

McCarthy Tétrault *Advance*™  
Building Capabilities for Growth



## Privacy in the Workplace Update – What You Don't Know May Hurt You

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# Employees' Rights to Privacy in the Workplace

- Federal or Provincial statutes
  - *Personal Information Protection Act (PIPA)*
  - *Personal Information Protection and Electronic Documents Act (PIPEDA)*
  - *Privacy Act (BC)*
- Common law
- Canadian Charter of Rights and Freedoms
- Important value in our society

# Employees' Rights to Privacy in the Workplace

- PIPA Basics:
  - Informed consent to collect, use and disclose personal information
  - Collection, use and disclosure must be reasonable
  - Employee personal information
    - Notification only

# Investigation Exception

- Under *PIPA*, “investigation exception” allows employers to collect information without consent/notification if:
  - it is reasonable for the employer to believe that a breach of an agreement or law may occur
  - the employer is investigating the potential breach;
  - it is reasonable to expect that collecting with consent would compromise availability/accuracy; and
  - the collection is reasonable for the investigation.

# Alberta *PIPA* (and others) to be Amended

- Alberta *PIPA* declared unconstitutional by Supreme Court of Canada
  - *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401* (“*UFCW*”), 2013 SCC 62
- 12 months to amend – BC, Manitoba and federal legislation likely to follow

# Covert Video Surveillance

- *Overwaitea Food Group v. United Food and Commercial Workers, Local 1518*
  - policy and collective agreement provisions on video surveillance
  - “grazing” the produce (theft) vs. “sampling” (grievor’s job)

# Covert Video Surveillance

- *IKEA Canada Limited Partnership v. Teamsters Local Union No. 213*, BCLRB No. B144/2013 and B148/2013 (varied on other grounds on reconsideration B188/2013)
  - Private investigator secretly taped workers inside the store
  - Reasonable because:
    - Reasonable to believe use of replacement workers in violation of Code
    - No other way to collect information past picket line

# Disclosed Non-Covert Surveillance

- GPS Tracking: *Thyssenkrupp Elevator (Canada)*, Order P13-02
  - Mechanics travelled to client sites directly
  - GPS devices on vehicles transmitted information on vehicle location and operation to head office
    - Speed, braking, idling
  - Not continuously monitored
  - Information disclosed to limited group of managers in weekly reports and after an incident



# Disclosed Non-Covert Surveillance

## → GPS Tracking

- How sensitive is the information?
- How much personal information is collected and used; is it more than necessary to achieve the intended purpose?
- How likely is the information collected to be effective at achieving the intended purpose?
- How is the personal information collected, accessed and used?
- Were less privacy-intrusive options reasonably considered?

→ *Thyssenkrupp Elevator (Canada)*, Order P13-02 and *Kone Inc.*, Order P13-01

# Disclosed Non-Covert Surveillance

- GPS Tracking
  - Must give meaningful, precise notification to employees
    - what is being collected?
    - why is it being collected?
    - how is it being used and disclosed?

# Reasonable Expectation of Privacy in Workplace Devices?

- *R. V. Cole*, 2012 SCC 53
- *R v. McNeice*, 2013 BCCA 98
  - School-Board issued laptop
  - No policy prohibiting personal use
  - Deleted his browsing history
  - Had a reasonable expectation of privacy in his work laptop

# Social Media – “Worlds Collide”

- Productivity losses
- Threats to business confidentiality
- Harm to company’s reputation
- Undermining management
  - *Canada Post Corp. and C.U.P.E.* (2012), 216 L.A.C. (4th) 207 (Ponak)
    - Derogatory posts about her manager and supervisor on her Facebook account, over a one-month period
    - Visible to everyone with a Facebook account and published in the ‘news feed’ of the worker’s 50+ Facebook “friends”, which included other Canada Post employees

# Social Media

- *Canada Post Corp.* Facebook postings
  - “Up and drinking again. I’m playing with my [name of manager] Voo Doo doll. If I wasn’t drunk I would take her outside and run her over.”
  - “Hell called. They want the Devil back. Sorry, she’s busy enforcing productivity @ [name of postal depot]”
  - “I’m texting in sick. My idiot supervisor is 24.”
  - And, while at work: “Hello from stall 2. No sign of the evil [name of manager] so everything going smooth so far. It’s only 3 40 am so u never know. Her yes man [name of supervisor] is here probably to make sure we don’t take extra an extra minute on the lunch break gotta go sort.”

# Top Tips For Managing Privacy Risks in the Workplace

- Have clear policies and review regularly
- Make sure everyone is on the same page
  - Ensure that all employees receive copies of the policies
  - Periodic reminders
  - Ongoing training and education
- Conduct regular monitoring to ensure compliance
- Never take violations of the policy lightly

# The Future of Privacy Law in the Workplace

- Bring your own device (BYOD) programs
- Co-working and collaborative office spaces
- Smart buildings
- Criminal information checks

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