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LAWYERS FOR EMPLOYERS

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In this Issue

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Bill C-27: Modernizing Canada's Privacy Laws and its Impact on Employers

On June 16, 2022, the federal government tabled Bill C-27, *Digital Charter Implementation Act, 2022*. If passed, Bill C-27 would provide stronger legal frameworks in the areas of privacy and data protection throughout the country. Bill C-27 aims to accomplish this through the introduction of three acts: *The Consumer Privacy Protection Act* (the *"CPPA")*, *The Personal Information and Data Protection Tribunal Act* (the *"PIPDTA")*, and *The Artificial Intelligence and Data Act* ("*AIDA*").

Overview:

The Bill aims to modernize the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*"), which is Canada's current federal private sector privacy law that came into effect more than 20 years ago.

The purpose of the *CPPA* remains essentially the same as *PIPEDA*; to establish rules governing the protection of personal information in a manner that recognizes individuals' right of privacy and organizations' need to collect, use or disclosure personal information for reasonable purposes. However, while the purpose remains essentially the same, the Bill acknowledges the modern context of digital information where personal information is constantly flowing across international borders and that commercial activity relies on the "analysis, circulation and exchange of personal information."

The scope of the *CPPA* will be the same as *PIPEDA*, applying to every organization that collects, uses or discloses personal information in the course of a "commercial activity" or is about an employee of a federal work, undertaking or business. Provinces without private-sector privacy legislation, such as Ontario, remain unregulated in areas concerning personal employee information, but to the extent the personal information is being shared internationally or being

used for any commercial purposes, the *CPPA* will still apply to provincial employers in Ontario.

The *CPPA* aims to strengthen the rights of individuals in respect of their personal information. However, this will place a heavier burden on employer organizations and create serious consequences if an employer violates the legislation. The latent implications of this modernized structure mean employer organizations will unavoidably have to take a more controlled, proactive approach to how they administer personal information management and all its related uses

The Bill proposes significant penalties for non-compliance. Organizations that are guilty of an indictable offence are liable to a fine of up to 5% of global revenue, or $25 million dollars, whichever is greater. There are also significant administrative monetary penalties of up to 3% of global revenue or $10 million dollars for an increased number of provisions under *CPPA*. For example, the *CPPA* imposes numerous obligations on organizations to which it applies, including the development of a privacy management program, including policies, practices and procedures, and failure to do so could result in significant administrative penalties.

The key elements of each proposed Act are outlined below.

The *CPPA* will implement the following:

- repeal and replace part one of *the Personal Information Protection and Electronic Documents Act*, which pertains to the protection of personal information in the private sector;
- increase control and transparency when Canadians' personal information is handled by organizations;
- the right to access and amend personal information;
- the right to disposal of personal information (up to and including permanent and irreversible deletion);
- the right to data portability and mobility;
- establish stronger protections for the collection, use, and disclosure of minors' personal information;
- rights related to the transfer of information to service providers;
- requirements to obtain valid consent;
- using plain language notifications that speak to purpose, manner of processing; personal information to be processed, and the names of any third parties to whom the personal information may be disclosed to;
- specified business activity exception, allowing employers to collect or use personal information without an individual's consent if the purpose of a specified business activity falls within an individual's reasonable expectation;
- requirements for organizations related to the implementation and maintenance of a formal privacy management program comprised of procedures, policies, and practices;
- give the Privacy Commissioner of Canada greater oversight; and
- create larger fines for non-compliant organizations.

The *PIPDTA* will implement the following:

- permit the creation of a new tribunal to facilitate the enforcement of the *CPPA*;
- recommend administrative monetary penalties, reaching a maximum of $10,000,000.00 or 3% of the organization's global gross revenues for the previous year, whichever is higher;
- egregious violations can lead to penalties at the greater range of $25,000,000.00 or 5% of the gross global revenues in the preceding year, whichever is greater; and
- if violation directly leads to an injury for an affected individual, a private right of action will allow individuals to bring a claim for damages against the wrongdoer organization.

The *AIDA* will implement the following:

- direct organizations using high-impact AI systems to adopt measures to identify, assess and mitigate the risk of harm and bias;
- create an AI and Data Commissioner to support the Minister of Innovation, Science and Industry with enforcement of the Act; and
- outline criminal prohibitions and penalties regarding the use of illegal data for AI development, regarding reckless deployment of AI causing serious harm, and regarding AI development involving fraudulent intent to cause economic loss.

Potential Implications for Employers

Federally regulated employers should initiate action on the assessment of their data policies and personal data management procedures. Although it is not anticipated that the Bill will come into force until 2023, employers should begin the process of developing enhanced privacy management systems and updating privacy policies recognizing the prevalence of digital information and the importance of protecting personal information.

Supreme Court of Canada denies Leave; Affirming E-consent as Valid and Binding

The Supreme Court of Canada (SCC) recently denied leave to appeal in *Battiston v. Microsoft Canada Inc.*, 2021 ONCA 727.

The SCC decision reinforces an Ontario Court of Appeal decision which concluded that an employee's consent through an internal e-consent process was a valid means of bringing an agreement, and in particular, termination provisions to the employee's attention. The decision also established that e-consent can limit incentive payments during the common law notice periods, if properly implemented.

After working at Microsoft for 23 years, an employee was terminated without cause. The trial judge awarded him 24 months' pay in lieu of notice, including damages for unvested stock awards despite Stock Award Agreement (the "Agreement") which stipulated that any unvested stock awards do not vest to an employee if employment comes to an end for any reason.

Every year, for 16 years, the employee participated in the stock award program; the employee received an email notification relating to his share awards. Each notification required the employee to accept the terms of the agreement. Acceptance was considered provided when the employee checked a box included in the email notification confirming that he had read, understood and accepted the stock award agreement. The email notifications contained the following language:

> *Congratulations on your recent stock award! To accept this stock award, please go to My Rewards and complete the online acceptance process. A record will be saved indicating that you have read, understood and accepted the stock award agreement and the accompanying Plan documents. Please note that failure to read and accept the stock award and the Plan documents may prevent you from receiving shares from this stock award in the future.*

At trial, the employee admitted to the court that he did not actually read the Agreement, and therefore did not know about the termination provisions. The employee asserted that he was under the impression that he would get the unvested stock if he was terminated.

The trial judge found that the termination provisions in the Agreement were not properly brought to the employee's attention. This, despite the fact that the Agreement was brought to the employee's attention by email every year, which he confirmed. The trial judge concluded that the "… email communication that accompanied the notice of the stock award each year does not amount to reasonable measures to draw the termination provisions" to the employee's attention. It is unclear what more the Employer could have done to bring this to the employee's attention.

Microsoft appealed to the Ontario Court of Appeal solely on the trial judge's conclusion that the respondent was entitled to unvested stock awards after his termination. The Court of Appeal agreed with the employer and concluded that the trial judge's findings regarding notification of the Agreement could not stand. In particular, the Court of Appeal stated that for 16 years, the employee expressly agreed to the terms of the Agreement. He made a conscious choice not to read it and misrepresented his acceptance of the terms to the employer when he clicked on the check box.

For employers, *Battiston* does not change the law regarding the implementation of enforceable agreements, which requires (i) termination clauses to be clear and unambiguous; (ii) terms must be consistent with all minimum statutory requirements and (iii) the employer must ensure that the employees are fully informed of the terms. However, *Battiston* does clarify that employers can implement automatic e-consent mechanisms to communicate the terms of an agreement with an employee, and this can be a valid and enforceable means of communicating with employees. An employee who repeatedly indicates to the employer that they have read, understood and accepted terms of an agreement by clicking on an e-consent box, will not be able to easily resile from that position later on or claim that they did not receive proper notification of terms of any agreement.

BC Supreme Court Finds Placing an Employee on Unpaid Leave for failing to Comply with Mandatory Vaccination Policy is not a Constructive Dismissal

In *Parmar v. Tribe Management Inc.,* the British Columbia Supreme Court recently became the first court in Canada to confirm that an employer is entitled to place an employee on an unpaid leave of absence for failing to comply with its mandatory vaccination policy. The Court confirmed that placing the non-unionized employee on unpaid leave was reasonable and, as such, was not a constructive dismissal.

The decision establishes a judicial willingness to uphold the implementation of reasonable vaccine policies adopted during the COVID-19 pandemic as a response to government and public health guidelines.

Background

The Plaintiff was an accounting executive, who worked for 19 years with a Vancouver-based company which provides condominium management services.

In the fall of 2021, the Employer announced it would be implementing a mandatory vaccine policy which required all 200+ employees to be "fully vaccinated" by the end of November 2021. The Policy provided employees with religious or medical reasons with an exemption.

The Plaintiff made her objection to the policy, known to the Employer. She did not seek an exemption based on religious or medical reasons, instead, the Plaintiff based her objections on unsupported literature and news about the potential risks associated with the available vaccines.

The Plaintiff proposed various alternatives, such as working exclusively from home. The Employer confirmed that there would be no further exemptions, and subsequently placed the Plaintiff on leave without pay on December 1, 2021.

On January 26, 2022, the Plaintiff resigned from her position and commenced litigation, claiming she was constructively dismissed.

Decision

By way of a summary trial, the Court considered whether it was reasonable for the Employer to place the Plaintiff on an unpaid leave of absence for failing to comply with their mandatory vaccination policy.

The Court noted that the Plaintiff's contract expressly provided that she would comply with all policies, which could be amended from "time to time" at the Employer's discretion.

Relying on the Supreme Court of Canada's matter of *Potter v. New Brunswick*, the court confirmed that the test for constructive dismissal involves considering two steps.

The first step applies where there has been a single act by the employer that may breach an essential term of the employment contract. This step requires the court to identify that an express or implied contract term was unilaterally changed. Once a breach is established, the court must determine whether a reasonable person, in the same situation as the employee, would have felt that the essential term of the contract was being substantially changed.

The second step in considering whether an employee was constructively dismissed is where an employer has taken a series of steps that, considered together made continued employment intolerable and demonstrate that the employer no longer intends to be bound by the terms of the employment contract.

The Court concluded that the employee had failed to meet the test for constructive dismissal concerning her administrative leave of absence, stating:

> [152] [The employee's] refusal to comply with the [the Policy] was a repudiation of her contract of employment. [The employer] did not accept that repudiation. Instead, it acted reasonably in putting her on an unpaid leave. She was not constructively dismissed from her position; she resigned. Any losses that she suffered from being put on unpaid leave were as a result of her personal choice not to follow [the employer's] reasonable [Policy]. […]
>
> [156] A reasonable employee in [the employee's] shoes would not have felt in all the circumstances than an unpaid leave as a consequence of failing to comply with the [Policy] was a substantial alteration of an essential term of the employment contract. This is confirmed by the fact that all but one of her fellow employees complied with the [Policy] and that most adult Canadians have since been vaccinated—many as a condition of continued employment.

In addition, the Court confirmed that a mandatory vaccination policy must be measured based on the information available at the time it was implemented. Given the severity of the COVID-19 pandemic, and the employer's obligation to provide a healthy work environment for their employees, the court held that the mandatory policy impacting an employee's bodily integrity was reasonable.

The Court concluded that the Plaintiff remained entitled to her personal beliefs, and at all times, had the sole discretion to make a choice between getting vaccinated or remaining unvaccinated. The Plaintiff knew the consequences of choosing not to be vaccinated, and she still chose that path, which ultimately did not support her claim for constructive dismissal

Takeaway

The Court's decision acts as a warning to employees who intend to claim constructive dismissal for their own failure to comply with an employer's reasonable mandatory vaccination policy. This case also demonstrates that an employee's unsupported personal beliefs do not supersede an employer's obligation to provide a healthy work environment.