



# ***TOP FIVE WORKPLACE PRIVACY ISSUES***

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# TOP FIVE WORKPLACE PRIVACY ISSUES

1. Do employees have privacy rights?
2. Can employers conduct background checks?
3. Can employers monitor employees?
4. Can employers share employee information with foreign affiliates?
5. Are employees entitled to access employers' records?

# DO EMPLOYEES HAVE PRIVACY RIGHTS?

## LEGISLATION - FEDERAL

*Personal Information Protection and Electronic Documents Act (“PIPEDA”)*

- Federally-regulated employers
- For example:
  - Banks
  - Air transportation and aerodromes
  - Shipping
  - Railways
  - Broadcasters



# DO EMPLOYEES HAVE PRIVACY RIGHTS?

## LEGISLATION - PROVINCIAL

- **Alberta** – *Personal Information Protection Act*
- **B.C.** – *Personal Information Protection Act*
- **Quebec** – *An Act respecting the protection of personal information in the private sector*
  - *Civil Code*
  - *Charter of Human Rights and Freedoms*

# DO EMPLOYEES HAVE PRIVACY RIGHTS?

## LEGISLATION – ALBERTA & B.C.

### Employee Personal Information:

- Notice (not consent)
- Information relates to employment relationship
- Reasonable for the purposes of establishing, managing or terminating the employment relationship



# DO EMPLOYEES HAVE PRIVACY RIGHTS?

## RELEVANCE OF LEGISLATION TO ONTARIO EMPLOYERS

- Contacting federal, B.C., Alberta and Quebec employers for references
- Independent contractors and consultants
- Third party service providers



# DO EMPLOYEES HAVE PRIVACY RIGHTS?

## STATUTORY TORTS

- B.C., Manitoba, Newfoundland and Saskatchewan
- It is a tort that is actionable without proof of damages for a person to willfully and without claim of right violate the privacy of an individual
- Consent is a defence



# DO EMPLOYEES HAVE PRIVACY RIGHTS?

## PERSONAL HEALTH INFORMATION

- All provinces except Quebec and Prince Edward Island
- Ontario – *Personal Health Information Protection Act, 2004*
  - Information obtained from health information custodians
  - In-house doctors/nurses
  - Health numbers and health cards





# DO EMPLOYEES HAVE PRIVACY RIGHTS?

## *Criminal Code:*

- Using a device willfully to intercept a private communication without the express or implied consent of the originators or intended recipient
- To intercept fraudulently and without colour of right any function of a computer system

# DO EMPLOYEES HAVE PRIVACY RIGHTS?

## PUBLIC SECTOR ORGANIZATIONS

- E.g., Ontario – *Freedom of Information and Protection of Privacy Act*
  - Hospitals, educational institutions, etc.



# DO EMPLOYEES HAVE PRIVACY RIGHTS?

## COMMON LAW

- Arbitration cases (unionized)
  - Most arbitrators recognize privacy rights
  - Consider collective agreement
- Court cases (non-union)



# DO EMPLOYEES HAVE PRIVACY RIGHTS?

## COMMON LAW

### *Tsige v. Jones:*

- Employee accessed co-worker's bank records 174 times over four years
- Dismissed by lower court
- Court of Appeal created new tort



# DO EMPLOYEES HAVE PRIVACY RIGHTS?

## COMMON LAW

### Intrusion upon Seclusion:

- Intentionally intrudes upon the seclusion of another or his/her private affairs
- If the invasion would be highly offensive to a reasonable person
- Limits on damages

# DO EMPLOYEES HAVE PRIVACY RIGHTS?

## COMMON LAW

- **Workplace privacy cases after *Tsige v. Jones*:**
  - *Complex Services Inc. v. OPSEU, Local 278*
  - *Hamilton International Airport Ltd. v. C.U.P.E. (Local 5167)*



# CAN EMPLOYERS CONDUCT BACKGROUND CHECKS?

- Background checks include criminal, driving, credit, reference, education, social media, etc.
- Legislative requirements:
  - Consent (Federal and Quebec)
  - Notice (Alberta and B.C.)
  - Only perform checks that are “reasonable”



# CAN EMPLOYERS CONDUCT BACKGROUND CHECKS?

## *CAW-Canada, Local 2098 v. Diageo Canada Inc.*

- Criminal checks on employees bidding into safety-sensitive positions
- Arbitrator found policy reasonable
- Policies of unionized employers may be scrutinized





# CAN EMPLOYERS CONDUCT BACKGROUND CHECKS?

## *Somwar v. McDonalds' Restaurants of Canada Ltd.*

- Credit check by employer without notice or consent
- Action by employee for invasion of privacy



# CAN EMPLOYERS CONDUCT BACKGROUND CHECKS?

## *Somwar v. McDonalds' Restaurants of Canada Ltd. (cont'd)*

- It is **not** settled law in Ontario that there is **no** tort of invasion of privacy
- The time has come to recognize invasion of privacy as a tort in its own right

# CAN EMPLOYERS CONDUCT BACKGROUND CHECKS?



- Consider laws applicable to disclosing organization
  - Educational institutions
  - Police checks
    - *Municipal Freedom of Information and Protection of Privacy Act*

# CAN EMPLOYERS CONDUCT BACKGROUND CHECKS?



- **Social Media Checks:**
  - Consider applicable laws:
    - Information collected is “personal information”
    - “Publicly available” information is narrowly defined

# CAN EMPLOYERS CONDUCT BACKGROUND CHECKS?



- **Social Media Checks (cont'd):**

- Risks:

- Collecting irrelevant information
- Collecting information of third parties without consent
- Inaccurate/outdated information
- Collecting information about protected characteristics under human rights laws

# CAN EMPLOYERS CONDUCT BACKGROUND CHECKS?



- **Social Media Checks (cont'd):**
  - Reducing Risks:
    - Obtain consent/provide notice
    - Limit checks
    - Train personnel
    - Document reasons for decisions
    - Retain information (securely)

# CAN EMPLOYERS MONITOR EMPLOYEES?

- Different tests in different jurisdictions
- General factors:
  - Necessary?
  - Reasonable? Effective?
  - Less invasive alternatives?



# CAN EMPLOYERS MONITOR EMPLOYEES?



## Video Monitoring:

- Reasons for surveillance?
  - Security vs. performance monitoring
  - Beware of “function creep”
- Consider alternatives
- Provide notice to employees



# CAN EMPLOYERS MONITOR EMPLOYEES?



## *Colwell v. Cornerstone Properties Inc.:*

- Secret camera installed in office ceiling
- No credible explanation
- Employee felt “violated”
- Poisoned work environment
- Constructive dismissal

# CAN EMPLOYERS MONITOR EMPLOYEES?

## Internet and Email Monitoring:

- Generally more latitude
- Reasons for surveillance?
- Clear policies?



# CAN EMPLOYERS MONITOR EMPLOYEES?



## *R. v. Cole:*

- Cole had a reasonable expectation of privacy in laptop owned by employer and issued for employment purposes
- Policies may reduce, but do not eliminate, expectation of privacy
- Charter case

# CAN EMPLOYERS MONITOR EMPLOYEES?



## *Claude Poliquin v. Devon Canada Corporation:*

- Clear policies prohibiting pornography
- Supervisor forwarded pornography to clients, suppliers and other employees
- Termination for cause upheld

# CAN EMPLOYERS MONITOR EMPLOYEES?



## *Claude Poliquin v. Devon Canada Corporation (cont'd):*

- Negative impact on employer
- Employers are entitled to prohibit use of equipment and systems for improper purposes and to monitor employees' use of equipment to ensure compliance

# CAN EMPLOYERS MONITOR EMPLOYEES?



## GPS Tracking:

- Purpose for tracking?
- PIPEDA Case Summary #351
  - Purposes - manage productivity, safety, asset protection and employee management
  - Limits on tracking for employee management purposes

# CAN EMPLOYERS MONITOR EMPLOYEES?

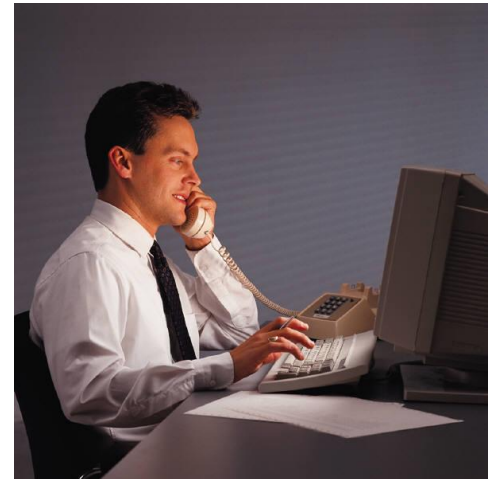


## GPS Tracking (cont'd):

- *Schindler Elevator Corporation (Re)*
- Tracking service vehicles using GPS and engine monitoring technology
- Purposes included performance monitoring and safety
- Collection and use was reasonable

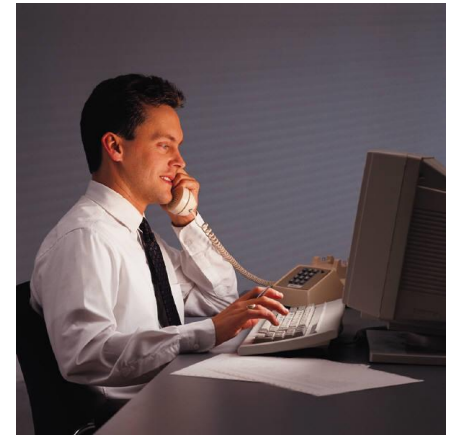
# CAN EMPLOYERS SHARE EMPLOYEE INFORMATION WITH FOREIGN AFFILIATES?

- Transfer to affiliate for processing
  - Data protection agreement
  - Consistent policies
- Disclosure for other purposes
  - Consent
  - Notice





# CAN EMPLOYERS SHARE EMPLOYEE INFORMATION WITH FOREIGN AFFILIATES?



- Principles from PIPEDA cases:
  - Transfer across borders is not prohibited
  - Cannot prevent foreign authorities from accessing information stored in foreign jurisdictions
  - Consent is not required if transfer is consistent with original purposes

# CAN EMPLOYERS SHARE EMPLOYEE INFORMATION WITH FOREIGN AFFILIATES?

- Alberta Requirements
  - Policies respecting foreign service providers
  - Notification requirements
- Quebec Restrictions

# ARE EMPLOYEES ENTITLED TO ACCESS EMPLOYERS' RECORDS?

## Broad access rights under statutes:

- Personnel files
- Emails, memos, etc.
- Meeting notes
- Phone logs and recordings
- Contracts
- Statistics



# ARE EMPLOYEES ENTITLED TO ACCESS EMPLOYERS' RECORDS?

## Exceptions include:

- Personal information of third party
- Investigating breach of employment agreement
- Other specific exceptions in each statute



# ARE EMPLOYEES ENTITLED TO ACCESS EMPLOYERS' RECORDS?

## Access rights under:

- Collective agreements
- Employer policies
- Common law





# QUESTIONS?

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