



Privacy in Employment

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Privacy and Employment in 2019

- A. Reasonable expectation of privacy
- B. Tort of intrusion upon seclusion
- C. New confidentiality requirements apply to you
- D. Workplace surveillance

R. v. Jarvis (2019 SCC)

- When does an individual have a reasonable expectation of privacy in public settings?
- Earlier decision in *R v Cole* (2012)
- Accused teacher used “pen camera” to surreptitiously record students in school common areas
- Criminal charge of voyeurism
- School had general surveillance system of which students were aware
- Students knew they were being filmed
- But still had reasonable expectation they would have privacy from *this* filming

R. v. Jarvis (2019 SCC)

- This decision could impact the analysis of the reasonable expectation of privacy of employees in their workplaces
- Do your employees have work-issued laptops? The “context” is important
 - Policy
 - Practice of allowing employees to “surf” or take computers home
 - Web browsing history, private folders on laptop
- Most applicable to circumstance of a “secret” video recording
 - E.g. employee-on-employee interactions attracting discipline
 - Reasonable expectations of Canadians relating to privacy
- If installing video cameras, best practice is to advise those affected

Intrusion upon seclusion

- What is it?
 - “*One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to the reasonable person.*”
- Requires intentional or reckless invasion that is highly offensive to reasonable person
- Court awarded **\$7,000** to Plaintiff for ex-wife’s intrusion upon seclusion by sneaking into his home, changing locks, and photographing and removing his possessions without genuine apology.

Key takeaways:

- New tort, gaining acceptance in *some* jurisdictions across Canada
 - Ontario and NS have accepted
 - BC has rejected its existence
 - NL has not yet decided the question
- UK case questioning whether employer can be **vicariously liable** for intentional privacy violation?

New confidentiality obligations

- New confidentiality obligations in the *Labour Standards Act*
- Previously, NL legislated privacy and access obligations applied primarily to two distinct groups:
 - Public employers (*ATIPPA*); and
 - Medical records in the care of a defined custodian (*PHIA*)
- New amendments came into force on **January 1, 2019**
- **All employers must maintain confidentiality of employee information in relation to employee workplace leave**
- All types of leave are covered: pregnancy, parental, sick, compassionate care, family violence, crime-related, child death or disappearance, reservist, and critical illness
- Consider obligations, responsibilities of all individuals in workplace who get this info

Public employers – Video surveillance

- ***Paradise (Town) (Re)***, 2018 (NL OIPC)
- The OIPC received a complaint about Town’s video surveillance system
- OIPC Guidelines state that before a public body can install video surveillance, must have:
 - “...a real, pressing and substantial problem which is ongoing in nature that has not and cannot be mitigated by other less privacy intrusive measures”; and
 - “Specific, ongoing and verifiable reports of incidents of crime, public safety concerns, or other compelling circumstances are required to proceed.”
- Insufficiently specific assessment of need for cameras prior to their use
- Safety or vandalism prevention generally not enough; needed evidence of specific incidents
- OIPC criticized broad access to videos among employees of Town
- Recommendation that Town immediately cease video surveillance unless it could demonstrate authorization under ATIPPA



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