Legal Symposium 2016: The Modern Workplace

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Privacy in the Workplace

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Outline

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1. Impact of the new federal *Digital Privacy Act* and amendments to PIPEDA
2. Issues relating to Bringing Your Own Device to Work ("BYOD")
3. Issues related to background security checks of potential or current employees
4. Issues and potential liabilities related to the collection and (mis)handling of employee data

Collection/Use/Disclosure

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- Common features of both federal and provincial privacy laws concern the collection, use and disclosure of personal information
- Legislation provides the legal framework for the gathering and handling of personal information of individuals
  - Context of Employment

Collection/Use/Disclosure

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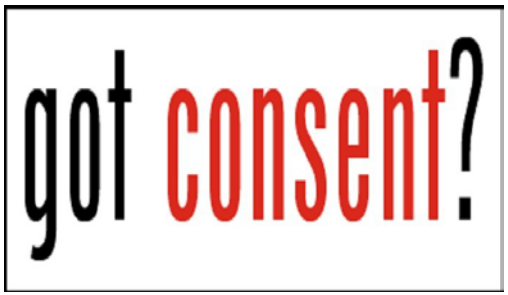
- **Collection**:
  - How an employer/organization gathers information on its employees/individuals
  - Broadly defined
  - Generally restricted by what is "*reasonable*"
  - Statutes contain exemptions for when consent is needed in a variety of situations



Collection/**Use**/Disclosure

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- **<u>Use</u>**:
  - Once information has been collected about an individual, how is it being used?
  - Typically, there must be a reasonable *purpose* for the information that was collected; relates to whether the collection is *reasonable*

Collection/Use/Disclosure

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- **Disclosure**:
  - Occurs where the employer/organization disseminates the collected information, for a reasonable use
  - Where the largest liability may lie
  - Mistakes can be aggravated by technology, leading to mass disclosure

Privacy Laws: What applies?

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- **BC Privacy laws**:
  - *Privacy Act,* R.S.B.C. 1996, c 373
    - Statute of general application, tort of breach of privacy
  - *Personal Information Protection Act,* S.B.C. 2003, c. 63 *(PIPA)*
    - Private sector businesses in the province
  - *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 *(FOIPPA)*
    - Public bodies in the province

Privacy Laws: What applies?

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- **Federal privacy laws**:
  - *Privacy Act,* R.S.C. , 1985, c. P-21
    - Public bodies as set out in Schedule

  - *Personal Information Protection and Electronic Documents Act,* S.C. 2000, c. 5 (*PIPEDA*)
    - Private sector organizations
    - Federal Works, Undertakings, and Businesses (FWUBs)
    - Now includes “authorized foreign bank”

Digital Privacy Act

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- New Federal *Digital Privacy Act* made amendments to *PIPEDA*:
    i. Organizations must tell individuals if their personal information has been lost or stolen and if there is a risk that they could be harmed as a result.
    ii. Organizations will need to tell those individuals what steps they can take to protect themselves
    iii. Organizations need to report these potentially harmful data breaches to the Privacy Commissioner of Canada

Digital Privacy Act

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- Other key amendments:
  i. Scope of what can be disclosed in the public interest has been broadened
  ii. New language regarding valid consent for the collection/use/disclosure of personal information – new exceptions to consent

Digital Privacy Act

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- Valid Consent – section 6.1

"…the consent of an individual is only valid if it is reasonable to expect that an individual to whom the organization's activities are directed would understand the nature, purpose and consequences of the collection, use or disclosure of the personal information to which they are consenting."
[emphasis added]

Digital Privacy Act

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- Exceptions to Consent:
  i. Organizations may now disclose personal information without consent to another organization in certain circumstances (fraud/other crime)
  ii. Use and disclosure of personal information without consent in connection with business transactions, provided certain conditions are met

Digital Privacy Act

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- Exceptions to Consent:
  i. Banks = authority to disclose personal information without consent to a government institution or an individual's next of kin
     - Reasonable grounds to believe the individual "has been, is or may be the victim of financial abuse"

BYOD Policies

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BYOD Policies

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- BYOD (Bring Your Own Device) is an arrangement whereby an organization authorizes its employees to use personal mobile devices, such as smartphones and tablets, for both personal and business purposes

BYOD Policies

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- Advantages to a BYOD Policy:
  - Increased employee satisfaction and productivity (they get to use the devices they want, how they want to)
  - Shifts the hardware cost burden from the employer to employees
  - Clarification of rules and expectations where employees are already using their own devices for business purposes

BYOD

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- Inevitability to BYOD?

- Hillary Clinton

BYOD Policies

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- Disadvantages to a BYOD Policy:
  - Privacy law concerns
  - Data security concerns
  - Legal discovery concerns
  - Privacy or Security Breach could be immensely costly to an organization

BYOD Policies

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- On August 13, 2015, the Privacy Commissioners of BC, AB, and Canada released joint guidelines for employers to consider when evaluating whether to introduce a Bring Your Own Device Policy

- Guidelines can be found here: https://www.oipc.bc.ca/guidance-documents/1827

Guidelines - Summary

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1. Ensure commitment by senior management

   - Ensure you can secure the resources to plan for and successfully implement a program that protects privacy

Guidelines - Summary

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2. Conduct privacy impact and risk assessment
   - Identify, prioritize and mitigate the risks arising from the collection, use, disclosure, storage and retention of personal information related to the technology itself as well as “people-related” risks

Guidelines - Summary

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3. Develop, communicate and implement a BYOD policy
   - A BYOD policy should cover acceptable use, corporate monitoring, sharing of devices with family and friends, app management, and responsibility over security features and voice/data plans

Guidelines - Summary

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4. Develop a pilot program
   - Test it out on select staff on a single mobile platform?
   - Enables employer to further assess and address risks

Guidelines - Summary

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5. Develop training materials and program
   - Policy needs to be easy to understand and must be communicated to all employees
   - Training should be provided not only to employees but IT professionals who will be responsible for administering the BYOD program

Guidelines - Summary

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6. Demonstrate accountability
   - Be ready to demonstrate to employees, individuals and regulators that your BYOD program complies with applicable privacy laws and/or policies

Guidelines - Summary

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7. Mitigate risk through containerization
   - Using software that allows devices to be partitioned into two separate “containers” or compartments is recommended
   - Organization should have ability to remotely erase the information in the corporate container

Guidelines - Summary

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8. Implement storage and retention policies
   - Separate from the BYOD policy, organizations should have policies on how personal info may be stored and retained

Guidelines - Summary

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9. Encrypt devices and communications

- It is also recommended that all remote connectivity be done through a secure connection, such as a Virtual Private Network (VPN)

Guidelines - Summary

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10. Address patch and software vulnerabilities

- The BYOD policy should be clear who is responsible for installing and updating software and security patches to ensure systems are up-to-date and protected from malicious activities
- Should not be the device owner!

Guidelines - Summary

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11. Address app management

- Provide a list of approved apps that can be installed and a policy on how apps should be installed, updated and removed

Guidelines - Summary

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12. Ensure effective authentication and authorization practices

- Crucial to ensuring security of information is maintained prior to a person being able to access corporate resources or personal information

Guidelines - Summary

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13. Address malware protection

- Make sure network security is regularly monitored, tested and updated
- BYOD participants should know to mitigate risk by not clicking on suspicious links, viewing suspect emails and texts and exercising sound judgment as to the sites they visit

Guidelines - Summary

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14. Have a plan for when things go wrong

- Implement a formal incident management process with clear expectations and responsibilities to detect, contain, report, investigate and correct security incidents and privacy breaches in a consistent and timely manner

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Background and Security Checks of Potential Employees

Background and Security Checks of Potential Employees

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- To consider:
  - What are you collecting?
  - Do you have consent?
  - Is it public?
  - Why are you collecting it?
  - What will you do with it?
  - Is there a risk you'll collect something you don't want to?

Background and Security Checks of Potential Employees

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- Social media background checks

- Are you aware of extent of your online presence?
- Google yourself!

Known Online Presence

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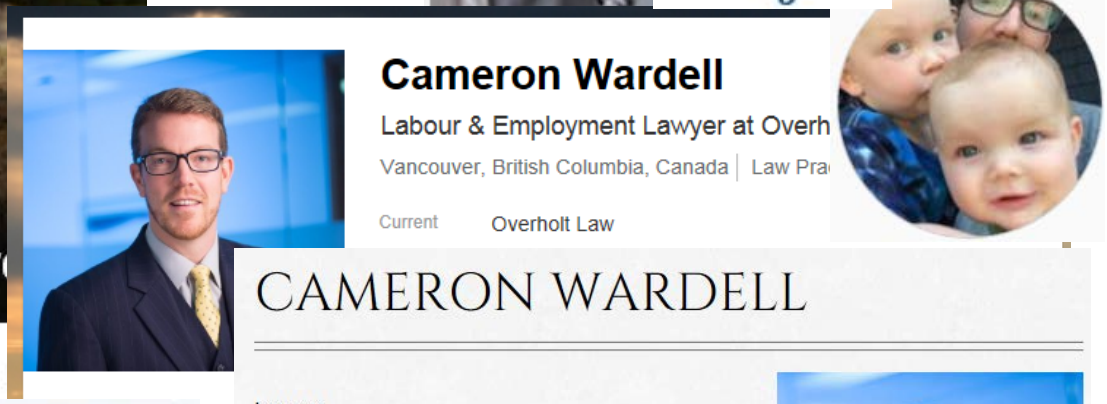
Instagram



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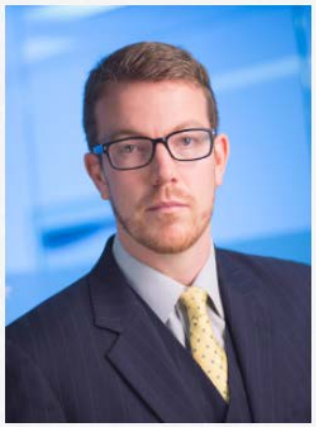
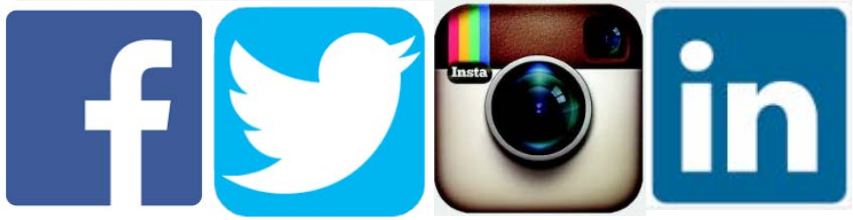
Just dismissals, but not just dismissals...





Unknown Online Presence

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Background and Security Checks of Potential Employees

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- Social media background checks

- Risks inherent to the internet:
  - Accuracy
  - The collection of irrelevant material
  - Overreaching or unreasonably seeking information
  - Human rights protections

Social Media Background Checks

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- *BC Human Rights Code*
  - Applies at time of interview
  - "must not" refuse to employ because of:

    race, **colour**, **ancestry**, **place of origin**, **political belief**, **religion**, **marital status**, **family status**, **physical** or **mental disability**, **sex**, **sexual orientation** or **age** of that person or because that person has been **convicted of a criminal or summary conviction offence** that is **unrelated to the employment** or to the intended employment of that person.

- A.k.a. the "prohibited grounds" or the "protected grounds" of discrimination

Social Media Background Checks

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- What if you discover:
  - Pictures suggesting religious faith?
  - Pictures suggesting political belief?
  - Pictures depicting sexual orientation?
  - Pictures depicting a disability?
    - Addictions!
  - Pictures/information depicting marital/family status?
    - Pregnant?
    - Children!

Social Media Background Checks

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- May need to preserve what you find
  - Requirement to preserve records used to "make a decision" or in custody of employer for one year
- May need to prove a negative
  - If you didn't rely on it in your decision, why did you look for it?

Social Media Background Checks

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- Tips to avoid risks:
  - Find more reliable sources to gather info
  - Verify troubling information through individual
  - Do not use deception to gather
  - Use a third party
  - Carefully consider what you've found
  - Be prepared to provide what you've found

Background and Security Checks of Potential Employees

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- Criminal record checks
- Not offered by municipal/RCM Police
- "Police Information Check" available:
  - Vulnerable sector
  - Non-vulnerable sector
- Changes in 2014:
  - No mental health information
  - "adverse contact" only reported to vulnerable sector

Police Information Check

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- Police Information Check
  - Should only be done as part of a conditional offer of employment

- Human rights issue:
  - Must not refuse to employ on the basis of a conviction “unrelated” to employment
    - Threat to business?
    - Circumstances of charge?
    - Passage of time?

Background and Security Checks of Potential Employees

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- Reference checks
  - Consent usually required
  - Listing references implies consent
  - Listing previous employers does not imply consent
  - Language of PIPA suggests that some reference checks might be permitted without consent (but still need notification)
  - Breach of FIPPA where no consent obtained

Background and Security Checks of Potential Employees

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- Credit checks/other more extensive checks
  - Generally not allowed
  - Must be related to requirement of a position
  - Rare

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Potential liabilities related to the collection and (mis)handling of employee information

Collection and (Mis)Use

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Collection and (Mis)Use

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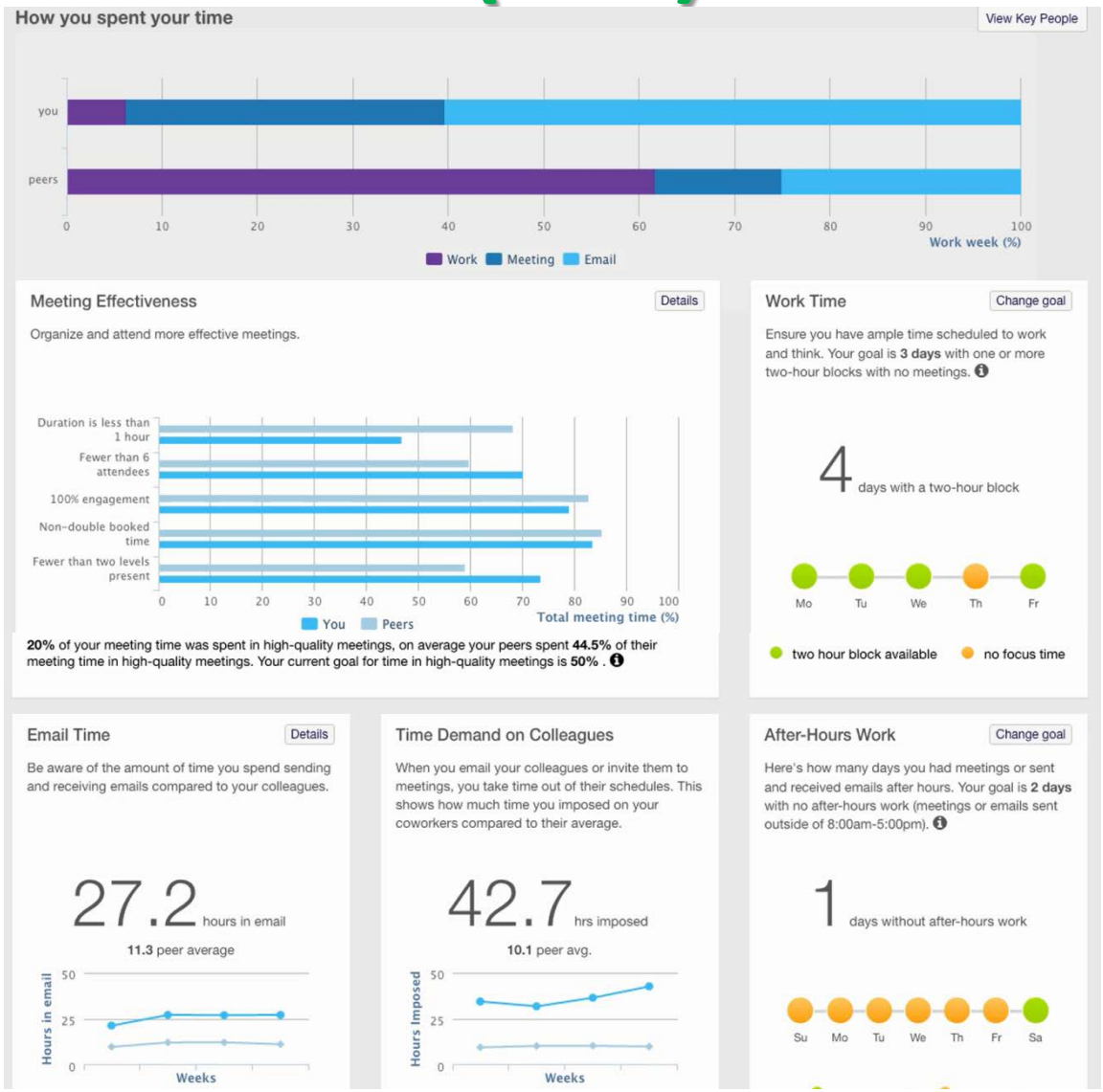

Collection and (Mis)Use

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Jawbone UP24 health bracelet

FEATURES

- Comfortable bracelet to wear
- Vibrating alarm won't wake a partner
- Activity data sent to cloud for community analysis
- Insights engine throws up health

PROS

1. Measures steps, sleep and calories
2. Water resistant: you can shower with it
3. Syncs to smartphone using lower power Bluetooth 4

CONS

1. More expensive than original UP
2. 7 instead of 10 days battery life
3. No display on wristband

PRICE

Collection and (Mis)Use

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- Employee metrics and monitoring:
  - Need a (reasonable) purpose
  - Notify
  - Need a policy
  - Need consent in most instances
  - Re-evaluate

Collection and (Mis)Use

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Overt Video Surveillance

Video Surveillance

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- BC Privacy Commissioner guidelines:
  - Overt surveillance can be appropriate
  - Best use - Security
  - Means must be tied to purpose of collection
  - Should be minimally invasive
  - Secure retention
  - Must give notice of presence
  - Must develop a policy
  - Must be ready to answer questions to employees/others about it

Video Surveillance

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- BC Privacy Commissioner guidelines:
  - Does a less invasive alternative to video surveillance exist that would satisfy the business purpose?
  - Must evaluate and re-evaluate
- Federal Privacy Commissioner guidelines:
  - Inform employees of existence and reason for surveillance
  - Provide a related policy

Potential Liabilities - What could possibly go wrong?

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Potential Liabilities

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- Investigations/Audits
- Prosecutions
- Civil Claims and damages
- Other kinds of proceedings
- Intangibles

Investigations/Audits

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- Wide-ranging requirements in PIPA, PIPEDA and FIPPA…
- Power to investigate exists under all statutes
- Commissioner empowered to make orders:
- Orders must be obeyed

Prosecution

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- Criminal Charges:
  - *Criminal Code of Canada*
- Recording Conversations:
  - Need consent from one party
  - Consent could be given at the outset of employment
- NOTE: admissibility a different issue

Prosecution under a privacy statute

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- Charges can be laid for breach of privacy statute
- Available under PIPA, FOIPPA, PIPEDA:
  - PIPA/FOIPPA – summary conviction
  - PIPEDA – summary conviction or indictment

Prosecution under PIPA

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- *PIPA*
  - *Deception/coercion in collection.*
  - *Disposal with the intent to evade request for access.*
  - *Obstruction.*
  - *False statements.*

Prosecution under PIPA

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- *PIPA*
  - *Dismissal, suspension, demotion, discipline, harassment (ect.) of employee for whistleblowing.*
  - *Failure to comply with an order.*

- Maximum fines:
  - $10K for individuals
  - $100K for organizations

Prosecution under FIPPA

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- FIPPA – General Offences
  - *False statements and attempts to mislead.*
  - *Obstruction.*
  - *Failure to comply with an order.*

- Maximum fine:
  - $5K

Prosecution under FIPPA

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- FIPPA – Privacy Offences
  - *Unauthorized disclosure or failure to report unauthorized disclosure.*
  - *Stores information outside of Canada (without consent).*
  - *Failure to report a foreign demand for disclosure.*

- Maximum fines:
  - Individuals: $2K
  - Partnerships/service providers: $25K
  - Corporations: $500K

Prosecution under PIPEDA

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- PIPEDA
  - *Dismissal, suspension, demotion, discipline, harassment (ect.) of employee for whistleblowing (same as PIPA).*
  - Failure to retain information.

- Maximum fines:
  - $10K if by summary conviction
  - $100K if by indictment

Prosecutions

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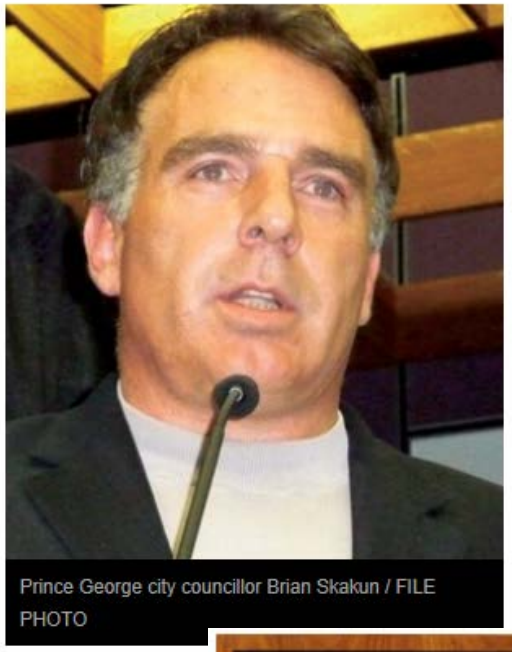
- Rare
- *R. v. Skakun*
  - City councillor in Prince George
  - Released a report detailing harassment investigation of local RCMP to the CBC
  - Convicted
  - Two appeals (dismissed)
  - $750 fine



Prince George city councillor Brian Skakun / FILE PHOTO

Damages

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- Damages
  - *PIPA*
  - *PIPEDA*
  - *Criminal Code*!

- Damages not available:
  - *FIPPA* (good faith)
  - Internal and complete scheme
  - No private duty of care arises

Civil Claims and Damages

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- Tort liability:
  - Negligence (supervision v. hiring)
  - Breach of confidence
  - Intentional infliction of mental distress
  - Waiver of tort
- Common law 'privacy' torts:
  - Intrusion upon seclusion
  - Publicity given to private life
  - Public disclosure of private embarrassing facts
  - Publicity which places the plaintiff in a false light in the public eye
  - Appropriation, for the defendant's advantage, of the plaintiff's name or likeness

Civil Claims and Damages

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- The *Privacy Act (BC)*:

  "It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another."

- No common law tort in BC
- No action available under FIPPA

Civil Claims and Damages

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- Damages for breach of contract?
- *Albayate v. Bank of Montreal*
  - Bank failed to update address for woman following divorce
  - Sent information to previous address, received by ex-husband
  - Failure to implement privacy policy
  - Breach of policy = breach of privacy

Civil Claims and Damages

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- Vicarious liability
- *Evans v. Bank of Nova Scotia*
  - Employee passing information to spouse, sold to third parties
  - Certified as a class action
  - Opportunity to abuse system w/o monitoring system/oversight
  - Live question of vicarious liability
- *Ari v. ICBC*
  - Employee breach of customer privacy
  - Question of vicarious liability for intentional breach of PIPA left open

Other Kinds of Proceedings

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- Complaints under the *Human Rights Code:*
  - Free
  - Complainant friendly
  - Can take time to resolve
  - Difficulty in proving a negative
- Wrongful dismissal:
  - Could privacy intrusions result in a hostile workplace?

Intangibles

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- Morale:
  - No one likes to be subjected to surveillance
  - Open communication best
  - Develop reasoning
  - Communicate purposes
  - Paper and implement policy
  - Be receptive to criticism

Resources

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- Office of the Privacy Commissioner of Canada

  https://www.priv.gc.ca/index_e.ASP

- Office of the Information & Privacy Commissioner of BC

  https://www.oipc.bc.ca/


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