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HUMAN RESOURCES
LAW AND ADVOCACY

EMPLOYEE PRIVACY IN AN ELECTRONIC WORLD

New technology continues to increase the ways that employers can identify, locate, communicate with and monitor employees. But privacy laws can limit the use of this technology. The key for employers? Striking a balance between an employee's right to privacy and the organization's need to effectively carry on operations.

It wasn't long ago that privacy concerns in the workplace involved no more than locking the file drawers in Human Resources. Today, electronic records, recording devices, wireless communications and biometric technology can all play a key role in an organization. And when that technology is used to monitor employees in some way, privacy concerns emerge.

"There are really two competing factors at work here," says Scott Williams, head of Hicks Morley's Information and Privacy Group. "The first is the gradual enactment and evolution of privacy laws that protect personal information and limit invasions of privacy. The second is the dramatic advances in some very useful technologies that allow for monitoring and communications in ways that weren't even possible ten years ago."

Employers are now able to leverage technology to accomplish a wide range of objectives relating to their employees, from increasing efficiency, to monitoring suspect behaviour, to improving service response times for customers. But in doing so, they must navigate a web of civil and criminal laws, along with the terms of employment contracts and collective agreements.

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Here is a look at three types of technology that are currently at use in many workplaces and the privacy concerns that employers need to address in using them.

BIOMETRIC TECHNOLOGY

While the use of employee fingerprint or hand scans have been used for some time in security-sensitive industries, biometric technology is experiencing wider use in employee timekeeping systems. Employee fingerprint or hand geometry information is initially recorded in digital form, encrypted so it can't be used by others, and then used to verify employees' identities when they "punch in" for work.

"Security is a big privacy concern with biometric information," says Paul Broad, a London-based member of the Group. "There should be no realistic possibility that a third party could steal the information and use it to impersonate the employee."

For this reason, it's imperative that employers use best-in-class encryption, have clear policies and third-party contracts to protect access, and arrange secure and immediate disposal of the original unencrypted data.

It's also important that there be a proven business need to implement the technology in the first place.

"We have started to see challenges to the use of biometrics," says Broad. "Arbitrators will often uphold the use of the technology if the organization can demonstrate that there is minimal risk of a privacy breach and there is a clear business need. But arbitrators have denied use of the technology in cases where the business need hasn't been established."

GLOBAL POSITIONING SYSTEMS

Global Positioning System (GPS) monitoring – often through GPS-enabled cell phones – has proven to be a cost-effective tool for many employers, allowing them to quickly dispatch employees to customer establishments, plan sales calls and more effectively manage their mobile workforce.

While the location-only data collected through GPS monitoring has been recognized to be less sensitive, GPS monitoring is still subject to the privacy rules found in legislation and case law.

"Even though the implementation of GPS monitoring may not seem to raise significant

privacy issues, it is still important to 'design for privacy' from the start," says Dan Michaluk, a member of the Group in the firm's Toronto office. "You still want to take all the typical precautions involved in surveillance implementation and document these precautions in protocols and policies. Spell out who's going to have access, for what purposes and under what confidentiality conditions. Spell out the basic security controls and who is responsible for assessing the adequacy of these controls on an ongoing basis. A good up-front process will build a record to defend the system should there be challenges. It takes some time, but consider it 'money in the bank'."

CELL PHONES AND PERSONAL DIGITAL ASSISTANTS (PDAs)

Cell phones and PDAs may seem like old technology, but their widespread use as a portable email device is fairly recent. Employees who expect to have email use monitored in an office setting may not have turned their minds to monitoring on a PDA.

"It's all about expectations," says Elisha Jamieson, a Toronto-based member of the Group. "Employees who might anticipate email monitoring when at their desk may not expect it on their PDA. When you issue them to employees, it's important to let them know you may be monitoring their use of the device."

Email monitoring of employees has, in a number of cases, been found to be acceptable on the basis that there is a diminished expectation of privacy when engaging in activities on an employer's computer or PDA. Arbitrators and courts have also indicated that a reduced expectation of privacy exists when employers have clearly set out their right to monitor in a computer or PDA use policy.

"Aside from civil concerns, employers should also be aware of the provisions of the *Criminal Code* dealing with the interception of private communications," says Aida Gatfield, a member of the Group in Hicks Morley's London office. "To avoid criminal liability, an employer needs the consent of the originator or intended receiver of the email."

> The right approach is to state the scope of personal use allowed.

Employers should ask themselves whether their older 'acceptable use' policies are still appropriate. In many organizations employees are allowed to use their work computers for some degree of personal use. Reliance on a dated 'no personal use' policy can be dangerous. The right approach is to state the scope of personal use allowed and clearly state that personal use enjoys no expectation of privacy. Employers should tell employees that this applies to internet services hosted by third parties, whether MS Hotmail or Facebook or otherwise.

GET ADVICE BEFORE YOU IMPLEMENT

Employers who are considering the use of monitoring and surveillance systems need to be aware of the potential legal impact before they commit.

"Aside from the potential liability for damages, some systems can be extremely expensive to purchase and implement, and you don't want to make that kind of investment only to have a court or arbitrator deny your use of it," says Williams. "Getting the legal advice you need – right when you're considering the options available to you – is the best way of ensuring your investment in a new system is a good one."

HR QUICK HITS

First criminal conviction under Bill C-45 relates to worker's death

Several years ago, the federal Government passed Bill C-45, which amended the *Criminal Code* to provide for criminal liability where a person or corporation shows wanton and reckless disregard for the lives or safety of others. A Quebec company recently became the first to be convicted and sentenced under those *Criminal Code* provisions.

In 2005, a worker with a Quebec company, Transpavé inc., was killed by a palletizer (a device used to stack and organize factory products onto a pallet) while attempting to clear a pile-up on a conveyor belt. It was later determined that the palletizer's guarding system – a light curtain – had been turned off.

Transpavé was charged under the new *Criminal Code* provisions, and later plead guilty to the charges. On March 17, 2008, Transpavé was sentenced following a joint submission by the Crown and defence. The company was fined $100,000, with a $10,000 victim surcharge added on. Apparently, the company has also spent close to $750,000 trying to address the safety issues that led to the accident.

Wage Earner Protection Program Act – In force soon?

In 2005, the federal Government passed the *Wage Earner Protection Program Act* in order to provide greater protection to employee wages in the event that an employer becomes bankrupt or is placed into receivership. While the *Act* has not yet been brought into force, the current federal Government passed Bill C-12 in December, which amends the *Act* and makes consequential amendments to the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* that deal with the obligations and powers of trustees in bankruptcy, interim receivers and receivers. We expect that the *Wage Earner Protection Program Act* will be brought into force at some point later this year.

CLIENT CONFERENCES 2008

There is still space for clients to attend our regional, complimentary client conferences this spring. Come hear the latest on family status, workplace violence, blogs and more. The remaining conferences are being held in the following locations:

Kingston: May 21

London: June 5

Ottawa: June 19

Waterloo: May 29

Burlington: June 10

Please visit *www.hicksmorley.com* to register.

PROVIDING EMPLOYEE BENEFITS AFTER AGE 65

The end of mandatory retirement has come and gone, but that hasn't put an end to the issues relating to employment after retirement age.

BY: MICHAEL J. KENNEDY AND NATASHA D. MONKMAN

Although the Ontario Government has amended the *Human Rights Code* to eliminate mandatory retirement, the *Code* continues to permit age-based distinctions in employee benefits plans, provided that the plans comply with the *Employment Standards Act, 2000* and its regulations. Since the *ESA* regulations continue to define age as "18 years or more and less than 65 years", the protections of the *ESA*, and hence the *Code*, cease to apply at age 65.

This appears to preserve the status quo, meaning employers are not legally required to provide benefits to employees age 65 or older. But despite the provisions of the *Human Rights Code*, employers with collective agreements have experienced a number of challenges relating to these benefits.

WORDING OF COLLECTIVE AGREEMENTS IS KEY

In unionized workplaces, unions have initiated grievances when employers discontinue benefits coverage for employees at age 65. The general argument is that the employer is failing to provide the benefits promised in the collective agreement.

When a collective agreement specifically states that benefits stop at age 65, an employer will have a strong argument that insurance policies ceasing coverage at that age comply with the obligations in the collective agreement. When the collective agreement states that "all employees" will be covered under a certain plan, a policy that stops coverage at age 65 risks being found to violate the collective agreement. Arbitrators generally find that "all employees" means all employees regardless of age or any other distinction.

RECENT DECISION EXTENDS BENEFITS

A recent example of a successful challenge to an employer's post-age-65 benefits policy is the decision in *City of London and C.U.P.E.* In that decision, Arbitrator Gregory Brandt upheld the union's grievance regarding the denial of benefits to workers past age 65.

The union conceded that the long-term disability plan was compliant with the collective agreement, as the collective agreement stated that coverage would end at age 65. For all other health and insurance plans, the union argued that the City could not purchase insurance coverage for those under age 65 without providing coverage to those over age 65 because the collective agreement required that *all employees* be entitled to certain benefits.

Arbitrator Brandt found that where the collective agreement promised the benefits to "all employees", this meant all employees regardless of age. Arbitrator Brandt found that it was quite possible for employers to have been in compliance with their collective agreements on the eve of December 12, 2006 (when Bill 211 came into force), and in violation the very next day.

BARGAINING FOR BENEFITS

Grievances are not the only route being used by unions to extend benefits coverage beyond age 65. Many union locals are now seeking this coverage at the bargaining table. For employers, this can mean facing demands for expensive benefits coverage or being asked to provide benefits coverage not provided by insurers.

Many union locals are now seeking this coverage at the bargaining table.

Some employers are resisting the demands. C.U.P.E. justified its seven-week strike in Kawartha Lakes this winter on the employer's refusal to agree to full post-age-65 benefits for employees. After the strike, C.U.P.E. was not successful in obtaining full post-age-65 benefits. Other employers are prepared to provide some benefits, such as extended health coverage, but not others, such as long-term disability coverage. Still other parties have developed alternative approaches to the issue, such as agreeing to pay a straight cash amount approximating the cost of post-age-65 benefits.

GOING FORWARD IN THE POST-MANDATORY RETIREMENT WORLD

In the end, full or partial restrictions on benefits after age 65 may go the way of mandatory retirement itself. There are two potential reasons for this:

- ***Charter* challenge.** There are some concerns that the exception in the *Human Rights Code* may be open to a challenge on the grounds that it's an infringement of the *Charter of Rights and Freedoms*. The *ESA* regulations that are the basis of the *Human Rights Code* exception are extremely narrow and have historically been used to permit age-based distinctions in limited circumstances only.
- **Labour market pressures.** As the baby boom generation moves towards retirement, and employers face a shrinking labour pool, employers may be forced to provide post-age-65 benefits to attract and retain the workers they need.

Whether these events come to pass remains to be seen. In the meantime, with potential legal challenges based on current employment and labour contracts, you should review your benefits policies to determine what distinctions are made at age 65. You should also review employment contracts and policies to determine whether they require you to provide benefits to all employees, regardless of age. Finally, you may want to explore the possibility of coverage beyond age 65. In this latter regard, a number of insurers have begun making at least some benefits available for employees over this age.

Michael Kennedy *is a partner in the firm's Toronto office. Michael advises the firm's clients on a wide range of labour and employment matters, and has an active litigation practice. He is Co-Chair of the firm's Municipal practice.*

Tel: 416.864.7305
Email: michael-kennedy@hicksmorley.com

Natasha Monkman *is an associate in the firm's Toronto office. Natasha is a member of the Pension and Benefits Practice Group, and advises clients regarding plan interpretation and administration, statutory compliance and member communications.*

Tel: 416.864.7302
Email: natasha-monkman@hicksmorley.com

DRUG TESTING LAWS CONTINUE TO EVOLVE

Employee drug testing is a critical issue for many employers, especially those in safety-sensitive industries. But as court rulings continue, precise legal boundaries remain elusive.

BY: AIDA GATFIELD

It is now established that, in most cases, an employer may test an employee for drug use where there is reasonable suspicion that an employee is under the influence of drugs or where a serious incident has occurred. However, an employer's ability to conduct random and pre-employment drug testing continues to be the subject of litigation.

Random and pre-employment drug testing can involve both human rights legislation and collective agreement issues. The Courts of Appeal in Ontario, Alberta and Quebec have now each ruled on drug testing from a human rights perspective. Meanwhile, the Ontario Divisional Court has recently made a significant ruling on the collective agreement perspective.

COURTS OF APPEAL DEBATE THE ISSUES

Courts of Appeal across Canada have provided rulings on a number of drug testing policies, but differences in the decisions have resulted in a lack of clear rules for employers.

- **Random testing.** In its 2000 decision in *Entrop v. Imperial Oil Limited*, the Ontario Court of Appeal held that random alcohol testing for employees in safety-sensitive positions was permissible under human rights legislation, provided that the duty to accommodate was factored into the response to a positive result. The Court rejected random

drug testing for those same employees on the basis that the technology used did not measure current impairment; rather, the test merely revealed the presence of the drug in the body.

In 2007, the Quebec Court of Appeal struck down provisions of Goodyear Canada Inc.'s policy that provided for random testing of employees in high-risk jobs. The Court left open the possibility of such testing if the employer could show that its business was of a dangerous nature and required special protection measures, or if there were problems related to drug or alcohol use that affected the number of accidents in the workplace.

- **Pre-employment testing.** In 2007, the Alberta Court of Appeal considered the issue of pre-employment testing in *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company*, a case involving a casual marijuana user who claimed to be discriminated against on the basis of perceived disability. The Alberta Court of Appeal expressly declined to follow the reasoning in the *Entrop* decision (which found that pre-employment testing violated the Ontario *Code*), and held that pre-employment drug testing in safety-sensitive positions was not discriminatory under the Alberta *Human Rights Act*, at least in respect of casual users. The Court did not consider the issue of random testing.

THE COLLECTIVE AGREEMENT PERSPECTIVE

The Ontario Divisional Court recently upheld an arbitrator's ruling on a collective agreement interpretation that would place more limits on an employer's ability to conduct random testing.

The Arbitrator found that the policy violated the collective agreement based on the general privacy interests of employees.

Imperial Oil reinstituted random drug testing (for cannabis) for safety-sensitive positions after the development of a new saliva test that could measure current impairment (i.e. whether an employee was impaired while on the job). This new development seemed to answer the concerns of the Court of Appeal in the *Entrop* decision.

The union challenged the policy under the collective agreement, and the matter went to arbitration. The Arbitrator found that the policy violated the collective agreement based both on a provision requiring employees to be treated with dignity and on the general privacy interests of employees.

Much like the Quebec Court of Appeal in *Goodyear* (which actually cited the *Imperial Oil* arbitration decision), the Arbitrator stated that to justify random drug testing the employer needs to show that it has "an out of control drug culture taking hold in a safety-sensitive workplace". In January 2008, the Divisional Court unanimously upheld this decision, going so far as to comment that the decision represented a "perfectly reasonable approach".

While the Ontario Court of Appeal decision in *Entrop* left open the possibility of random drug testing, at least in safety-sensitive positions, the recent Divisional Court decision in *Imperial Oil* appears to have closed that door again. If these views on employee privacy gain widespread acceptance, Ontario employers may have some difficulty instituting pre-employment or random drug testing, and may be restricted to situations of post-incident and reasonable cause, unless testing protocols can be negotiated with the union representing the employees.

CLARITY TO FOLLOW?

For now, *Entrop* remains the law in Ontario. However, the Alberta Human Rights and Citizenship Commission is seeking leave to appeal the *Kellogg Brown & Root* decision to the Supreme Court of Canada. Given that there are now inconsistent decisions from different Courts of Appeal, it is possible that the Supreme Court may soon clarify this area of the law. In the meantime, if your company or organization is developing a drug testing policy, or considering a change to an existing policy, be sure to get legal advice before implementing any new procedures.

***Aida Gatfield** is an associate in the firm's London office. She advises clients on a full range of labour and employment matters in both the unionized and non-unionized settings with a particular interest in human rights and privacy law.*

Tel: 519.433.7515
Email: aida-gatfield@hicksmorley.com

EMPLOYMENT LITIGATION AND BEYOND

When Ian Dick joined Hicks Morley in 2006, he brought much more than just 20 years of litigation experience to the firm. He also brought the expertise gained from working on some of the most complex advocacy cases in Canada, from trials relating to the tainted blood scandal to environmental hearings for the Voisey's Bay nickel mine development in Newfoundland and Labrador.

Ian talked to *FTR Quarterly* about his career, his move to Hicks Morley and the rapid expansion of the litigation practice at the firm.

We've talked to many lawyers who identified law as their calling from an early age. Was that the case with you?

It wasn't exactly a calling, because I had more of an interest in business than law when I was growing up. But I certainly had exposure to law at a young age. I grew up in Thornhill, and my father was a lawyer by training but spent most of his career in government, first as deputy minister for the Attorney General and then for the Ministry of Finance.

He always said that he disliked lawyers, which I'm not sure is entirely true seeing as he worked with them all his career and ended up with a son in the profession. At least I hope it's not true.

What was your path to law school?

I went to Western for my undergrad work and planned to do an MBA and focus on business – Western was a great school for that. But I needed a year of business experience to get into the MBA program, so I went to work at Scotiabank. It was a good learning experience and I realized in talking to the people there that you could contribute as much or more to business as a lawyer as you could as an MBA grad. So I changed tack and went to law school at Osgoode.

How did you end up doing litigation?

I think articling was the turning point. I articled at Cassels Brock and eventually became a partner there, but in those early years I really enjoyed the variety of work that came with a commercial litigation practice.

I spent my first six years in the commercial litigation group, and then got involved in a major environmental law case that involved about two years of full-time hearings before a Consolidated Hearings Board of the Environmental Assessment Board and Municipal Board. That was my entry into administrative law, and I've continued to do a lot of administrative law work every since.

But in different careers really.

That's true. I enjoyed the work I was doing but I had a great opportunity to move to the Department of Justice in 1997, and I made the leap into government. They gave me as much challenging litigation as I could possibly handle and it really broadened my experience as a litigator, not just in terms of subject matter but in terms of the other factors I had to deal with – politics, media, and just the consistently high profile of the work you were doing. It never let up, whether it was the tainted blood litigation or the environmental hearings surrounding the Voisey's Bay development. It was all big, controversial stuff that affected a lot of people.

Why the move to Hicks Morley in 2006?

Like my previous move to Justice, it was really a case of opportunity knocking. The firm's litigation practice was expanding, I had heard great things about the place from people who worked here, and after nine years in government I saw a great opportunity to put my experience to use in an area that I could help shape and expand.

How would you describe the litigation practice at Hicks Morley?

Well it's certainly growing as the need for advocacy has grown. We have more than 40 lawyers who practice some form of litigation and 10–12 partners who are involved on a regular basis.

When I came to the firm, we undertook a survey of the litigators to determine the type of work that they've done in the past, and the range of work was staggering. I know we're thought of as employment litigators, but there's a lot of what I call 'complementary litigation' that stems from that. We do judicial review applications and hearings for appeals of tribunal decisions, professional discipline work, commercial litigation, the whole gamut of pension and benefits litigation, plus the employment and labour work that we're well known for.

Anything your clients need to watch out for?

I think class action lawsuits are a trend that

is not going to go away. They really lend themselves so neatly to employee claims. With an enterprising plaintiff's counsel, issues relating to benefits, overtime pay, and other work conditions can so easily become the focus of litigation.

Pension issues are another area to watch out for. In many cases, pension obligations are driving many companies' business decisions, and pension litigation – especially in an insolvency context – is increasing dramatically.

And I think a third area that is often overlooked is the protection of confidential information, especially when it concerns departing employees. I really think every employer should be proactive in tailoring employment contracts for key employees at the time of hire. It really produces a double benefit by reducing the chances of litigation and by strengthening a client's case when litigation does occur. In my experience, restrictions that come from cookie cutter employment contracts rarely hold up in court.

We know it's a challenge for clients to keep up on this stuff, so we've begun experimenting with podcasts on our new website, and I think, along with newsletters like this one, this will be a great way for our clients to stay a step ahead on key issues.

What about the non-podcasting, non-litigating Ian Dick? What do you do outside of work hours?

My wife and I have a 13-year-old son and hockey is his passion, so that makes it our passion too. I probably spend three to four nights a week at hockey rinks around town. In the summer, I'm a hack golfer and sail whenever I have the time. We have a cottage in the Bruce Peninsula, on the cold side of Georgian Bay near Wiarton, and that's a great place to unwind. And I still nurture my inner geek through a fantasy baseball pool that I do with people – mostly sportscasters – whom I've known for years. We have a lot of fun and it's a great break from the legal world.

HR QUICK HITS

Under development: New rules of procedure at the Human Rights Tribunal of Ontario

The transition to the new direct access human rights regime will take effect on June 30, 2008. At that time, all new human rights complaints will be made directly with the Human Rights Tribunal of Ontario, and not the Commission. The Tribunal has been in the process of developing new Rules of Procedure both for complaints that are submitted directly to the Tribunal after June 30th, and for complaints that are filed with the Commission up to June 30th and which are subject to special transitional provisions.

HICKS MORLEY IS PLEASED TO ANNOUNCE THAT TWO NEW LAWYERS HAVE JOINED THE FIRM

TERRA KLINCK

Terra joined our Pension and Benefits Practice Group as a partner in April 2008. Terra is a highly regarded member of the pension and benefits community with more than 10 years of pension and benefits experience. Prior to joining the firm she was a partner in the pension and benefits department at a national full-service firm. Terra received her LL.B. from the University of Western Ontario and her B.Comm. from McGill University. Her practice focuses on all legal issues relating to defined benefit and defined contribution pension plans, savings plans and employee benefit plans, including fiduciary duties, plan redesign proposals, plan mergers and wind-ups, ongoing plan administration matters and governance and compliance issues. She has expertise in designing, drafting and implementing deferred share unit plans, long-term incentive plans and supplemental pension plans. We are thrilled that Terra has decided to continue her practice at Hicks Morley.

Terra can be reached at 416.864.7351
or terra-klinck@hicksmorley.com

DEANNA WEBB

Deanna joined Hicks Morley in March 2008 as an associate after practising for two years with the labour and employment law group of a national law firm. While in law school, Deanna gained a range of experience in negotiations, mediation and litigation, and was a finalist in the Hicks Morley Labour Arbitration Moot. In addition to her legal training, Deanna has a Master of Industrial Relations degree from Queen's University. During her articling year, Deanna was seconded to the Ontario Labour Relations Board where she assisted the Board solicitors and vice-chairs, and was most recently seconded to the in-house legal department of a major information and transportation company.

Deanna can be reached at 416.864.7232
or deanna-webb@hicksmorley.com

TORONTO
Toronto Dominion Tower
66 Wellington St. W.
30th Floor, Box 371
Toronto, ON M5K 1K8
Tel: 416.362.1011
Fax: 416.362.9680

WATERLOO
100 Regina St. S.
Suite 200
Waterloo, ON N2J 4P9
Tel: 519.746.0411
Fax: 519.746.4037

LONDON
148 Fullarton St.
Suite 1608
London, ON N6A 5P3
Tel: 519.433.7515
Fax: 519.433.8827

KINGSTON
366 King St. E.
Suite 310
Kingston, ON K7K 6Y3
Tel: 613.549.6353
Fax: 613.549.4068

OTTAWA
150 rue Metcalfe St.
Suite 2000
Ottawa, ON K2P 1P1
Tel/Tél: 613.234.0386
Fax/Téléc: 613.234.0418

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