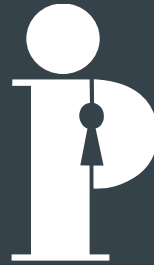


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Information and Privacy  
Commissioner of Ontario

Commissaire à l'information et à la  
protection de la vie privée de l'Ontario

## Privacy Law Update

**Ontario Connections: Access, Privacy, Security & Records Management  
Conference, June 7, 2016**

**David Goodis, Information and Privacy Commissioner of Ontario**

**Lyndsay Wasser, McMillan LLP**

# Disclosure to Children's Aid Society

## *de Pelham v Peel Regional Police* 2015 ONSC 6558

- CAS advise police of presence of potential caregiver in home where vulnerable foster child placed
- police tell CAS he had **pending criminal charges** [drug, gun]
- he claims disclosure violated *MFIPPA*
- IPC says permitted under:
  - *Child and Family Services Act* [s. 72 **duty to disclose for harm prevention**]
  - *MFIPPA* [s. 32(e) **disclosure under another statute**]
- Divisional Court upholds IPC (on both substantive and Legislative privilege grounds)

- John Stevens v Glennis Walsh, 2016 ONSC 2418
  - Pilot accessed work schedule of colleague who was in divorce proceedings and provided information to the ex-wife
  - **Intrusion upon seclusion**
  - Damages - **1,500**
  
- T.K.L. v. T.M.P., 2016 BCSC 789
  - Step-father surreptitiously recording step daughter in bedroom and bathroom
  - **Statutory tort** under *Privacy Act*, R.S.B.C., 1996, c.373
  - Damages - **\$85,000** (general and aggravated)

- Jane Doe 464533 v. N.D.
  - Former boyfriend posted intimate video online
    - New Privacy Tort – Public Disclosure of Private Facts/Publicity Given to Private Life
      - Giving publicity to a matter concerning the private life of another person
      - If the matter publicized or the act of publication would be highly offensive to a reasonable person and is not of legitimate concern to the public
  - Damages - **\$100,000** plus costs

# Video Surveillance

- Halton Catholic District School Board [MC13-46]
  - privacy complaint about school's use of video surveillance
  - IPC finds board failed to demonstrate volume, scope of PI collected was **necessary** [*MFIPPA* s. 28(2)]
  - IPC recommends board conduct assessment of system in a manner consistent with *MFIPPA*, the board's internal policy and the report
- Toronto Catholic District School Board [MC13-60]
  - similar complaint to above
  - but, based on the evidence, collection of images within school property permitted under *MFIPPA*
  - although capturing of images **outside school property** not lawful
  - IPC recommends board adjust cameras to blur off-site images, revise notice of collection and its policies

- Telus & Rogers “Tower Dump” case
  - Police request for 40,000 call detail records from cell phone tower
    - Names, numbers, addresses, banking details
  - “Far beyond what was reasonably necessary to gather evidence concerning the commission of the crimes under investigation”
  - Contrary to Section 8 of the Canadian Charter of Rights and Freedoms – i.e., **The right to be secure against unreasonable search or seizure**
  - Guidelines for police and courts to follow in future

# Privacy and text messages

- *R v Pelucco* 2015 BCCA 370
  - police seize phone of potential drug buyer (Guray), use it to solicit drugs from dealer (Pelucco)
  - when P arrives by car, police seize phone, with the text messages, and cocaine/other drugs
  - on appeal, Crown argues P had no reasonable expectation of privacy in sent text messages, since G could have chosen to share them with anyone
  - BCCA (majority): sender normally will have a **reasonable expectation that text will remain private in hands of recipient** [*Charter* s. 8]
    - P was entitled to expect police would not search messages on G's phone without authorization
    - police violated P's reasonable expectation of privacy

# Class Actions

- Ashley Madison
  - Data breach affecting 30 to 40 million users of website
  - Class action lawsuit claiming **\$750 million** in damages
    - Breach of contract
    - Breach of Ontario *Consumer Protection Act*
    - Negligence
    - Intrusion upon seclusion
    - Publicity given to private life
    - Breach of Privacy
  - To what extent will Canadian courts impose liability on organizations that have been victims of criminal activity, such as cyberattacks?



- The Bank of Nova Scotia case
  - Employee of bank provided personal information to girlfriend for fraudulent purposes
  - 165 suffered identity theft
  - Big question: Would bank be held vicariously liable? If it settles, we will not know
  - Proposal to offer \$1.55 million divided among some of the claimants
  - Currently waiting to see if the settlement will be approved

# Background checks for public servants

- union representing federal workers challenges new security screening process for employees
- new process includes **fingerprinting, credit and criminal checks, searches of public information (including social media)**
- check required to obtain **basic reliability status** needed to be federal employee
- replaces a 1994 standard which collected less information for entry-level clearance

# Background checks for public servants

- union files Federal Court application, claims new check violates *Charter* s. 7, federal *Privacy Act*
- union also sought an interim injunction
- FC finds serious issue but union fails “irreparable harm” test for injunction
  - government would face irreparable harm if checks halted, delay would not be in the public interest in ensuring Canada’s national security, international interests, public trust in the public service
  - but main FC application yet to be decided

# Statutory Changes

- The *Digital Privacy Act* - Amendments to PIPEDA
  1. Definition of Personal Information
  2. Changes to **Consent**
  3. Collection, use and disclosure of **employee** personal information
  4. Business **transactions**
  5. Compliance agreements
  6. Mandatory **breach reporting** (still not in force)

# Snooping into health records

- to date, IPC has referred six individuals to AG for *PHIPA* offence prosecution [s. 72]
  - 2011: nurse at North Bay Health Centre
  - 2015: two radiation therapists at Toronto's UHN
  - 2015: social worker at a family health team
  - 2016: registration clerk at a regional hospital
  - 2016: regulated professional at a Toronto hospital

# Snooping into health records

- successful offence prosecutions
  - two radiation therapists pled guilty to willfully collecting, using or disclosing personal health information in contravention of *PHIPA* [s. 72(1)(a)]
    - each fined \$2,000, \$500 victim surcharge
  - registration clerk pled guilty to same offence
    - clerk agreed to \$10,000 fine, \$2,500 victim surcharge
- professional discipline
  - nurses in North Bay and Peterborough **suspended** by College of Nurses of Ontario for four months each

# Online Behavioural Advertising

- Bell Case - Relevant Advertising Program (RAP)
  - Considered **reasonable expectations** of customers
    - Paid service
    - Sensitive information
  - Explicit **"opt-in"** consent required
  - RAP also resulted in **class action lawsuit**
    - Plaintiff's claiming \$750 million

# Online Behavioural Advertising

- Guidelines on Privacy and Online Behavioural Advertising; Policy Position on Online Behavioural Advertising
  
- Conditions for relying upon “opt-out” consent
  - Clear and understandable notice - Cannot be “buried in a privacy policy”
  - Notice must outline purposes and parties involved
  - Must be able to opt-out easily. Opt-out must take effect immediately and be persistent
  - Can only collect and use non-sensitive information (not sensitive information – e.g., medical or health information)
  - Information must be destroyed or de-identified as soon as possible





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