

Privacy: What Laws Apply In Atlantic Canada?



With increasing digitization and the potential harm resulting from violations of an individual's privacy or unauthorized disclosure of one's personal information, employers must remain diligent in efforts to collect, retain and disclose personal information and promote a culture of respect regarding the privacy of their employees.

In Canada, legislation affecting the personal information and privacy of individuals exists at both the federal and provincial levels. The legislation, in each case, attempts to balance the privacy rights of individuals against other legitimate interests.

In addition to provincial and territorial legislation protecting privacy and personal information, the Ontario Court of Appeal recently recognized the tort of inclusion upon seclusion (also known as invasion of privacy) in *Jones v Tsige*.

Privacy Legislation

(a) Nova Scotia

In Nova Scotia, the *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5 ("FOIPPOP") governs privacy in the public sector. FOIPPOP applies to hospitals, public bodies, universities and, as a result of incorporation through Part XX of the *Municipal Government Act*, SNS 1998, c 18, municipalities. FOIPPOP addresses both access to records in the custody or control of public bodies and the regulation of the collection, use and disclosure of personal information by those bodies.

Nova Scotia has specific legislation aimed at protecting personal information from unauthorized disclosure outside of Canada. The *Personal Information International Disclosure Protection Act*, SNS 2006, c 3 ("PIIDPA") provides additional protection for personal information collected, used, or disclosed by public bodies and service providers who act on behalf of a public body. If an individual, business, or organization is working on behalf of a public body or municipality, the personal information collected, used or disclosed in performing those services may be protected under the PIIDPA. The PIIDPA makes it illegal to disclose personal information outside of Canada, or store personal information at, or allow it to be accessed from, locations outside Canada, unless authorized by the head of a public body or the responsible officer of a municipality if the storage or access is deemed

to meet the necessary requirements.

The Nova Scotia Information Access and Privacy Office is mandated to assist public bodies in the application of both the FOIPOP and the PIIDPA. Under s. 33 of the FOIPOP, the Governor in Council is required to appoint a review officer to administer the FOIPOP and the PIIDPA. In 2009, the *Privacy Review Officer Act*, SNS 2008, c 42 ("PROA") was proclaimed into law. The PROA empowers review officers with the authority to investigate complaints regarding how information shared with government or public bodies is handled. This statute provides for independent oversight with respect to all privacy decisions of public bodies in Nova Scotia.

(b) New Brunswick

The *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6 ("RTIPPA") and the *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05 ("PHIPAA") govern privacy in the public sector in New Brunswick.

The RTIPPA came into force on September 1, 2010 and repealed the *Right to Information Act*, SNB 1978, c R-10.3 and the *Protection of Personal Information Act*, SNB 1998, c P-19.1. The RTIPPA supports principles of openness and accountability, while holding public bodies accountable by ensuring that personal information in their care is securely protected and handled. The RTIPPA applies to public bodies including government departments, Crown corporations, regional health authorities, municipalities and universities. The RTIPPA prescribes a detailed framework for requesting information and mandates that public bodies respond to requests for information and protect personal information.

(c) Prince Edward Island

The *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01 ("FOIPPA") was enacted on November 1, 2002. Similar to other provincial legislation regarding access to, and protection of, personal information, the FOIPPA provides both a means of requesting access to records of public bodies and guidelines for the use of personal information by the government. The Office of the Information and Privacy Commissioner enforces the FOIPPA and conducts independent reviews of decisions of public bodies under the statute.

(d) Newfoundland and Labrador

In Newfoundland and Labrador, the *Access to Information and Protection of Privacy Act*, SNL 2002, c A-1.1 ("ATTIPA") and the *Personal Health Information Act*, SNL 2008 P-7.01 are the governing provincial legislation regarding access to, and protection of, personal information and personal health information. These statutes are similar in form and function to the legislation in other Atlantic Canadian provinces.

Newfoundland and Labrador's Privacy Act, RSNL 1990, c P-22 provides individuals with a statutory cause of action in the case that their privacy has been violated. This is essentially a statutory tort for invasion of privacy. This legislation addresses violations of privacy related to visual and auditory surveillance and listening to or recording of conversations. Individuals are responsible for enforcing claims under the *Privacy Act* – the Office of the Information and Privacy Commissioner does not pursue such matters. This legislation likely encompasses the developing common law tort of invasion of privacy.

Legislation declared to be substantially similar to PIPEDA in Atlantic

Canada

Private sector organizations in Atlantic Canada are governed by the federal *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 ("PIPEDA"). Under paragraph 26(2)(b) of PIPEDA, the Governor in Council can exempt an organization, a class of organizations, an activity or a class of activities from the application of PIPEDA with respect to the collection, use or disclosure of personal information that occurs within a province that has passed legislation deemed to be substantially similar to the PIPEDA.

The effect of the Orders in Council recognizing these statutes as substantially similar is to exempt the legislation from Part 1 of the PIPEDA in respect to the collection, use and disclosure of information that occurs in those provinces.

In Atlantic Canada, both Newfoundland and Labrador and New Brunswick have laws with respect to personal health information which have been deemed to be substantially similar to PIPEDA. In each instance, the statutes were deemed to be substantially similar following a request for review from each province.

The regulatory process to obtain the Order in Council, for any province, cannot begin until the provincial law is in force. Nova Scotia's *Public Health Information Act* recently came into force and is undergoing a review by the Privacy Commissioner to determine its suitability for designation as substantially similar to the PIPEDA. Prince Edward Island has no comparable legislation at this time.

In Newfoundland and Labrador, the substantially similar legislation is the *Personal Health Information Act*, SNL 2008, c P-7.01 ("PHIA"). The PHIA came into force on April 1, 2011.

In New Brunswick, the substantially similar legislation is the *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05 ("PHIPAA"). The PHIPAA came into force on September 10, 2010 and replaced the previous *Protection of Personal Information Act*, SNB 1998, c P-19.1.

Both the Newfoundland and Labrador and the New Brunswick Acts refer to health care providers as "custodians". Custodians are individuals or organizations that handle personal health information in order to provide or assist in the delivery of health care. The list is broad and organizations which collect, use, or disclose personal health information for the purpose of health care should determine whether they fall within the definition of custodian pursuant to the governing legislation.

Despite the substantially similar exemption, PIPEDA continues to apply to the collection, use or disclosure of personal information in connection with the operations of a federal work, undertaking or business in the respective province, as well as to the collection, use or disclosure of personal information outside the province. It also applies to personal health information collected, used or disclosed by non-custodians. Agents of health information custodians, who are brought within the purview of the Newfoundland and Labrador PHIA and the New Brunswick PHIPAA in section 52 of each Act, are also included in the PIPEDA exemption.

Nova Scotia's *Personal Health Information Act*, SNS 2010, c 41 came into force on June 1, 2013. This statute governs the collection, use, disclosure, retention, disposal and destruction of personal health information. The Nova Scotia government expects that this legislation will be declared to be substantially similar to PIPEDA in 2014.

Prince Edward Island's *Health Information Act* received Royal Assent on May 14, 2014. The legislation is yet to be proclaimed into force and, as such, the regulatory

process to obtain substantially similar designation has not yet begun.

Common law privacy: intrusion upon seclusion

The Ontario Court of Appeal recently confirmed the existence of the tort of intrusion upon seclusion as a category of a broader tort relating to invasion of privacy in *Jones v Tsige*. In that case, Tsige, in her capacity as a bank employee, accessed Jones' personal banking information on 174 occasions over a period of four years. Although she did not publish or distribute it, she used the information for her own purposes in a dispute with Jones' partner, Tsige's former husband. Tsige apologized for her actions and the court concluded she was embarrassed and contrite.

In order to establish the tort of intrusion upon seclusion, the Court of Appeal established a three-part test:

1. The defendant's conduct must be intentional (which includes recklessness).
2. The defendant must have invaded the plaintiff's private affairs or concerns without lawful justification
3. A reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish.

In awarding damages, the Ontario Court of Appeal held that damages are appropriate to remedy "intangible harm such as hurt feelings, embarrassment for mental distress, rather than damages for pecuniary losses," in an amount "sufficient to mark the wrong that has been done". Jones claimed \$70,000 in damages for invasion of privacy and exemplary damages of \$20,000. The court said the range of damages for this type of claim is up to \$20,000 and awarded Jones \$10,000.

Justice Sharpe went further to qualify the new tort in order to prevent the "opening of the floodgates" and said:

A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded: it is only intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.

Notably, proof of actual loss is not an element of the cause of action.

The tort of intrusion upon seclusion established in *Jones v Tsige* has been referred to in three recent Atlantic Canadian decisions including *Point Lodge Ltd. v Handshoe Trout*. Relying on *Jones v Tsige*, the court was "satisfied that in an appropriate case in Nova Scotia there can be an award for invasion of privacy." The facts in this case are that Mr. Handshoe, on his blog, disclosed the business and home address of one of the directors of the defendant corporation and his location when he was on vacation. He also made "extremely derogatory and homophobic comments of the most outrageous kind" about the directors of the corporation and their sexual orientation, including posting "doctored photographs" of a sexual nature depicting them. Justice Hood found that the case was not one which merited an award of damages for invasion of privacy.

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