HR QUARTERLY

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Hicks Morley

HUMAN RESOURCES LAW AND ADVOCACY

INFORMATION AND PRIVACY– THE HR SPHERE AND BEYOND

Information management and privacy issues can extend far beyond the labour and employment area. Our expertise covers the spectrum – with solutions to manage all risks.

Taken a look at your inbox lately? Few things highlight the prominent role of information management and privacy law in Canada today more than the flurry of "confirm your subscription" and "we need your consent" emails that so many have received. Nearly four years after the legislation first passed, individuals are finally seeing Canada's Anti-Spam Legislation ("CASL") in action.

"CASL has been one of the most significant information-management issues that organizations have faced recently," says Kathryn Meehan, an associate in the firm's Waterloo office. "We've helped clients tackle a range of CASL-related issues, from modifying systems to demonstrate due diligence in achieving compliance, to wording requests for consent, to identifying when they can rely on implied consent."

A WAVE OF CHANGE

Because of its July 1, 2014 "go live" date, CASL has been front and centre for many employers, but it is really just the latest development in a wave of change relating to information management and privacy.

"Outside of CASL, one of the biggest changes our clients are facing right now is the expanded recognition of privacy rights from the courts," says Paul Broad, a partner in the firm's London office.

"This has occurred in a few ways. For example, courts have expressly recognized invasion of privacy torts – with the intrusion upon seclusion being the most recent. And the Supreme Court of Canada has endorsed a longstanding 'balancing of interests' approach that labour arbitrators apply to a wide range of employee privacy issues."

Courts have also decided a number of *Charter* cases that recognize – and potentially expand – the notion of a "reasonable expectation of privacy."

"Outside of CASL, one of the biggest changes our clients are facing right now is the expanded recognition of privacy rights from the courts."

"One of the best examples of expanding individual privacy is the recognition of a limited expectation of privacy in an employee's use of a workplace computer," says Joseph Cohen-Lyons, an associate in the Hicks Morley Toronto office. "It's just one of the ways Canadian law is moving towards increasing privacy protection. And given the increased focus both in Canada and abroad on these issues, I think this trend is likely to continue."

As individual privacy rights expand, the need for security-focused information systems and policies – and employee training to ensure the right actions – is more important than ever. Training in particular can often be overlooked.

"The educational component of a data security program is not always applied as strongly as it should be," says Paul Broad. "Training employees in privacy and security-related matters not only ensures they know what systems are in place and what practices are expected – it helps them identify how they should act in view of them."

Kathryn Meehan agrees. "One of the best ways of assessing the internal risks addressed by privacy and data security programs is to conduct an audit. Some individuals may not be following the process the way the employer anticipates – and an audit can determine this before any issues or complaints arise."

BEYOND PRIVACY

While privacy issues are front and centre for many organizations, proper information management encompasses much more than privacy concerns. One of the key issues now faced by organizations is how the technology used by employees in the workplace increases the risks of data breaches.

"The expansion of the electronic workplace – including mobile technology using personal devices – creates risks of unauthorized access and data loss for vast amounts of data," says Scott Williams, a partner in the firm's Toronto office. "It's becoming harder and harder to maintain control of corporate data because of how business IT systems are changing."

And just as data is becoming more difficult to control, the consequences of data loss are rising.

> As individual privacy rights expand, the need for security-focused information systems and policies – and employee training to ensure the right actions – is more important than ever.

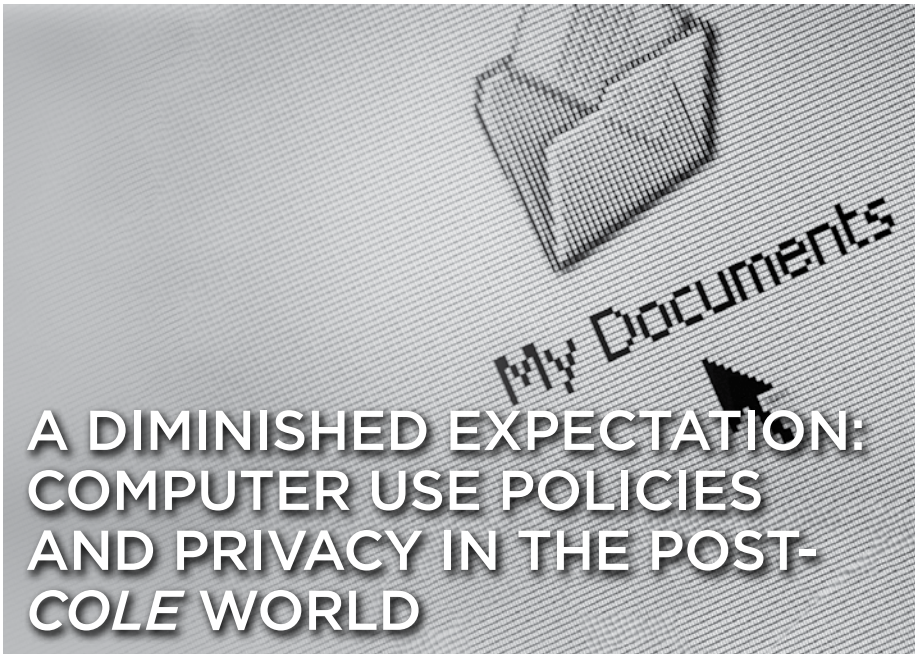
"Class action claims are slowly becoming a factor in Canada," says Dan Michaluk, chair of Hicks Morley's information management and privacy practice group. "There will soon be a near Canada-wide data breach notification obligation for organizations in the commercial sector – resulting in organizations facing potential litigation if they don't respond carefully."

With more at stake, organizations need to give "information governance" strategic priority – and address the key issues relating to the control and security of corporate information.

A STEP AHEAD

While CASL and other legislation has made information and privacy a more recent concern for many organizations, it has been on the Hicks Morley radar for some time.

"As lawyers who act exclusively for management we know how businesses operate. We also have more than 20 years of experience in developing best practices for our clients," says Michaluk. "We understand information management and privacy protocols from first principles – and can identify the steps that an organization needs to take to put effective safeguards in place. Times are changing fast, and we want to make sure our clients stay a step ahead in protecting their interests."



A DIMINISHED EXPECTATION: COMPUTER USE POLICIES AND PRIVACY IN THE POST-*COLE* WORLD

Employer-issued electronic devices are now ubiquitous in the modern workplace. However, employers who provide electronic devices to their employees often face an uncertain task in balancing an employee's interest in privacy with the employer's interest in maintaining the operational integrity of its computer systems. Employers are right to ensure that employee activity on these devices remains within the boundaries of acceptable use.

BY: JOSHUA F. CONCESSAO

To achieve this balance, employers rely on computer use policies to communicate these permitted uses. While employers enjoy considerable flexibility in drafting such policies, recent case law from the Supreme Court of Canada suggests that employees nonetheless have a residual, though considerably diminished, privacy interest. Clarity in setting out an employer's expectations and ensuring employee awareness are therefore crucial steps in permitting an employer to rely on its policies and to retain a clear right of access to system data.

THE *COLE* CASE – CHANGING THE PRIVACY LANDSCAPE

In *R. v. Cole*, the Supreme Court of Canada considered the extent of an employee's expectation of privacy in personal information stored on a work-issued computer. The issue in *Cole* was whether

the information on the employee's work-issued computer was protected by a reasonable expectation of privacy such that the police required a warrant to search the information on the work-issued laptop.

The employee was a teacher alleged to have stored child pornography on his work-issued laptop. The images were detected by the school's IT staff during routine maintenance of the school's network. The employer provided the laptop to the police, who searched the laptop without a warrant. The employee argued that the evidence on the laptop was obtained by the police unlawfully even though the employer owned the laptop. The Court held that the employee did have a reasonable expectation of privacy and that the police were required to obtain a warrant to search the work-issued laptop.

While the Court left "for another day the finer points of an employer's right to monitor computers issued to employees," it did clearly state that an employee's expectation of privacy was limited. It also upheld the finding by the Court of Appeal for Ontario that the monitoring, search and seizure of the employee's laptop by school officials was permitted. In doing so, the Court recognized that despite having a reasonable expectation of privacy, the search and seizure of the laptop by school officials was not unreasonable given the school officials' statutory duty to maintain a safe school environment.

This finding by the Court points to important considerations in assessing an employer's right to monitor and restrict the scope of work-issued technology use. Employers will find analogous duties to maintain a safe and discrimination-free workplace pursuant to various obligations under the *Human Rights Code* and the *Occupational Health and Safety Act*.

Moreover, the Court in *Cole* did not directly address the effect of the terms and conditions of a well-drafted computer use policy on an employer's right to access system data for legitimate purposes. Although *Cole* means that an employer cannot "invalidate" an expectation of privacy by policy or contract, a computer use policy that is rooted in "legitimate employer interest" and that clearly articulates the employer's right to access, monitor and limit usage will still be given effect.

The flexibility that employers enjoy in drafting computer use policies permits them considerable latitude in defining the scope of employee usage and the employer's right to monitor and access such usage.

POLICY TIPS

In light of *Cole*, employers should consider the following points when drafting their computer use policies:

- articulate the purposes for which an employer may access and use information stored on its system;
- advise that personal use of employer-issued devices is a privilege and choice that is associated with limitations on privacy; and
- advise that the privacy interest associated with personal use will not prevail over an employer right of access.

The flexibility that employers enjoy in drafting computer use policies permits them considerable latitude in defining the scope of employee usage and the employer's right to monitor and access such usage.

Stating the purposes for accessing data is essential post-*Cole*, and typically include the following key points:

- to engage in technical maintenance, repair and management;
- to meet a legal requirement to produce information, including by engaging in e-discovery;
- to facilitate continuity of work;
- to improve business processes and manage productivity; and
- to prevent misconduct and ensure compliance with the law.

The post-*Cole* world presents an opportunity for employers to draft their computer use policies with flexibility and care. The proper drafting of such policies can be used to safeguard legitimate business interests while achieving an appropriate balance with respect to the privacy expectations of employees.

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HR QUICK HITS

Recent developments in privacy litigation

Class actions are becoming an increasingly common vehicle in which litigants are asserting claims for breach of privacy. Two recently certified class actions illustrate this point. In *Evans v. Bank of Nova Scotia*, the Ontario Superior Court certified a class action in a matter where the plaintiffs alleged, among other things, intrusion upon seclusion arising from a breach of their privacy rights. That case involved the alleged improper disclosure of confidential information belonging to Bank customers by a Bank employee to a third party. In *Condon v. Canada*, the Federal Court certified a class proceeding against the federal government in a case where the Minister of Human Resources and Skills Development Canada lost an external hard drive on which was stored personal information of 583,000 individuals involved in the Canada Student Loans Program. The plaintiffs in *Condon* also alleged intrusion upon seclusion, among other things. In both cases, the Courts found that the claims of intrusion upon seclusion could *proceed*; no decision on the merits of either case has yet been rendered.

NEW POLICY SHEDS LIGHT ON GENDER DISCRIMINATION PREVENTION

In 2012, the Ontario government passed an amendment to the Ontario *Human Rights Code* ("*Code*") extending protection against discrimination on the grounds of gender identity or gender expression. A recently released policy by the Ontario Human Rights Commission ("Commission") sheds further light on this evolving legal landscape.

BY: MICHELLE C. FOLLIOTT AND PATTY G. MURRAY

Toby's Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression) amended the *Code* to specify that every person has a right to equal treatment without discrimination because of gender identity and gender expression with respect to services, goods and facilities, accommodation, contracting, employment, and membership in a trade union, trade or occupational association or self-governing profession. The *Code* was also amended to specify that every person has a right to be free from harassment because of sexual orientation, gender identity or gender expression with respect to accommodation and employment.

THE NEW POLICY

The *Code* authorizes the Commission to publish policies that interpret the *Code* and set standards for *Code*-compliance. While the Commission's policies do not create free-standing legal obligations, the Human Rights Tribunal of Ontario ("HRTO") will consider the policies when asked to do so by parties to a proceeding. Given that the policies may be given deference and considered by Ontario courts and the HRTO, it is essential for employers and service providers to familiarize themselves with the issues these policies address in developing and implementing best practices.

In April 2014, the Commission published its *Policy on preventing discrimination because of Gender Identity and Gender Expression* (the "Policy"), providing definitions and guidance relating specifically to gender identity and expression.

The Policy defines gender identity as each person's internal and individual experience of gender, namely their experience of being a woman, man, both, neither or anything in-between. It recognizes that gender identity may be the same or different from someone's birth-assigned sex and is fundamentally different from an individual's sexual orientation.

Gender expression is defined as how people present their gender identity, including their appearance, body language, voice, name and preferred pronoun (he, she, they). Trans or transgender is defined as people with diverse gender identities and expressions that differ from stereotypical gender norms.

GENDER IDENTITY, EXPRESSION AND WORKPLACE DISCRIMINATION

The Policy addresses both gender-based and sexual harassment. Gender-based harassment can involve:

- comments that ridicule or demean people because of their gender identity or expression;
- behaviour designed to reinforce traditional heterosexual gender norms;
- a refusal to use someone's self-identified name or pronoun;
- "outing" or threatening to expose someone as trans; and
- intrusive comments or questions, such as comments about a person's physical characteristics.

Sexual harassment can involve similar misconduct including intrusive or offensive questions about a person's sex, sexual identity, orientation, relationships or activities; jokes that objectify someone in a sexual way; leering or inappropriate staring; or threats, unwelcome touching or violence.

> Addressing these challenges with sensitivity and in a manner that respects dignity is key to successful outcomes.

Employers have a legal duty to maintain workplaces free from discrimination and harassment because of gender identity and expression. Organizations must take steps to prevent and respond to violations of the *Code* as a failure to do so may result in liability and damages.

While harassment generally involves multiple incidents of inappropriate conduct, the Policy is careful to note that a single incident involving any person, regardless of their position of authority in the organization, may be serious enough to create a poisoned environment.

Since poisoned work environments are a form of discrimination, employers who authorize, condone or adopt behaviour that contributes to or creates such environments may be held liable.

GENDER IDENTITY AND EXPRESSION: IMPLICATIONS FOR YOUR ORGANIZATION

Under the Policy, individuals must be treated in accordance with their gender identity in all aspects of their lives, regardless of whether they have undergone surgery or updated their identity documents.

Integration, inclusivity and full participation are the hallmarks of equality. Segregated treatment is considered less dignified and acceptable only where it is the best way to achieve equality. The Policy addresses several key areas where gender identity and expression may intersect with today's workplace. Not surprisingly, contentious issues can arise most particularly around the use of facilities given the privacy concerns that may arise.

Washroom and Change Room Use: The Policy states that trans people have the right to use washrooms and change rooms that match their lived gender identity and should not be required to use separate facilities because other people express discomfort or transphobic attitudes.

While recognizing the rights of trans individuals, it is also important that organizations ensure that all parties' rights are respected and appropriately balanced. To achieve this balancing of rights, organizations should consider options that may allow trans people access to single-user, gender-neutral washrooms or privacy areas in change rooms.

Dress Codes: Trans people and other gender non-conforming individuals should be allowed to dress according to their lived gender identity. Where uniforms or other garments are required, the requirement must be reasonably necessary and should not negatively impact trans people or be based solely on gender roles.

Personal Information: Information that relates to a trans person's sex, gender identity or medical history should only be collected where relevant and necessary, and must be stored in secure filing systems and kept private and confidential. Preferred names and genders should be recognized and reflected in appropriate documents even where they do not match a person's identity documents. Employers are well advised to design employment forms with inclusivity in mind and to allow people to self-identify their sex and gender, including non-traditional identities.

ACCOMMODATION REQUIRED

While accommodating needs based on gender identity or gender expression may present unique challenges for an organization, addressing these challenges with sensitivity and in a manner that respects dignity is key to successful outcomes. With awareness, communication and appropriate consultation with those involved, organizations can achieve solutions that are respectful for all involved.

Michelle Folliott *is an associate lawyer at the Hicks Morley Toronto office and currently practises in all areas of labour and employment law, providing advice and representation to both private and public sector employers and management on a wide range of labour and employment issues, including human rights and accommodation matters.*

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Patty Murray *is a partner in the Toronto office and one of the senior practitioners within the firm's human rights practice group. She has advocated before the Canadian Human Rights Commission, the Human Rights Tribunal of Ontario and labour arbitrators, and regularly speaks on issues of human rights to human resources professionals. Patty sits as the Co-Chair of the Practice Advisory Committee at the Human Rights Tribunal of Ontario.*

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HR QUICK HITS

Federal health and safety changes coming into effect October 31, 2014

On October 31, 2014, amendments to various occupational health and safety provisions contained in Part II of the *Canada Labour Code* will come into force, including:

- a new statutory definition of "danger";
- modifications to the work refusal process and the investigation of continuing work refusals; and
- the transfer of investigation powers, duties and functions of a health and safety officer to the Minister of Labour.

These changes were enacted by *Economic Action Plan 2013 Act, No. 2*, omnibus legislation intended to implement various measures from the federal government's 2013 Budget.

Supporting regulations to these amendments, *Regulations Amending Certain Regulations Made Under the Canada Labour Code*, will also come into force on that date.

For more information on these changes, and for the latest legislative developments of interest to employers, human resources professionals and pension plan administrators, please consult our blog, www.humanresourceslegislativeupdate.com

PRIVACY, PLEASE

Dan Michaluk is chair of Hicks Morley's information management and privacy practice group – and has practised his entire career at the firm. In addition to being rated for inclusion in The Best Lawyers in Canada in the area of privacy and data security, he is also a dedicated paddleboarder, training through the winters in the icy waters of Lake Ontario.

We spoke to Dan about his life, his career and the evolution of information management for employers.

You did a business degree and a law degree at Queen's. Did you grow up near Kingston?

I actually grew up in Toronto, but Queen's had a great business school and it was right by the water. I was an avid windsurfer back then, so being near the lake was a huge draw.

How did your interest in law develop?

I'd always been drawn to advocacy and arguing different positions – even in high school – so law was always on my radar. My interest in labour and employment developed in business school. I took some labour courses that really caught my interest – and that interest continued in law school.

What brought you to Hicks Morley?

Hicks Morley was the top labour and employment firm, so it was my first choice for a position, and I was fortunate to be accepted. That was 1997-98.

But you didn't stay?

Not initially. I withdrew my name from consideration in terms of being hired back as an associate. I didn't feel ready to settle into corporate life – and I'd become very serious about surfing. So my wife and I travelled the world, staying for periods in Australia and Hawaii.

When I came back, I worked for a small software company, then did some business writing for a management consultant, working virtually from Hawaii. By 2003, we were ready to come home for good and I reapplied for an associate position at the firm.

> These are interesting times – we're seeing far greater awareness of data security, but, at the same time, employers are facing greater data security challenges.

What was behind your focus on information and privacy?

It was a natural flow from my work in the technology sector after articling. Much of that work was centred on software implementations. So I learned a lot about how corporate IT worked and the role of business technology. I brought that interest and experience to the firm, and got involved in the information and privacy area right from the start.

How has your practice evolved over the past decade?

One thing that hasn't changed is my need to stay in touch with oral advocacy. So I always have a number of arbitration files on the go. But I think that oral advocacy will be a growing part of our information and privacy work. In 2012, I represented the Canadian Association of Counsel to Employers at the Supreme Court of Canada on a workplace privacy case in *R. v. Cole*. So these issues are growing in prominence.

And we now have a new privacy tort – intrusion upon seclusion – courtesy of the Ontario Court of Appeal. There'll be a growing number of civil claims based on this tort. Breach notification laws are also being passed at the federal and provincial levels and will invite litigation.

What's the biggest difference between how organizations treat information and privacy today than ten years ago?

These are interesting times – we're seeing far greater awareness of data security, but, at the same time, employers are facing greater data security challenges. Based on the so-called "consumerization of IT" phenomenon employers are being forced to compromise on data security to prevent employees from choosing to use outside hardware and services for work. More and more, data security that used to be achieved by "locked down" technology now must be achieved through policies and rules. That's one of the key ways we help organizations – by finding ways to achieve control in this new environment.

More and more, data security that used to be achieved by "locked down" technology now must be achieved through policies and rules.

How about your life outside of law – what are your main interests?

We have two wonderful kids, Hugo, 7, and Penny, 5, so it's a busy time on the home front. My main personal passion outside of work and family is traditional paddleboarding, where you're kneeling or lying on the board as you paddle.

I train year-round and last year competed for the first time in the World Paddleboard Championships, a 32-mile race from Molokai to Oahu in Hawaii. It's a seven-hour race and it was the hardest thing I've ever done. But it was worth it – I finished second in the over-40 category and I've signed up for it again this year. I take it very seriously – but it's something I absolutely love doing.

PROFESSIONAL DEVELOPMENT SESSIONS AND WORKSHOPS

This professional development program for in-house counsel and human resources professionals is designed to keep you informed about the latest legal developments and best practices.

September 17	A Change Is Gonna Come: How to Create Employee Engagement in a Unionized Workforce Breakfast CPD Session*
October 2	Hicks Morley Alumni Reunion
October 8	Breakfast CPD Session*
October 22	Psychological Disabilities and the Workplace: WSIB & Human Rights Implications Breakfast CPD Session*
November 6	WSIB Winning the Uphill Battle Conference
November 19	Ex-pats and Imports – International Employment Law 101 Breakfast CPD Session*
November 25	Workplace Investigation Training
November 26	Human Rights Update 2014: Accommodation and the Diverse Workforce Breakfast CPD Session*

**CPD Accreditation pending, visit hicksmorley.com/advantage for details.*

CLIENT CONFERENCES 2014
ON YOUR MARK

We were delighted to recently host over 1,500 clients at our biennial, complimentary client conferences in Waterloo, Kingston, Ottawa, Toronto and London. We hope you found the information valuable and the experience meaningful. Thanks for joining us.

For more information on Hicks Morley's fall educational programs, please visit hicksmorley.com

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