



Access and Privacy Training Day 2015

Significant IPC Orders and Court Decisions

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Top Ten Cases



10. Personal **privacy**

Order PO-2811

Ontario (Community Safety) v. Ontario (IPC), 2014 SCC 31

- ON sex offender registry private (unlike US)
- media seeks aggregate data from registry
 - first 3 digits of postal code + # persons in area
 - typically 1000s in each area
- M denies access based on *FIPPA* privacy [s. 21], law enforcement [s. 14] exemptions
- SCC upholds IPC decision that not reasonable to conclude individuals **identifiable**
 - thus no basis for privacy, law enforcement harms



Personal **privacy**

Order PO-2811

Ontario (Community Safety) v. Ontario (IPC), 2014 SCC 31

- SCC confirms single evidentiary threshold for all “**could reasonably be expected to**” exemptions in Canada
 - must show risk of harm is “**well beyond merely possible or speculative**, but not as high as on the balance of probabilities”



9. Research exclusion

Order PO-3365

- Records relating to reforms to the automobile insurance regime generated by an expert panel did not fit within the scope of the exclusion in s. 65(8.1)
- Two components for exclusion to apply:
 - "Research"
 - Conducted by an employee or person associated with an educational institution or hospital



Research exclusion

Order PO-3365

- “...a systematic investigation designed to develop or establish principles, facts or generalizable knowledge or any combination of them, and includes the development, testing and evaluation of research” [at para. 19]
- Exclusion recognizes role of research in post secondary institutions, protects academic freedom and competitive environment
- Panel members selected by RFP on the basis of expertise to advise the government, not to pursue individual academic or clinical research goals



8. Advice to government

Order PO-2872

John Doe v. Ontario (Finance), 2014 SCC 36

- request for options paper with “pros and cons” of proposed change to tax statute
- IPC rules record not exempt since it does not reveal a “suggested course of action”
 - not “advice or recommendations”
 - no evidence info actually communicated (drafts only)
- SCC quashes IPC decision, says exemption covers **entire deliberative process**, not just “suggested course of action”
 - entire record exempt
 - also, no need to demonstrate advice actually communicated to decision maker



Advice to government

Order PO-2872

John Doe v. Ontario (Finance), 2014 SCC 36

- once institution establishes context of **deliberative process** of government decision-making or policy making, records generated likely exempt
- but *FIPPA* exceptions still exist:
 - factual material [13(2)(a)]
 - reports [13(2)(c)(e)(f)(h)(j)(k)]
 - older than 20 years [13(3)]
 - publicly cited [13(3)]



7. Special Investigation Report: Crossing the Line

- Recording of attempted suicide information in the CPIC database amounts to a “disclosure” within the meaning of *FIPPA* [s. 42(1)]
- Report called for immediate **end to the practice of automatically entering** all threats of suicide or attempted suicide
- Mental Health Disclosure Test – limits when suicide related information should be recorded in the CPIC



6. Third party **commercial** info

Order PO-3011

HKSC Developments v. IPC, 2013 ONSC 6776 (Div Ct)

Order MO-2738

Miller Transit v. IPC, 2013 ONSC 7139 (Div Ct)

- IPC rules in two cases that contracts fail the **supplied** test in 3P commercial information exemption [*FIPPA* s. 17]
- contracts normally considered **mutually generated** or negotiated, not supplied
- in both cases, court upholds IPC's interpretation of the exemption, and application to specific contracts
- based on "reasonableness" standard



5. Public Interest override

Order PO-3164

*Ministry of Community Safety and Correctional Services v.
IPC and Toronto Star (2014) ONSC 3295*

- Ministry denied access to dates DNA samples were taken from victims and addresses identified as part of a notorious criminal investigation on the basis of personal privacy [s. 21(3)(b) *FIPPA*]
- A compelling public interest was found to exist in the record which identified the **dates and times when DNA evidence was collected** and revealed whether there was timely cataloguing of evidence



5. Public Interest override

Order PO-3164

*Ministry of Community Safety and Correctional Services v.
IPC and Toronto Star (2014) ONSC 3295*

- IPC held that disclosure of record would have minimal impact on privacy interests of victims and ordered release notwithstanding no previous notice as record was withheld
- Divisional Court- referred matter back to IPC on account of a **breach of procedural fairness** for not providing **notice to victims**



4. Employment-related information

Order PO-2917

Ontario (CSS) v. IPC, 2014 ONSC 239 (Div Ct),
appeal to be heard January 20, 2015 (on other issues)

- requester seeks own file at Family Responsibility Office
- M withholds FRO **employee names**
 - but grants access to most records
- IPC rules employee names appear in records generated in course of "**normal business**"
 - do not qualify as records relating to labour relations or employment matters [*FIPPA* s. 65(6)]



Employment-related information

Order PO-2917

Ontario (CSS) v. IPC, 2014 ONSC 239 (Div Ct),
appeal to be heard January 20, 2015 (on other issues)

- Div Ct upholds IPC s. 65(6) ruling
- Div Ct also upheld IPC's rejection of M arguments that names should be withheld on basis of:
 - threat to **safety or health** [*FIPPA* s. 20]
 - **conflict** with Grievance Settlement Board consent order dealing with FRO employees and their ability to withhold surnames
- these issues now before Court of Appeal



3. Custody and control

Order MO-3031

- Records of School Board trustees regarding selection of a new trustee not subject to *MFIPPA*
- Communications not made acting as an officer or employee of the school board or discharging a special duty
- Generally **records of elected officials not subject to *MFIPPA* but could be** if the records relate to school board matters and may be obtained by request (*ATIA* control test - *National Defence*, 2011 SCC 25)



2. Right to sue for **intrusion upon seclusion**

Hopkins v. Kay, 2014 ONSC 321,
Court of Appeal hearing December 15, 2014

- *PHIPA* comes into force in 2004
 - establishes two avenues to sue for damages:
 - (i) if IPC order [s. 65(1)] or
 - (ii) if offence conviction [s. 65(2)]
- **intrusion upon seclusion** common law tort recognized by ON Court of Appeal in 2012
 - *Jones v Tsiges*



Right to sue for **intrusion upon seclusion**

Hopkins v. Kay, 2014 ONSC 321,
Court of Appeal hearing December 15, 2014

- Peterborough Regional Health Centre employees “snooped” on patients’ PHI records
- IPC aware of breach, but does not issue order
 - hospital had adequately responded
- patients bring **class action** against hospital, alleging it failed to prevent breaches
 - based on **intrusion upon seclusion** tort



Right to sue for intrusion upon seclusion

Hopkins v. Kay, 2014 ONSC 321,
Court of Appeal hearing December 15, 2014

- Superior Court rules class action can proceed
- hospital appeals, argues
 - *PHIPA* establishes only avenues to sue
 - may sue for damages only under *PHIPA* s. 65
(**IPC order** or **offence conviction**)



Right to sue for **intrusion upon seclusion**

Hopkins v. Kay, 2014 ONSC 321,
Court of Appeal hearing December 15, 2014

- IPC intervenes in Court of Appeal
 - says victims' right to sue not solely dependent on existence of IPC order (or conviction)
 - IPC decides not to make order for wide variety of reasons, including that custodian responded adequately to breach [*PHIPA* s. 57(4)]
- Ontario Hospital Association also intervenes
 - supports hospital's view that proceeding barred



1. Collection of personal information

Order PO-3356-R, *Review of the Liquor Control Board of Ontario's personal information collection practices*

- Following judicial review for procedural fairness, IPC re-examined the collection practices of the LCBO in relation to purchases made by spirit, beer and wine clubs on behalf of their members
- **Same conclusion** as in Order PO-3171 - with one exception, the **collection** of members personal information when orders are submitted by clubs on behalf of their members was **not authorized** in accordance with s. 38(2) of *FIPPA*



Collection of personal information

Order PO-3356-R, *Review of the Liquor Control Board of Ontario's personal information collection practices*

- LCBO's arguments that the collection of personal information was in accordance with *FIPPA* were all rejected
 - Authorized by statute (no specific provisions)
 - For law enforcement (speculative)
 - Necessary for the administration of a lawfully authorized purpose (only with respect to instances where individual picks up their order)