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Privacy Law Update

Ontario Connections: Access, Privacy, Security & Records Management Conference, June 6, 2017

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Tribunal Publication of Decisions

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- Two complaints to IPC against two administrative tribunals about online decisions revealing their names, personal information
- Each person was a party to the matter
- Case 1: Tribunal demonstrated its hearings and decisions arise out of public proceedings; IPC concludes disclosure of PI consistent with *FIPPA*
- Case 2: Tribunal regulating complainant's profession, found breach of professional duties, imposed ban on practicing; IPC says tribunal has authority to investigate and impose sanctions against members; continuing publication of PI consistent with purpose for which it was collected, not a breach of *FIPPA*

A.T. and Globe24h.com

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- Romanian-based website with no physical presence in Canada (server also located in Romania)
- Republished Canadian court and tribunal decisions. Decisions were indexed to search engines
- Implications of the case:

1. Application of *PIPEDA* to online businesses
2. Interpretation of *PIPEDA* exemptions
3. The right to be forgotten?

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- Extraterritorial reach of *PIPEDA*

1. *PIPEDA* is silent as to territorial reach. No language expressly limiting application to Canada
2. Applies to all circumstances in which there exists a "real and substantial link" to Canada – i.e., "…whether there is a sufficient connection between the country and the activity in question for Canada to apply its law consistent with the principles of order and fairness and international comity"
3. For online businesses, relevant connecting factors include: (1) location of target audience; (2) source of content; (3) location of website operator; and (4) location of host server
4. Connecting factors in this case: (1) content is Canadian decisions taken from Canadian legal websites; (2) website targets Canadians; (3) website's impact is felt by members of the Canadian public

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- Journalistic exemption

1. Test for journalistic exemption: (1) to inform the community on issues the community values; (2) involves an element of original production; (3) involves self-conscious discipline calculated to provide an accurate and fair description of facts, opinion and debate at play within a situation
2. Does not apply because decisions were already available for free online, the respondent did not add value (e.g., commentary or analysis), and the respondent's primary purpose was to incentivize individuals to pay for the removal of content from the site

- Publicly available exemption

1. Only applies if collection, use or disclosure relates directly to the purpose for which the information appears in the judicial or quasi-judicial record or document
2. Respondent's purposes were unrelated to open courts principle. Publication of decisions on indexed website undermines the administration of justice

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- The right to be forgotten?

1. Commentators have suggested that this case indicates a willingness by the courts to recognize a "right to be forgotten" in Canada
2. Court decisions should not be indexed by search engines because they contain sensitive information
3. Globe24h.com ordered to remove decisions from website and take steps to remove the decisions from search engine caches
4. Court also granted declaratory relief (i.e., declaration that respondent contravened *PIPEDA*) on the basis that this would allow the applicant and others to submit a request to Google and other search engines to remove links to decisions on Globe24H.com

Disclosure of PI to Tribunal

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- MC11-73, MC14-15: Complaints against two school boards alleging improper disclosure of a student's Ontario Student Record to Human Rights Tribunal of Ontario
- In both, parents of the student had brought a complaint to the tribunal against the school board
- IPC finds disclosures complied with the tribunal's rules of procedure requiring parties to disclose documents on which they intend to rely during the hearing of the complaint
- IPC concludes school boards did not breach *MFIPPA* in disclosing records to the tribunal; disclosures in accordance with s. 51
  - *MFIPPA* does not limit information available by law to party to litigation

Class Action Update

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- Casino Rama

1. Cyberattack discovered in November 2016
2. Confidential data of employees, customers and vendors was stolen
3. National class action lawsuit was commenced approximately 4 days after the breach was publicly announced, on or around November 14, 2016
4. The plaintiffs are claiming $60 million in damages, as well as legal costs and paid credit monitoring for the plaintiffs

Class Action Update

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- Ashley Madison

1. Class action filed August 2015
2. OPCC Report of Findings was released in August 2016
3. Found the following *PIPEDA* breaches:
   i. Safeguards insufficient based upon sensitivity of information – lack of documented information security policies or practices; lack of explicit risk management process; failure to train all employees; lack of multi-factor authentication; poor key and password management practices
   ii. Indefinite retention of information about users with deactivated, inactive and deleted profiles
   iii. Charging users a fee for deletion of personal information
   iv. Failure to verify email addresses
   v. Misleading statements and "trust-marks" on website

Class Action Update

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- Recent Settlements

1. Walmart - Defendant agreed to pay: (1) up to **$350,000** for credit monitoring; and (2) up to **$5,000** to each class member for out-of-pocket losses, unreimbursed charges and time spent remedying issues fairly traceable to the breach, up to a cumulative maximum of **$400,000**

2. Home Depot - Defendant agreed to pay: (1) up to **$5,000** to class members for documented claims of Canadians whose payment card information and/or email address was compromised, up to an aggregated maximum of **$250,000**; (2) credit monitoring for class members up to **$250,000**; (3) honorariums of $1,000 to $4,000 to representative class members; (4) costs for administering the settlement of up to **$100,000**; (5) costs for the notice of the fairness hearing and for the notice of the settlement, estimated at **$50,000**; and (6) legal fees and disbursements to the plainitiffs' counsel of **$406,800**

Identifiable Individuals

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- PO-3643: FOI request to Ministry of Community Safety and Correctional Services for number of in-patient suicides at specific hospitals, psychiatric facilities
- Ministry gave total annual number for all facilities, but withheld names of facilities and number per facility, citing "personal information" exemption
- IPC determined numbers alone do not reveal information about identifiable individuals
- IPC ordered the information to be disclosed
- Application of "reasonable expectation" that someone could be identified test upheld by SCC [*MCSCS v. IPC*, 2014 SCC 31]

Ransomware

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- Malicious software that encrypts files/data and demands payment in exchange for decryption key
- Often targets educational and healthcare institutions
- Wannacry - Attack began on May 12, 2017 and within a day was reported to have infected more than 230,000 computers in over 150 countries
- Ontario IPC - Technology Fact Sheet, "Protecting Against Ransomware" (July 2016)
- Alberta OPC - "Advisory for Ransomware" (March 2016)
- Canadian Cyber Incident Response Centre and U.S. Department of Homeland Security Computer Emergency Readiness Team also issued ransomware alerts in March/April 2016

Ransomware

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- Protecting your Organization:

1. Back up information regularly. When not in use, back-ups should be off-line. Test backups.
2. Educate about phishing attacks. How to recognize them. How to check legitimacy of emails/attachments/links.
3. Install antivirus software. Configure to perform real-time malware scans.
4. Patch promptly (software and operating systems). Wannacry was a known vulnerability!
5. Consider application whitelisting.
6. Limit number of administrator accounts. "Least privilege" access principle.
7. Be prepared with a response plan. Test plan before an emergency occurs.

New privacy legislation for child protection sector

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- *Supporting Children, Youth and Families Act, 2017* [Royal Assent June 1, 2017]

1. For first time child, youth, family service providers, including children's aid societies, will be covered by statutory privacy laws
2. Collection, use, disclosure, access to own PI rules modelled on *PHIPA*
3. IPC will have oversight role; *PHIPA*-like investigation, order-making powers
4. Expected to come into force spring 2018

New PHIPA Mandatory Breach Notification

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- *Health Information Protection Act, 2016*

1. Custodian must notify individual at first reasonable opportunity if PHI stolen, lost, used, disclosed without authority
2. In context of the provincial EHR, if PHI collected without authority, custodian responsible for the collection must also notify individual at first reasonable opportunity
3. IPC must also be notified if the circumstances meet prescribed requirements

New PHIPA Mandatory Breach Notification

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- Minister of Health and LTC posted draft regulation seeking comments on prescribed requirements; not yet finalized
- Proposed circumstances triggering IPC notice include:

1. Where reasonable grounds to believe PHI was stolen, or further used or disclosed without authority
2. Where breach is part of a pattern of similar losses or unauthorized uses or disclosures
3. Where custodian has notified a college of disciplinary action arising from breach [*PHIPA*, s.17.1]
4. Where breach is significant having regard to the nature and volume of PHI, the number of individuals to whom the PHI related, number of custodians or agents responsible

Statutory Changes – Private Sector

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- *CASL* changes – July 1, 2017

1. Private right of action comes into force
2. Transitional provisions expire

- *PIPEDA*

1. Mandatory breach reporting and recording requirements are still not in force
2. Regulations are expected before the end of 2017

Privacy and Text Messages

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- *R v Marakah* 2016 ONCA 542
  - Last year, we talked about 2015 BCCA case [*Pelucco*]: Sender of text message has reasonable expectation that text will remain private in hands of recipient [*Charter* s. 8]
  - Firearms trafficking investigation, Toronto Police arrest two accused, search residences on search warrant
  - Police find, search both accused's cell phones, which contain incriminating text messages between them
  - ONCA majority says no reasonable expectation of privacy under *Charter*, mainly due to lack of control individuals have over text messages in the hands of the recipient
    - In dissent, LaForme JA says absence of control over sent text messages does not negate a reasonable expectation of privacy
    - SCC appeal argued March 2017, decision pending

The General Data Protection Regulation

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- The GDPR will come into force in May 2018 (less than one year)
- Will apply to data controllers and processors outside the EU if they have an establishment in the EU or their data processing activities relate to: (1) offering goods or services to EU residents; or (2) monitoring the behaviour of EU residents within the EU
- Key distinctions as compared to Canadian privacy laws:

1. Stricter consent requirements (in some respects)
2. Short timeline for breach reporting (72 hours)
3. Restrictions on international transfers (including onward transfers)
4. Proscriptive requirements for DPO's
5. The right to be forgotten

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