



Privacy Update – Recent Updates in Privacy Law

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Privacy Update – Recent Developments in Privacy Law

Overview

1. Can you be sued for a privacy breach?
Privacy class action update and the implications of Ontario's new privacy tort
2. Recent developments under PHIPA and FIPPA
3. Recent cases – Freedom of information

Can you be sued for breach of privacy?

- In Canada, traditionally no independent action for breach of privacy
- Typically tied to something else (i.e. constructive dismissal, breach of contract, trespass, negligence, breach of fiduciary duty)

Can you be sued for breach of privacy?

- May be statutory basis (i.e. PHIPA)
- Increasing concern regarding risk of identity theft (i.e. fraud/credit monitoring, need for protective measures)
- Significant increase in privacy class actions in Canada
 - Loss/theft of PHI (i.e. Durham Health Region)
 - Business practices / unauthorized access by employee(s) (i.e. recent certification of class action lawsuits against Regional Health Authorities in Newfoundland and Nova Scotia)

Privacy Breach – Statutory Basis

- Limited recourse under PHIPA for breach of privacy
- Offences under the *Provincial Offences Act*
 - Significant fines
- Action for damages for breach of PHIPA
 - Statutory right to seek compensation from Superior Court for breach of privacy for actual harm suffered where order issued by IPC or conviction
 - damages for mental anguish capped at \$10,000 (payable where willful or reckless)

Durham Health Region Class Action

- December 2009 - Nurse loses unencrypted USB key with PHI of 83,500 individuals immunized for H1N1
- January 2010 - IPC Order HO-007 – strong encryption for mobile storage devices
- December 2011 - Class action certification motion
 - \$40 million damages (negligence, breach of statutory duty, breach of fiduciary duty)
 - Primary concern - identity theft

Durham Health Region Class Action

- July 2012 – class action settlement approved
 - \$500,000 in costs to counsel, plus % of claims paid
 - Must demonstrate economic loss, otherwise, no damages
 - Opportunity to mitigate loss
- Mr. Justice Lauwers:
 - Risks from lost data “negligible”
 - No evidence of identify theft / minimal information

Class Actions – Unauthorized Access

- Recent class action law suits related to privacy breaches / unauthorized access to EHRs
- Hospitals notifying patients and managing breach
- Termination / discipline
- Early stages
 - Vicarious liability – is hospital responsible for *intentional* behaviour of employee?
 - Systems responsibilities - adequate training, policies and procedures and systems in place to monitor policies?

New Privacy Tort – Intrusion upon Seclusion

- Ontario Court of Appeal - *Jones v. Tsige*
- Bank employee accessing personal bank account of spouse's ex-wife (another bank employee) 174 times over 4 year period
- Brought motion for summary judgment on the basis that Ontario law does not recognize tort of breach of privacy
- CA determined that there ought to be a right of action for 'intrusion upon seclusion' in certain situations where there has been a deliberate and significant invasion of personal privacy

Three elements - Intrusion upon seclusion

- Conduct must be intentional (or reckless)
- Individual must have invaded, without lawful justification, another's private affairs or concerns
- A reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish
 - Objectively, only certain types of intrusions highly offensive i.e. involving financial or health information, employment, diary, personal correspondence

Damages for Intrusion Upon Seclusion

- No need to demonstrate harm to economic interests or actual loss
- Damages for intrusion upon seclusion will be relatively modest (i.e. capped at \$20,000)

Implications for Health Industry Clients

- Extends beyond PHI to other types of personal information
- Actions may be contrary to organizational policy (employee discipline), but may still be exposed to potential law suits / class action law suits
- Significant public relations and legal risk, therefore, when and how individuals are notified is very important → ensure strong communication strategy

Implications for Health Industry Clients

- Risk management
 - Adequate policies and procedures
 - Privacy breach management
 - Training, monitoring and auditing compliance coming under increasing focus
- Consider risk transfer (i.e. privacy notification and look back programs, identity theft monitoring)

Review Orders/Decisions

- A review of Orders issued under PHIPA, as well as corresponding fact sheets and guidance documents reveal that many of these repeat the **SAME THEMES ...**
 - Failure to use appropriate encryption or other safeguards when storing PHI on mobile devices
 - Limit ability to remove PHI unless adequate safeguards are in place
 - Improper disposal/destruction of PHI
 - Document management and retention policies
 - Contractual protections when relying upon third party

Recent Developments – PHIPA and FIPPA

- PHIPA Order HO – 011 – October 2011
 - Cancer Care Ontario in its role as a “prescribed person” (Ontario Cancer Screening Registry)
 - Delivery of screening reports to over 7000 physicians in paper format (sent by courier)

Recent Developments – PHIPA and FIPPA

- Key findings:
 - Need to evaluate privacy and security standards as they evolve over time
 - Consider whether the use of fax, mail and courier services are adequate given technological advances
 - Put practices in writing
- IPC Fact Sheet # 18 – August 2012 – Secure Transfer of Personal Health Information

Recent Developments – PHIPA and FIPPA

- July 2012 - Elections Ontario losing unencrypted USB key involving personal information of up to 2.4 million individuals
 - Failure to effectively implement and monitor privacy practices
- IPC White Paper - A Policy is Not Enough: It Must be Reflected in Concrete Practices – September 2012

Recent Decisions – Freedom of Information

- Carleton University (IPC, Feb. 2012)
 - Presumption that an access request for emails does not require routine search of backup tapes for deleted emails
 - Exception - unless there is a reason to assume that such a search is required
 - If individual requests search from backup tapes, must search and retrieve

Recent Decisions - Advice and Recommendation

- Ontario Court of Appeal – finding that IPC applying “advice and recommendation” exemption too narrowly
 - Entire deliberative process is protected (not necessary to go to final decision maker)
 - Presentation of range of options may be properly withheld
- leave to appeal to SCC filed (May 15, 2012)

Ontario (Finance) v. Ontario (Information and Privacy Commissioner)

Recent Decisions –Third Party Information

- Supreme Court of Canada decision - *Merck Frosst v. Canada (Health)*
 - Outlines procedural and substantive protections for third parties
 - Although deals with federal *Access to Information Act*, likely will apply more broadly
 - No single interest is paramount (i.e. duty to provide access equally important as duty to protect third party information)

Recent Decisions –Third Party Information

- Threshold to trigger notice obligation is low
 - no need to provide notice where information clearly exempt or clearly subject to disclosure, but otherwise, must provide notice
- While third party assistance may be required, the decision to disclose ultimately lies with institution - head must apply the exemption / conduct thorough analysis
- Only where third party believes decision is wrong does the onus shift to third party
- Decision also considers substance of tests and threshold for harms-based exemptions

Questions?

Thank you!