freedoms* specify that "everyone has the right to life, liberty and security of person" as well as "the right to be secure against unreasonable search and seizure". These constitutionally enshrined rights and freedoms safeguard our liberty and personal privacy, and every Canadian expects these rights to be upheld by state actors such as the Workers' Compensation Board (WCB). Thus, it naturally follows that workers and their representative unions will vehemently oppose any infringement of privacy rights that are not "demonstrably justified in a free and democratic society".

Currently the WCB does not have a policy regarding the use of surveillance to gather evidence on workers whose claim for benefits are under suspicion. The Board, however, is empowered pursuant to the *Workers' Compensation Act* sections 88(1) and 96 (1) to adjudicate and investigate compensation claims. And while the Board's *Practice Directive #C 12-7, Surveillance and Other Evidence* is not binding, it provides some useful guidance

when officers are contemplating, or are in the process of, probing into the personal activities of workers to weigh the legitimacy of their claims. The directive expressly states that "surveillance is a tool of last resort to be used where there are reasonable grounds to suspect misrepresentation or fraud by a worker and other investigative methods would be ineffective." Despite this cautionary provision, many workers' advocates as well as some Workers' Compensation Appeal Tribunal (WCAT) Panels have found that Board officers are not employing surveillance as a last resort, and equally problematic, using inconclusive surveillance evidence to make definitive decisions penalizing workers.

The BC Building Trades fully supports the recommendations of Mr. Petrie with respect to surveillance policy as set out in *Restoring the Balance: A Worker-Centred Approach to Workers' Compensation Policy*, March 31, 2018. In our opinion, the Board's proposed surveillance policy lacks the necessary specificity and "flesh on the bones" to bring Petrie's recommendations to fruition. The proposed policy takes a few steps in the right direction, but there is a significant distance to go yet.

Since the completion of Mr. Petrie's report, the Board has done an exemplary job analyzing and consulting on Petrie's recommendations. However, when it comes to this policy, the BC Building Trades as well as the BC Federation of Labour think your expedited consultation and submission deadline did the people we represent a disservice.

We are in full agreement with the important principles that Mr. Petrie says should inform any surveillance undertaken by the Board. These principles include:

> *A request procedure which requires clear and substantive reasoning and is not just a subjective opinion from a claim owner; and approval by a person independent of the claim's adjudication process, based on clear criteria.*
>
> *Guidelines that video surveillance is a tool of last resort. Where there is a concern about the consistency of a worker's presentation, claim owners should attempt to attain additional assessments or evidence prior to a request for surveillance.*
>
> *A requirement that when the video surveillance is obtained, it is examined for its probative value by a qualified examiner.*
>
> *That if there is a consideration of adverse decisions after the surveillance is completed and examined, that the worker or his representative will be provided with the surveillance evidence and given a reasonable time to respond.*
>
> *If criminal charges are contemplated, then the procedural protections afforded by the Charter in a criminal context apply. In the context of an investigation, these are set out in R. v. Jarvis [2002] 3 S.C.R.*

The Board's proposed surveillance policy would be significantly strengthened by "putting flesh on the bones" of the principles articulated above. For, while the existing law and practices as well as British

Columbia's *Freedom of Information and Protection of Privacy Act* (*FIPPA*) provide general safeguards against the most blatantly unreasonable invasions of personal privacy, there is an urgent need to create procedures as well as structures (e.g., an independent body outside of the existing adjudicative process) that protects workers against overly enthusiastic case managers whose vague suspicions may trigger Orwellian-like surveillance leading to a termination of worker benefits based on insubstantial evidence.

To repeat, surveillance should only be employed as a tool of last resort where there are reasonable grounds to suspect misrepresentation or fraud by a worker, and where other investigative methods would clearly be ineffective. In such unique cases, surveillance, to quote Mr. Petrie, "should be used with clear procedural guidelines and protections and should not be used as a simple adjudicative tool for difficult files." Given the delicate nature of invading a worker's personal space as well as the fact the Board conducts surveillance in a small number of cases (only 0.2% of claims per year involve the use of surveillance, according to the Board), it should not be an overly complicated or costly task to follow a highly specialized policy and procedure when a worker is under suspicion and actioning surveillance is being considered.

Although the *Federal Personal Information Protection and Electronic Documents Act* (*PIPEDA*) applies to the collection, use or disclosure of personal information in the course of a commercial activity and does not legally apply to the activities of the Board, it is highly instructive that this instrument defines video surveillance as <u>covert</u> because individuals under surveillance are unaware that they are being watched. As a result, the federal government fully acknowledges that it must proceed with the utmost caution before, during and after videoing a member of the public.

> *The Office of the Privacy Commissioner considers covert video surveillance to be an extremely privacy-invasive form of technology. The very nature of the medium entails the collection of a great deal of personal information that may be extraneous, or may lead to judgments about the subject that have nothing to do with the purpose for collecting the information in the first place. In the Office's view, covert video surveillance must be considered only in the most limited cases.*

The Board must set out in policy the reasonable purposes for which it will collect, use, and disclose video surveillance of a worker. If done right, this policy should enable the Board to fulfill its purposes under the *Workers' Compensation Act*, while refraining from going on aimless fishing expeditions and invading workers' personal space. In this regard the *PIPEDA* provides helpful guidance. Four questions should be posed, resolved, and documented prior to undertaking video surveillance. First, is there a demonstrable, evidentiary need for the collection of video surveillance? It's not enough for a Board officer to be acting on mere suspicion or speculative musings. Secondly, is it more likely than not that the surveillance will capture the requisite evidence and achieve the purpose? Thirdly, is the loss of worker's right to privacy proportional to the benefit to be gained by the Board? The importance of this question increases exponentially if the individual under suspicion has a psychological condition that makes them prone to an adverse response when they are informed of the surveillance they were subjected to without their knowledge. Lastly, the Board officer must seriously consider other means of obtaining the personal information that may facilitate decision-making prior to initiating video

surveillance. Every information gathering method that is less privacy-intrusive must be thoroughly reviewed, and if it holds even a remote chance of unearthing the sought-after evidence, it must be pursued prior to sanctioning covert video surveillance.

In addition to these general rules and procedures, the PIPEDA sets out a host of policy prescriptions. Using those policy provisions as a starting point and modifying them to meet our requirements here, the BC Building Trades thinks the policy should:

- limit the collection of personal information to that which is necessary to achieve the stated purpose;
- set out privacy-specific criteria that must be met before covert video surveillance is undertaken
- stipulate that the decision to undertake surveillance be documented, including rationale and purpose;
- specify that the authorization for undertaking video surveillance as well as making the final decision with respect to its relevance to the claim, be the responsibility of an independent office that is separate and apart from the adjudicate team (i.e., case manager, board medical advisor, etc.);
- require that the surveillance be stored in a secure manner;
- designate the persons (e.g., case managers, investigative agent, independent surveillance examiner) at the Board authorized to view surveillance;
- set out procedures for dealing with third party information;
- set out a retention period for the surveillance; and
- establish procedures for the secure disposal of video surveillance.

The Workers' Compensation Appeal Tribunal (WCAT) has a history of adjudicating claims involving surveillance activity. Drawing upon this history, Vice Chair Kathryn P. Wellington has articulated the process the WCAT follows when assessing surveillance evidence. On page 6 of her October 30, 2003 decision (WCAT-2003-03300) she sets out their standard questions:

1. Does the Board have the authority to rely on the video evidence? If not, may the WCAT rely on relevant evidence, regardless of how it was obtained?
2. Does the file indicate why the surveillance was conducted?
3. Is the subject of the surveillance, in fact, the worker? Is there adequate proof of this?
4. How does the activity observed in the surveillance relate to the conditions accepted under the claim?
5. Is the person who interprets the relevance of the activity observed on the video qualified to do so?
6. For how long and on how many occasions was the worker observed to engage in the activity?
7. Was the activity clearly visible?
8. Was the worker given an opportunity to see the video and offer an explanation before the Board made decisions adverse to the claim?

9. Is the evidence sufficient to warrant termination or suspension of benefits? What action does the Board officer take in response to the evidence?
10. What are the panel's reasons for weighing the video surveillance in a particular manner?

Expressly posing these questions in policy, compelling Board officers to methodically assess these matters, and ensuring that their responses are documented in a comprehensive fashion, should lead to improved decision-making and the lessening of unnecessary video surveillance and adverse decisions absent the necessary evidence to support them.

The principles of natural justice must be upheld to ensure governments interactions with its citizens are safeguarded against intrusions ranging negative impacts from a modest invasion of personal privacy to violent totalitarian, Orwellian behaviour. Essentially, these principles ensure that when a person's rights, privileges or interests are at stake, the government body must exercise procedural fairness. There are twelve commonly accepted rules of procedural fairness: (1) adequate notice of the nature of the proceedings and issue; (2) disclosure of evidence to be used against an applicant; (3) the opportunity to present whatever evidence the applicant wishes to be considered; (4) the opportunity to respond to the evidence held by the government with respect to the issue; (5) the duty of the decision-maker to consider all of the evidence and information pertaining to the case; (6) the right to counsel or representation; (7) the right to an interpreter; (8) legitimate expectation that the government will follow their own express procedures; (9) the right to an impartial decision-maker and freedom of bias; (10) institutional independence and requirement that the person who hears the case must decide; (11) the acceptance that unreasonable delay may cause prejudice toward the worker; and lastly, (12) the right to reasons in a final decision. While every one of these enumerated principles are fundamental to procedural fairness, I will focus my fire on principles 2, 3, and 4 which are of paramount importance in the context of surveillance.

Under the Board's current model, workers captured on video surveillance are contacted by a field officer/investigative agent, and a meeting is set up where they view the video footage. Following the screening, the worker is given the opportunity to respond and provide their evidence. Not surprisingly, this exercise of so-called procedural fairness scares the hell out of claim owners - whether their claims are legitimate or not - and is not a process providing a meaningful opportunity to respond or provide evidence to counter the not-so-subtle accusations advanced by a total stranger sitting across the table. This lamentable situation is exacerbated by the fact that the worker is only shown video footage that allegedly demonstrates fraud or misrepresentation.

It is of the utmost importance that workers who are scheduled to appear in front of a field officer/investigative agent to answer to serious accusations of fraud or misrepresentation be given an ample opportunity to review all the relevant evidence including the entire video evidence as well as memorandum and reports relevant to the matter. An appropriate period must be granted to workers under suspicion to review these materials *prior* to a meeting with the investigating officer (e.g., 30 days would seem a reasonable period). And the worker should also be granted the opportunity to respond in any way they see fit, whether face-to-face, in writing, or with the aid of an advocate. Not only would

this be in keeping with the principles of procedural fairness, it would mirror the processes already in place with respect to requests for review of Board decisions and appeals to the WCAT.

Lastly, as mentioned earlier, there is a pressing need to implement a process whereby decisions to undertake surveillance or act upon it in an adverse manner, are scrutinized by a *qualified person* (not a case manager, client service manager, or board medical advisor) who works independently of the adjudicative process and personnel. For example, the Board could establish a body of one or more whose sole responsibility, like a Freedom of Information officer, is to evaluate the grounds upon which the case manager has recommended video surveillance. Of course, the grounds are articulated in a formal proposal developed by the case manager in keeping with the evidentiary prerequisites stipulated in the policy and practice directive. If the invasion of the worker's personal privacy is supported by the gatekeeper, this same person or body would scrutinize the surveillance evidence obtained to determine whether further steps were justified including an interview with the worker or a decision adverse to the claimant. This "separation of powers" model would help the worker get a fairer hearing in keeping with natural justice and remove the existing unsavory practice that clearly crosses the line into adversarial adjudication.

This submission addresses only some of the most pressing shortcomings of the Board's proposed surveillance policy. Our colleagues at the BC Federation of Labour have raised similar as well as additional problems and concerns. We echo and support their submission. Unfortunately, the current surveillance policy proposal fails to provide necessary specificity that would breathe life into Mr. Paul Petrie's recommendations and safeguard our workers against the invasion of their privacy. To achieve this important task, we must collectively return to the drawing board.

The BC Building Trades appreciates the opportunity to provide input to the Board's policy consultation regarding video surveillance.

Thank you.

Sincerely,

Merrill James O'Donnell, M.A. LL. B.
Workers' Advocate

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