
Privacy Law: New and Emerging Issues

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Agenda

■ Legislative Update

- Bill C-11

- Private sector privacy legislation in Ontario

■ Hiring, Firing and Surveillance

- Privacy in the hiring process

- Confidentiality

- Surveillance

- “Intrusion upon seclusion” in the workplace

Agenda

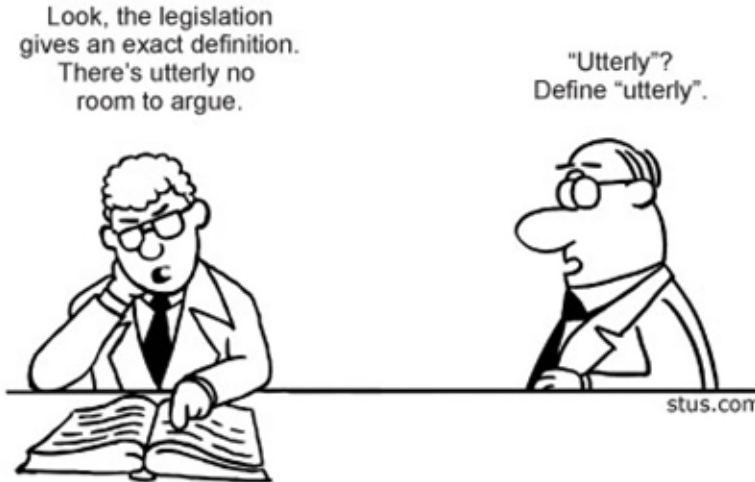
■ COVID-19

- Screening, test results and vaccination status
- Disclosing and safeguarding personal and/or medical information

■ Workplace Privacy Policy

- Why every workplace should have one
- Key components of a workplace privacy policy

Legislative Update



Legislative Update: Current Landscape

- *Privacy Act* - federal government institutions
- Private sector privacy legislation - BC, Alberta and Quebec
- In all other provinces and federal sector
 - *Personal Information Protection and Electronic Documents Act (PIPEDA)*
 - Municipal and health-specific privacy legislation

Legislative Update: Bill C-11

- Federal legislation applicable to all organizations, save for express exemptions
- *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*
- First Reading on November 17, 2020

Legislative Update: Bill C-11

- If passed, *Consumer Privacy Protection Act (CPPA)* will repeal and replace Part One of *PIPEDA*
- Will maintain some of the fundamental components of *PIPEDA*
- Strengthens consumer protection and accountability
- Introduces more stringent enforcement mechanism and harsher penalties for non-compliance

Legislative Update: Bill C-11

Key Components

- Implementation of privacy management program
- Duty to report and maintain records of any security breach
- No reprisal against employee for reporting contravention
- Enhanced consumer rights related to personal information held by an organization

Legislative Update: Bill C-11

Key Components

- Establishes an administrative tribunal to
 - Hear appeals of certain decisions made by the Privacy Commissioner under the *CPPA*
 - Impose penalties for the contravention of certain provisions of the *CPPA*
- Penalty up to \$25,000,000 or 5% of annual gross global revenues, whichever is greater

Legislative Update: Ontario

- Currently, no private sector privacy legislation in place
- Historically, *PIPEDA* has applied to commercial activity
- In late 2020, Ontario launched public consultation on potential for provincial privacy legislation
- No legislation currently in place or tabled
- Remains to be seen if will be introduced in 2021

Hiring, Firing and Surveillance



Hiring, Firing and Surveillance: Applicant Information

- In a jurisdiction with private sector privacy legislation, employer can only collect information reasonable to determine suitability for employment
- Will also need to comply with legislative obligations related to use, security and disclosure of information

Hiring, Firing and Surveillance: Applicant Information

Mark's Work Warehouse (Alberta) (2010)

- Complainant applied for a job as a sales associate
- Required to undergo pre-employment credit check
- Complainant had credit issues and was not hired
- Filed a complaint, investigated under *Personal Information Protection Act (PIPA)*

Hiring, Firing and Surveillance: Applicant Information

Mark's Work Warehouse (Alberta) (2010)

- Mark's position: credit check required to assess ability to handle financial responsibilities and risk of in-store theft or fraud
- Office of the Information and Privacy Commissioner held collection contravened *PIPA* as the information was not “reasonably required” for duties of the position

Hiring, Firing and Surveillance: Applicant Information

- In other jurisdictions, an organization may still want to limit the information required to only what is reasonably necessary to assess suitability
- An ‘overbroad’ request may increase potential that employer may contravene human rights legislation
 - Age, race, family status, disability, marital status

Hiring, Firing and Surveillance: Duty to Maintain Confidentiality

- Employee has common law duty to protect employer confidential information
- Duty of confidentiality survives termination
- Common law duty but best practice is to set out employee obligations in writing in employment agreement or policy
- Is breach cause for termination?

Hiring, Firing and Surveillance: Duty to Maintain Confidentiality

Steel v. Coast Capital Savings Credit Union, 2015 BCCA 127

- 21 year IT department employee accessed a manager's personal folder without permission
- Terminated for cause
- Wrongful dismissal claim dismissed by trial judge
- BC Court of Appeal upheld trial judge's decision

Hiring, Firing and Surveillance: Duty to Maintain Confidentiality

Steel v. Coast Capital Savings Credit Union, 2015 BCCA 127

- Employee was in a position of trust (she had access to every file on the system) and worked without supervision
- Employer had clear privacy protocols in place with clear warning of consequences of a breach
- Termination for cause justified

Hiring, Firing and Surveillance: Duty to Maintain Confidentiality

Credit Valley Hospital v. CUPE, 2012 CarswellOnt 451

- Five year employee tasked with clean up of site where patient committed suicide
- Took photos of the scene and posted to Facebook
- Photos deleted by the employee a day later
- Employee was dishonest during the investigation and did not have a clean disciplinary record

Hiring, Firing and Surveillance: Duty to Maintain Confidentiality

Credit Valley Hospital v. CUPE, 2012 CarswellOnt 451

- Grievance dismissed
- Hospital confidentiality policy and code of conduct clearly set out expectations and potential disciplinary consequences if breached
- Photos constituted a breach of patient confidentiality-employee should have known individual was a patient

Hiring, Firing and Surveillance:

Surveillance

- In a non-unionized setting employer has more discretion to engage in surveillance
- In a unionized setting, arbitrators have recognized ‘privacy interest’ and employer must demonstrate
 - Reasonable basis for surveillance
 - Surveillance is reasonably conducted
 - No less intrusive method to obtain information exists

Hiring, Firing and Surveillance: Surveillance

U.N.I.T.E.-H.E.R.E., Local 75 v. Fairmont Royal York Hotel,
2011 CarswellOnt 15249

- 19 employees terminated after workplace investigation into use of drugs and alcohol at work
- Termination based, in part, on surreptitious video surveillance evidence collected by an undercover investigator
 - Included video evidence obtained in the men's change room

Hiring, Firing and Surveillance:

Surveillance

U.N.I.T.E.-H.E.R.E., Local 75 v. Fairmont Royal York Hotel,
2011 CarswellOnt 15249

- Grievance addressed reasonableness of video surveillance
- Arbitrator concluded there was a reasonable basis for conducting surveillance
 - Earlier complaints from employees, alcohol missing, investigator's own initial observations

Hiring, Firing and Surveillance:

Surveillance

U.N.I.T.E.-H.E.R.E., Local 75 v. Fairmont Royal York Hotel,
2011 CarswellOnt 15249

- Surveillance conducted reasonably, save for the change room video
 - Investigator could have acted as “eye witness” instead
 - Video caught employees in various states of undress
- Employer prohibited from relying on change room video

Hiring, Firing and Surveillance: Surveillance

Colwell v Cornerstone Properties Inc., [2008] OJ No. 5092 (SCJ)

- Employee quit and alleged constructive dismissal after finding a secret video camera had been installed in her office (and hers alone)
- Boss claimed camera installed due to ‘so-called’ concern about theft by maintenance staff

Hiring, Firing and Surveillance: *Surveillance*

Colwell v Cornerstone Properties Inc., [2008] OJ No. 5092 (SCJ)

- Court: camera not itself unacceptable
 - Implausible explanation rendered conduct unacceptable
- Employee privacy was violated and amounted to constructive dismissal
- Entitled to seven months' pay in *lieu* of notice

Hiring, Firing and Surveillance: Intrusion Upon Seclusion

Jones v. Tsige, 2012 ONCA 32

- Tsige worked at BMO where Jones banked
- Accessed and reviewed Jones' private banking records 174x
- Jones claimed that Tsige invaded her privacy
- Court agreed - established new tort of *intrusion upon seclusion*

Hiring, Firing and Surveillance: Intrusion Upon Seclusion

■ Five elements to the tort:

1. Intentional or reckless conduct
2. Invasion of the plaintiff's private affairs
3. No lawful justification
4. Highly offensive to a reasonable person
5. Causes distress, humiliation or anguish

Hiring, Firing and Surveillance: Intrusion Upon Seclusion

Rancourt-Cairns v. The Saint Croix Printing and Publishing Company Ltd., 2018 NBQB 130

- Claim by employee against employer
- Unauthorized but unintentional access of the employee's iCloud account when phone returned on termination
- Photo of a medical note was downloaded and forwarded

Hiring, Firing and Surveillance: Intrusion Upon Seclusion

Rancourt-Cairns v. The Saint Croix Printing and Publishing Company Ltd., 2018 NBQB 130

- Medical note would have been disclosed in lawsuit, access was unintentional and phone examined for lawful reason
- Claim for intrusion upon seclusion dismissed

Hiring, Firing and Surveillance: Intrusion Upon Seclusion

St. Patrick's Home of Ottawa v. CUPE, 2016 CarswellOnt 3234

- Employer shared employee medical information with employee's other employer without consent
 - Confirmed the employee was not being accommodated and did not have any work-related restrictions and provided a medical note to that effect without the employee's consent
- Employee awarded \$1,000

Hiring, Firing and Surveillance: Intrusion Upon Seclusion

Rio Tinto Alcan v. Unifor, 2014 CarswellBC 4251

- Employer search of employee rooms at employer remote camp with sniffer dogs unreasonable
- \$1,750 awarded to each employee except one, who was awarded \$2,250 because lawful firearm was found

COVID-19 Privacy Considerations



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COVID-19 Privacy Considerations: Screening Information

- Employee COVID-19 screening information should be retained for contact tracing purposes (at least one month)
- Records should be maintained in a secure location and only disclosed to a third party if required by law

COVID-19 Privacy Considerations: Collection of Vaccination Information

- In a province with provincial privacy legislation, or in a unionized workplace, need to establish collection is “reasonable”
- In non-unionized workplace, still need to consider what employer will do if employee refuses
 - Termination may result in considerable liability

COVID-19 Privacy Considerations: Collection of Vaccination Information

- Collection may be appropriate if providing an incentive to employees to become vaccinated (*e.g.*, bonus or time off)
- Ensure vaccination records securely safeguarded in the same way as any other medical information
- Vaccination status should not be disclosed to third party without employee consent

COVID-19 Privacy Considerations: Disclosure of COVID-19 Diagnosis

- Reasonable to request that employee provide proof of diagnosis through COVID-19 test result (*e.g.*, screen shot or printout of results)
- Reasonably necessary to take steps to protect health and safety of co-workers, customers

COVID-19 Privacy Considerations: Disclosure of COVID-19 Diagnosis

- Obtain employee consent to disclose and limit only to people who need to know for contact tracing purposes
- In a province with private sector privacy legislation, disclosure of diagnosis to employees without consent may constitute violation
- For a unionized employer, may be viewed as a violation of employee ‘privacy interest’ or ‘intrusion upon seclusion’

COVID-19 Privacy Considerations: Disclosure of COVID-19 Diagnosis

- In some circumstances, employer may have a legislative obligation to disclose COVID-19 employee information to public health and government ministries
 - Regional class orders
 - Occupational health and safety legislation
- In these circumstances, employee consent is not required

Workplace Policies



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Workplace Policies

- A well-drafted policy can enhance likelihood discipline will be upheld if employee commits a privacy violation
 - May also reduce risk of inadvertent disclosure
- Policy should be clear and brought to attention of employees
- Directly state that a breach may result in discipline, up to and including termination **for cause**

Workplace Policies: Confidentiality

- Define confidential information
 - Ensure definition is not so broad as to be meaningless
- Outline when disclosure is permitted and who can waive confidentiality on behalf of the employer
- Put employee on notice that confidentiality obligations continue post-termination

Workplace Policies: Privacy

- Employer in federal sector, BC, Alberta and Quebec must have privacy policy to address employee personal information
- In other jurisdictions, must have a privacy policy to deal with personal information collected in the course of “commercial activity”
- Policies will need to be reviewed and revised if *CCPA* enacted

Workplace Policies:

Privacy

- Identify what personal information is collected, its purpose, and to whom it will be disclosed
- Obtain consent
- Ensure information is only used for purpose identified
- State whether an employee should have any expectation of privacy when using company technology or networks
- Identify how individual can access and correct personal information, and challenge compliance

Workplace Policies:

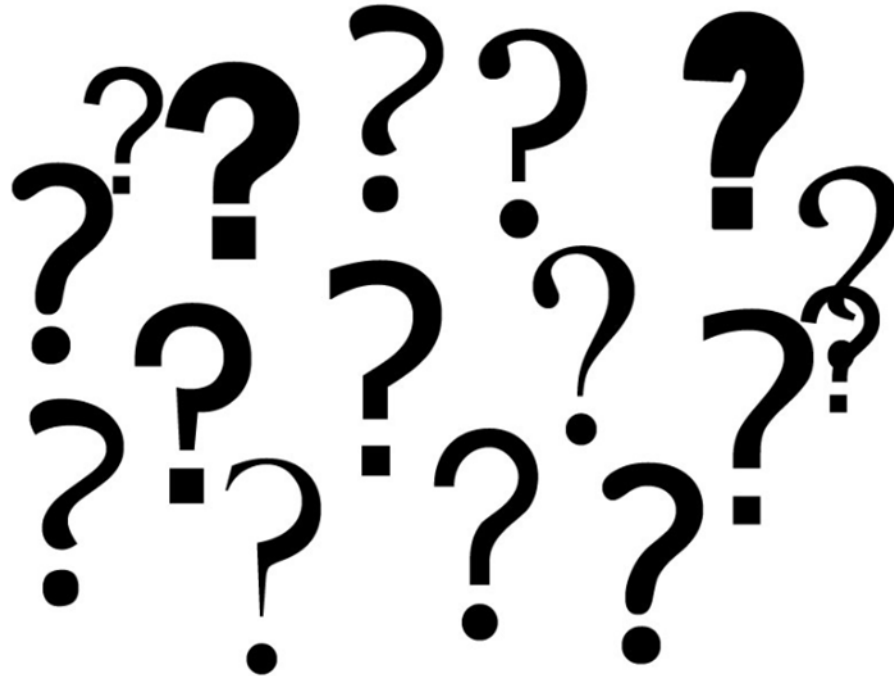
Privacy

- Identify an individual at the organization responsible for privacy and to answer questions
- Outline procedure to retain and destroy personal information
- Identify and implement safeguards to protect access to and disclosure of personal information

How Can SK Help?

- Advise, assist and and represent the organization regarding
 - discipline and/or discharge for breach of confidentiality
 - workplace surveillance
 - full range of agreements and policies, including:
 - Employment and independent contractor
 - Confidentiality
 - Privacy
 - Collection, use and disclosure of COVID-19 related information

Questions?





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