



Emerging Technologies and Employee Surveillance

Solving The Privacy Puzzle
PIPA Conference 2009

Moderator: **Frank Work, Q.C.** Commissioner

Presenters: **Ivan Bernardo, Kris Klein**



**MILLER
THOMSON** LLP

Barristers & Solicitors
Patent & Trade-Mark Agents



LAW OFFICE OF
KRIS KLEIN

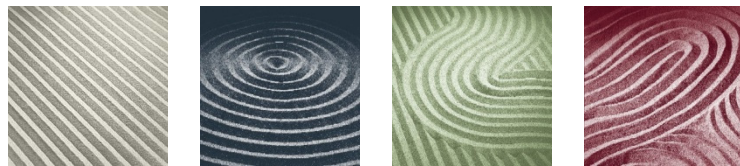
a professional corporation

MILLER THOMSON LLP

Barristers & Solicitors
Patent & Trade-Mark Agents

Employee Surveillance

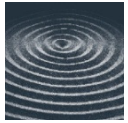
Solving The Privacy Puzzle, PIPA Conference 2009



Date: October 16, 2009
Presented by: Ivan Bernardo



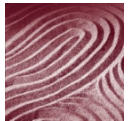
Overview



➤ Employee Surveillance



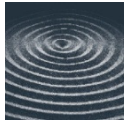
- Legal Framework



- Basic Principles
- Video Surveillance
- Drug and Alcohol Testing
- Facebook - Social Networking Sites



The Legal Framework



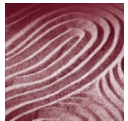
➤ Alberta:

- *Personal Information Protection Act* (“AB PIPA”)
- **Freedom of Information and Protection of Privacy Act (“FOIP”)**



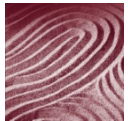
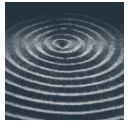
➤ BC:

- *Personal Information Protection Act* (“BC PIPA”)
- *Freedom of Information and Protection of Privacy Act* (FIPPA)





Personal Employee Information



- **AB and BC PIPAs provide rules for collection, use and disclosure of:**

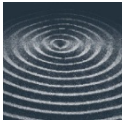
- **personal information (“PI”), and**
- **personal employee information (“PEI”)***

s. 2 AB and BC PIPAs

* Defined as “employee personal information” in BC PIPA



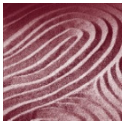
PI and PEI



- PI means information about an identifiable individual.



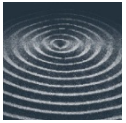
- PEI means, in respect of an individual who is an employee or a potential employee, personal information that is collected, used or disclosed solely for the purposes reasonably required by an organization to establish, manage or terminate an employment relationship or a volunteer work relationship between the organization and that individual, but does not include personal information about the individual that is not about an individual's employment.



s. 1 AB PIPA and BC PIPA



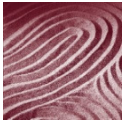
The TEST



- **An employer may only collect and use personal information about an employee *without the employee's consent* IF:**



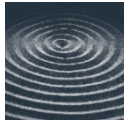
- **The collection is reasonable for the purposes for which the information is being collected,**
- **The information consists only of information that is related to the employment or volunteer work relationship of the individual, and**
- **In the case of an individual who is an employee of the organization, the organization has, BEFORE COLLECTING the information, provided the individual with REASONABLE NOTIFICATION that the information is going to be collected and of the purposes for which it is going to be collected.**



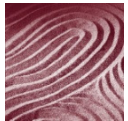
s. 15, 18 AB PIPA; s. 13, 16 BC PIPA



Basic Principles



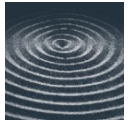
➤ Information/Privacy Principles



- Collection use and disclosure
- All forms of employee surveillance will require collection and use of personal information



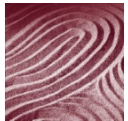
Basic Principles



➤ Employee Surveillance



- shared jurisdiction
 - Human rights tribunals
 - Labour arbitrations
 - Courts
- Strive for consistency





Personal Information Protection Act

➤ Reasonableness

➤ Balance

- Employee right to privacy
- Employer's legitimate business and property interests

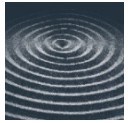


Employers Conflicting Responsibilities

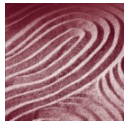
- Profit Motive - protect assets
- Occupational Health and Safety
- Privacy
- Human Rights
- Arbitrations (union environment)



Video Surveillance

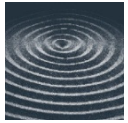


- OIPC has stated that Video surveillance is collection of personal information where it captures images of identifiable individuals.

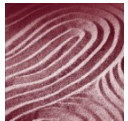




Video Surveillance



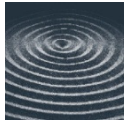
➤ OIPC has stated that it is permissible under certain circumstances



- Monitoring employee performance
- Detecting employee theft
- Detecting employee property damage



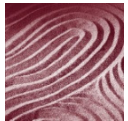
Video Surveillance

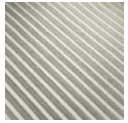


➤ Is its use reasonable?

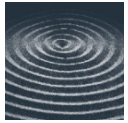


- Not in all situations

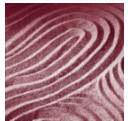




Video Surveillance



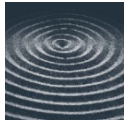
➤ Reasonableness:



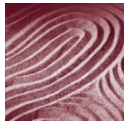
- Are there legitimate issues that the organization needs to address through video surveillance?
- Is surveillance likely to be effective?
- Are there less intrusive measures?
- Was surveillance conducted reasonably?



Video Surveillance



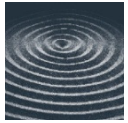
➤ Summary



- Video Surveillance justified in some cases to watch for theft and safety issues
- Not justified for performance issues b/c
 - No demonstrated need
 - Alternative methods for monitoring employees
 - ◆ Visits from supervisors
 - ◆ Monitoring work product - output



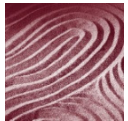
FaceBook



➤ Back to Basic Principles

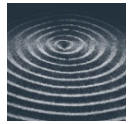


- Surveillance is collection
- Can only collect if related to employee relationship
- Prospective employees – no notice
- Employees - Notice





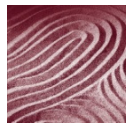
Drug and Alcohol Testing



➤ Direct collection required



➤ Consent therefore needed

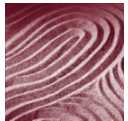
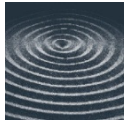


➤ Test result will be PEI

- Therefore can only be collected and used for reasonable purposes related to employment relationship



Drug and Alcohol Testing

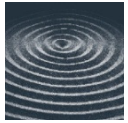


➤ Things to consider

- What is the purpose for testing?
- Will test accomplish purposes?
- Is collection reasonable required for the purposes?



Drug and Alcohol testing



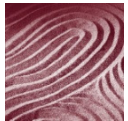
➤ Evidence-based decision making

- OIPC will want to know that a particular drug test will make workplace safer, if that is stated purpose
- Employer will need to demonstrative and have evidence



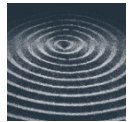
➤ Type of test

- Use in last 10 days?
- Current blood/alcohol level?





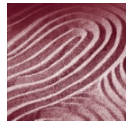
Drug and Alcohol testing



➤ What the courts have said



➤ Tide has turned in favour of employers





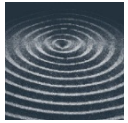
Drug and Alcohol testing

Automobile, *Aerospace...Union v. CNR*

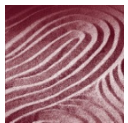
- Where an unusual workplace accident occurs with no clear explanation, employer is within its rights to demand both a breath and urine test.
- “[Not] every accident will justify urine tests. The facts of each case are important...why the accident occurred trumped the grievor’s privacy rights to withhold the sample.”



Drug and Alcohol testing



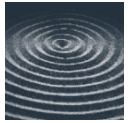
➤ *W. v. Canadian National Railway*



- Random alcohol testing as a term of reinstatement following on-the-job intoxication does not treat employee as an alcoholic.



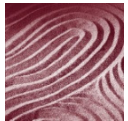
Drug and Alcohol testing



➤ Imperial Oil Ltd. v. C.E.P. Local 900

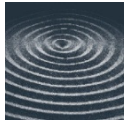


- Swab/saliva test is grieved
- There may be circumstances in which random testing would be acceptable
 - Evidence of out of control drug culture
 - Safety sensitive workplace
 - As part of an agreed rehabilitative program

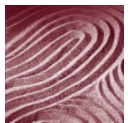




Drug and Alcohol testing



➤ *Chaisson v. Kellogg Brown & Root*



- “[E]xtending human rights protection to situations resulting in placing the lives of others at risk flies in the face of logic.”
- Leave to appeal to the Supreme Court of Canada was denied on May 29, 2008.