ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2017-07

September 28, 2017

CASTLEDOWNS BINGO ASSOCIATION

Case File Number 002402

Office URL: www.oipc.ab.ca

Summary: A former employee of Jester's Gaming Lounge (operated by the Castledowns Bingo Association, the Organization) made a complaint, alleging that the Organization disclosed her personal information without authority under the *Personal Information Protection Act* (PIPA). The Complainant also alleged that the Organization failed to secure her personal information.

The Adjudicator determined that the Organization is a non-profit organization as defined in PIPA, but that operating the Lounge is a commercial activity.

The Adjudicator also determined that employees hired to perform functions necessary to carry out the commercial activity are hired "in connection with" that commercial activity. In this case, the Complainant was hired as a bartender in the Lounge, and her personal employee information was collected, used and/or disclosed in connection with a commercial activity.

However, the Adjudicator found insufficient evidence to conclude that the Organization disclosed the Complainant's personal information (or personal employee information) as alleged by the Complainant. The Adjudicator also found that the Organization did not fail to make reasonable security arrangements to protect her personal information.

Statutes Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 34, 52, 56, *Societies Act*, R.S.A. 2000, c. S-14, **Can:** *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c-5, ss. 4, 26.

Orders/Decisions Cited: Decision P2013-D-01, Orders P2005-001, P2006-008, P2014-05.

Court Cases Cited: *Lawrence v. Toronto Humane Society*, [2006] O.J. No. 2410, *ONEnergy Inc. v. Canada*, [2016] T.C.J. No. 186.

I. BACKGROUND

[para 1] The Complainant worked at Jester's Gaming Lounge (operated by the Castledowns Bingo Association, the Organization). She states that another employee, using the Organization's laptop for his personal use, left his Facebook messages open on the laptop. Messages sent by the Complainant to the other employee were seen by the Organization's manager of the lounge. The Complainant asserts the Organization disclosed this personal information to others in contravention of the Act.

[para 2] The Complainant requested that the Commissioner investigate the complaint, and the matter has now proceeded to inquiry.

II. ISSUES

[para 3] The Notice of Inquiry, dated February 22, 2017, states the issues for inquiry as the following:

Issue A: Did the Organization collect, use and/or disclose the Complainant's personal information as this term is defined in section 1(1) of PIPA?

If so,

Issue B: Does PIPA apply to the Organization?

PIPA applies to the collection, use and disclosure of personal information by organizations, including to the collection, use and disclosure by non-profit organizations where the collection, use or disclosure is in connection with commercial activities carried out by the non-profit organization. It is therefore necessary to consider the following questions in this case:

1. Is the Organization a non-profit Organization within the terms of section 56(1)(b) of PIPA?

2. If the Organization is a non-profit Organization, did it collect, use and/or disclose the Complainant's personal information in connection with a commercial activity within the terms of section 56(3) of PIPA?

   This question involves a consideration of whether the personal information of an employee who is employed in a commercial activity engaged in by a non-profit organization is collected "in connection with" that commercial activity.

If PIPA applies to the Organization in its dealings with the Complainant's personal information, then the following issues will be considered.

Issue C: Did the Organization disclose the information contrary to, or in compliance with, section 7(1) of PIPA (disclosure without either authority or consent)? In particular, did the Organization have the authority to disclose the information without consent, as permitted by sections 20 and/or 21 of PIPA?

Issue D: Did the Organization disclose the information contrary to, or in compliance with, section 19 of PIPA (disclosure for purposes that are reasonable and to the extent reasonable for meeting the purposes)?

Issue E: Did the Organization comply with section 34 of the Act (reasonable security arrangements)?

III. DISCUSSION OF ISSUES

Issue A: Did the Organization collect, use and/or disclose the Complainant's personal information, as this term is defined in section 1(1) of PIPA?

[para 4] "Personal information" is defined in section 1(1)(k) of the Act as "information about an identifiable individual."

[para 5] The personal information at issue consists of comments made between the Complainant and a friend on Facebook. These comments included medical information about the Complainant, and information about personal (non-work) relationships. This is the Complainant's personal information.

Issue B: If so, does PIPA apply to the Organization?

[para 6] PIPA applies to the collection, use and disclosure of personal information by organizations, including the collection, use and disclosure by non-profit organizations where the collection, use or disclosure is in connection with commercial activities carried out by the non-profit organization. As stated in the *Notice of Inquiry*, it is therefore necessary to consider the following questions in this case:

1. Is the Organization a non-profit Organization within the terms of section 56(1)(b) of PIPA?

[para 7] PIPA defines "organization" in section 1(1)(i):

> *1(1)(i) "organization" includes*
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> *(i) a corporation,*
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> *(ii) an unincorporated association,*
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> *(iii) a trade union as defined in the Labour Relations Code,*

(iv) a partnership as defined in the Partnership Act, and

(v) an individual acting in a commercial capacity,

but does not include an individual acting in a personal or domestic capacity;

[para 8] Therefore, the Organization is an organization for the purposes of PIPA.

[para 9] Section 56(1)(b) defines "non-profit organization" as follows:

56(1) In this section,

…

(b)"non-profit organization" means an organization

(i) that is incorporated under the Societies Act or the Agricultural Societies Act or that is registered under Part 9 of the Companies Act, or

(ii) that meets the criteria established under the regulations to qualify as a non-profit organization.

[para 10] The Organization is incorporated under the *Societies Act*; therefore it meets the definition of "non-profit organization" under section 56(1)(b)(i) of PIPA.

2. If the Organization is a non-profit Organization, did it collect, use and/or disclose the Complainant's personal information in connection with a commercial activity within the terms of section 56(3) of PIPA?

[para 11] As stated in the *Notice of Inquiry*, this question involves a consideration of whether the personal information of an employee who is employed in a commercial activity engaged in by a non-profit organization is collected "in connection with" that commercial activity.

[para 12] PIPA applies to non-profit organizations only to the extent that personal information is collected, used and/or disclosed in connection with a commercial activity. Sections 56(1)(a), (2), and (3) delineate the application of PIPA to non-profit organizations; these provisions read as follows:

56(1) In this section,

(a) "commercial activity" means

(i) any transaction, act or conduct, or

(ii) any regular course of conduct,

that is of a commercial character and, without restricting the generality of the foregoing, includes the following:

(iii) the selling, bartering or leasing of membership lists or of donor or other fund-raising lists;

(iv) the operation of a private school or an early childhood services program as defined in the School Act;

> *(v) the operation of a private college as defined in the Post-secondary Learning Act;*
>
> *...*
>
> *(2) Subject to subsection (3), this Act does not apply to a non-profit organization or any personal information that is in the custody of or under the control of a non-profit organization.*
>
> *(3) This Act applies to a non-profit organization in the case of personal information that is collected, used or disclosed by the non-profit organization in connection with any commercial activity carried out by the non-profit organization.*

[para 13] Decision P2013-D-01 includes a thorough analysis of the interpretation of "commercial activity" in past orders and case law. The adjudicator concluded that the term "commercial activity" should be interpreted broadly; he stated (at paragraph 23):

> My interpretation that there is a relatively broad test for determining what constitutes a commercial activity is consistent with the definition that is set out in section 56(1)(a) of PIPA itself. A commercial activity is any transaction, act, conduct, or regular course of conduct that is of a commercial character. While admittedly somewhat circular, the definition does not say that a commercial activity is an activity that is "commercial". Rather, an activity must have a commercial "character". To me, the definition is meant to capture activities that are more or less commercial, or appear to be commercial by most accounts. To adapt a colloquial phrase, if it looks like a commercial activity, and walks like a commercial activity, then it is a commercial activity. In short, PIPA is meant to apply to non-profit organizations that are carrying out activities as though they are a business. Moreover, the idea that profit is not determinative or even relevant, when deciding whether an organization is carrying out a commercial activity, is even clearer under PIPA, given that the organization in question is already a "non-profit" organization (unlike the organizations in question under PIPEDA, which refers to the notion of "commercial activity" to decide whether *any* organization is subject to that legislation). Virtually all non-profit organizations under PIPA do not have the objective of making an overall profit that is distributed to individuals associated with the organization.

[para 14] I agree with this conclusion. In this case, the Organization is a non-profit organization as defined in PIPA. The Organization runs Jester's Gaming Lounge, which it describes as serving alcohol and food from a concession, and operating VLTs. The Complainant was a waitress/bartender in the Lounge.

[para 15] The Organization states that it is not running a commercial activity because it is not operating one of the activities included in section 56(1)(a)(iii), (iv) or (v). However, the definition of "commercial activity" in section 56(1) is not limited to the activities in subsections (iii)-(v). Commercial activity also encompasses "any transaction, act or conduct, or any regular course of conduct that is of a commercial character", *including* the activities listed in subsections (iii)-(v).

[para 16] In my view, the sale of food and alcohol in a lounge constitutes "carrying out activities as though [it is] a business" as discussed in Decision P2013-D-01, and is therefore a commercial activity within the definition of PIPA.

[para 17] The Organization has noted that the Lounge is accessible only via the bingo hall and does not have a separate entrance. Possibly the Organization means to argue that the Lounge is a physical part of the bingo hall, and not a separate entity, such that it is a non-profit activity by virtue of the bingo hall being non-profit. However, since a non-profit entity can carry on a commercial activity (as is the case here), whether there is a separate entrance between the bingo hall and Lounge is irrelevant.

[para 18] As the Complainant was a waitress/bartender in the Lounge, her employment with the Organization was related to the operation of the Lounge. As I have found that the Organization is carrying on a commercial activity, I will consider whether the Complainant's personal information relating to her employment falls within the scope of PIPA by virtue of her position with the Lounge.

Application of PIPA to employees of non-profit organizations

[para 19] In Order P2014-05, the adjudicator considered a situation in which an employee of a non-profit organization (as defined in the Act) made an access request to that organization for his personal information from his employment file. Since that organization was a non-profit organization as defined in the Act, the adjudicator considered whether the collection, use, or disclosure of the employee's personal information was done in connection with a commercial activity carried out by that organization.

[para 20] The adjudicator concluded that managing employees (including hiring and firing employees) is not a commercial activity under PIPA. This conclusion was based, in part, on interpretations of a similar provision in the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA). She found that information in an employee file is not collected, used or disclosed by a non-profit organization in connection with a commercial activity. She stated:

> While organizations pay employees for their service, this alone does not meant that the personal information of employees is collected, used, or disclosed in connection with a commercial activity. Hiring and managing employees is not the commercial activity in which a for-profit business engages. A for-profit business may hire and manage employees in order to engage in commercial activities. For example, a commercial retailer is not in the business of hiring employees, but retail. Although non-profit organizations are similar to for-profit organizations in that they may both hire employees, it is not the fact that a for-profit organization hires, pays, and manages employees that give the organization's activities a commercial character.
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> I draw support for this conclusion from *International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers and its Local 736 v. E.S. Fox Ltd*., 2006 CanLII 468 (ON LRB), in which the Ontario Labour Relations Board rejected the argument that an organization's collection, use, or disclosure of personal information for employment-related purposes is a commercial activity within the terms of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c-5 (PIPEDA). In that decision, the Board interpreted section 4(1)(a) of PIPEDA and the meaning of "commercial activity" as defined in section 2 of that Act. The Board said:

> Under subsection 4(1) of PIPEDA, Part 1 of that Act applies to personal information that the company collects, uses or discloses in the course of "commercial activities". PIPEDA defines "commercial activity" as follows:
>
> > "commercial activity" means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.
>
> Although the definition of commercial activity is quite broad and, as a result, subsection 4(1)(a) of PIPEDA would include the collection, use or disclosure by the company of the personal information of its employees' for commercial purposes, where the employees' personal information is being collected, used or disclosed for employment-related purposes, subsection 4(1)(a) does not apply. First, the collection, use or disclosure by an organization of the personal information of its employees solely for employment-related purposes cannot reasonably constitute a "commercial activity" under any logical interpretation of that phrase. The mere fact that an organization carries on a commercial activity cannot, on its own, render the collection, use or disclosure of employee personal information for employment-related purposes into a commercial activity […]
>
> I agree with the reasoning in the foregoing excerpt. The information in an applicant's employee file is the information an employer collects and uses for the purpose of managing the employee relationship. This, in itself, is not a commercial activity. (At paras. 15-16)

[para 21] The relevant provision of PIPEDA is section 4, which states:

> *4(1) This Part applies to every organization in respect of personal information that*
>
> > *(a) the organization collects, uses or discloses in the course of commercial activities; or*
> >
> > *(b) is about an employee of, or an applicant for employment with, the organization and that the organization collects, uses or discloses in connection with the operation of a federal work, undertaking or business.*

[para 22] In order for employee information (other than employees of federal works, undertakings or businesses) to fall within the scope of PIPEDA, the employee information must have been collected, used and/or disclosed *in the course of* a commercial activity (section 4(1)(a)). In the 2006 Ontario Labour Relations Board decision cited in Order P2014-05, the Board decided that in order for employee information to be collected, used or disclosed *in the course of* a commercial activity, the management of employees itself must be the commercial activity. The Board then concluded that managing employees is not a commercial activity.

[para 23] I agree with the Ontario Labour Relations Board and the adjudicator in Order P2014-05 that managing employees is not itself a commercial activity. In other words, if a non-profit organization is not otherwise carrying on a commercial activity, personal information collected, used and/or disclosed for the purpose of managing an employee is not itself a commercial activity such that it falls within the scope of PIPA.

[para 24] However, that is not a full answer to the question in the present case. In this case, I have found that the Organization *is* carrying on a commercial activity – operating the Lounge. Therefore, the question in this case isn't whether managing the employment relationship is a

commercial activity. Rather, the question is whether managing the employment relationship is *connected to* operating the Lounge.

[para 25] Order P2014-05 may have been interpreted more broadly to mean that PIPA will never apply to personal information of employees of a non-profit organization carrying on a commercial activity, just as PIPEDA does not apply to personal information of employees of PIPEDA organizations (other than federal works, undertakings, or businesses). However, that interpretation is flawed insofar as it likens section 56(3) of PIPA to section 4(1)(a) of PIPEDA. The language in section 56(3) of PIPA is notably broader than that of 4(1)(a) of PIPEDA. As I will discuss, case law indicates that the phrase "in connection with" used in section 56(3) of PIPA must be interpreted more broadly than the phrase "in the course of", which is used in section 4(1)(a) of PIPEDA.

[para 26] A better parallel to section 56(3) of PIPA is found in section 4(1)(b) of PIPEDA (cited above), which states that PIPEDA applies to personal information of employees collected, used and/or disclosed *in connection with* the operation of a federal work, undertaking or business. That provision has been interpreted more broadly than section 4(1)(a) of PIPEDA. Under section 4(1)(b) the federal Privacy Commissioner's office has investigated the collection, used and/or disclosure of employee information by federal works, undertakings and businesses, including telecommunications businesses (PIPEDA Case Summary #2002-73), nuclear technology organizations (PIPEDA Case Summary #2003-198) and transportation services organizations (PIPEDA Case Summary #2005-287).

[para 27] To summarize, managing employees is not itself a commercial activity; PIPA does not apply to employee personal information collected, used and/or disclosed by a non-profit organization that does not carry on any commercial activities. However, section 56(3) of PIPA should not be interpreted to mean that PIPA will never apply to employee personal information collected, used and/or disclosed by non-profit organizations. Rather, where a non-profit organization carries on a commercial activity, PIPA will apply if the employee personal information was collected, used or disclosed *in connection with* that commercial activity.

Is employee personal information collected, used and/or disclosed "in connection with" a commercial activity?

[para 28] PIPA states that the collection, use, and/or disclosure of personal information by a non-profit organization must be *in connection with* a commercial activity, in order for PIPA to apply. As I have said, "in connection with" is much broader than "in the course of". "In the course of X" means "while you are doing X"; "in connection with X" indicates "associated with X" or "related to X". The question is whether managing the employment relationship is *connected to* a commercial activity; in this case, whether the disclosure of information about employees of the Lounge is information disclosed "in connection with" that commercial activity.

[para 29] This requires an analysis of the breadth of the phrase "in connection with".

[para 30] In *Lawrence v. Toronto Humane Society*, [2006] O.J. No. 2410, the Ontario Court of Appeal considered the scope of "connected with".

[para 31] In that case, a member of the Society had requested a copy of the Society's membership list; The Society had denied the request because the individual's reason for wanting the list was not "for purposes connected with" the Society. The individual sought the membership list to communicate concerns to members about the Society's relationship between management and the unionized employees. The Court of Appeal considered the scope of the phrase "connected with", stating (at paras. 82-85):

> Second, and importantly, the application judge's approach is inconsistent with the expansive reach of the phrase "purposes connected with the corporation" as used in s. 307. Section 307(6) of the Act defines the phrase "purposes connected with the corporation" in inclusionary and non-exhaustive terms.
>
> As well, according to its ordinary dictionary meaning, the word "connected" enjoys a wide construction. It is defined in the *Oxford English Reference Dictionary*, 2d ed. (Oxford: Oxford University Press, reprint 2001) (1996) at 305 as "1. joined in sequence. 2. (of ideas etc) coherent. 3. related or associated".
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> Judicial consideration of the scope of the phrase "connected with" or "connected to" is to the same effect. Recently, in *Mantini v. Smith Lyons LLP* (2003), 64 O.R. (3d) 505, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 344, this court considered the meaning of a contractual requirement that any dispute "in connection with" a partnership agreement be referred to arbitration for resolution. Justice Feldman, writing for the court, stated at para. 19:
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> > In the case of *Denison Mines Ltd. v. Ontario Hydro*, [1981] O.J. No. 807 (Q.L.) (Div. Ct.), the court interpreted the words "arising in connection with" as having "a very broad meaning". The court referred to the House of Lords decision in *Heyman v. Darwins*, [1942] A.C. 356, [1942] 1 All E.R. 337 (H.L.) where Lord Porter stated at p. 399 A.C, that the words " arising out of' ... have a wider meaning" than "under". The Divisional Court went on to hold that "the words arising in connection with' are at least as wide as the words arising out of' and have a very broad meaning" (para. 15). I agree with these interpretations and in particular with the conclusion that the phrase "in connection with" has a very broad meaning. In my view, it has a broader scope than the phrase "out of", as the dispute need only be connected with the Partnership Agreement, even if it does not arise from or out of a specific provision of the agreement.
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> A similar approach was adopted in *Toronto Transit Commission v. Ontario (Regional Assessment Commissioner, Region No. 9)* (1994), 23 M.P.L.R. (2d) 66 (Ont. Gen. Div.) in the context of determining the scope of a tax exemption clause under an Ontario municipal taxing statute, exempting from tax lands or easements used "for [a stipulated] purpose" or "in connection with" certain forms of transit. In that case, Lederman J. commented at paras. 9 and 14:
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> > The two phrases, "for the purpose of" and "in connection with" which qualify the use of the land in order to attract the two exemptions within s. 120(1), are commonly found in taxation legislation. One is clearly broader than the other. This was pointed out by Campbell J. in *Kitchener-Waterloo Real Estate Board Inc. v. Regional Assessment Commissioner, Region No. 21 et al.* (1986), 32 M.P.L.R. 1 at 11 (H.C.J.) as follows:

> The respondent suggests that the words "in connection with" are broader than the words "for the purpose of" and says that even if the activity is not caught by the latter, it is caught by the former. This is an accurate interpretation of the plain meaning of the words of the statute. *The word "connection" simply means that there is some relationship between two things or activities - that they have something to do with each other. The relationship need not be purposive to constitute a connection. Many activities might be carried out in connection with a particular object, as integrally related activities, without being carried out for the purpose of that object* [emphasis added].

[para 32] In *ONEnergy Inc. v. Canada*, [2016] T.C.J. No. 186, the Tax Court of Canada considered the scope of the phrase "in connection with" occurring in the *Excise Tax Act*. In that case, a company sold its commercial product and began winding down the commercial business. Several years after the sale of the product, the company pursued legal action against former directors of the company for misappropriation of proceeds from the sale of the commercial product. The issue was whether the company incurred the litigation costs "in connection with" the acquisition, establishment, disposition or termination of a commercial activity; in this case, the company terminated its commercial activity with the sale of the commercial product.

[para 33] The Court said (at paras. 13, 14, 17-19, citations omitted):

> Textually, the Parties are not that far apart in their view. It says what it says: there must be a connection, defined in the Oxford Dictionary online as "a relationship in which a person or thing is linked or associated with something else". The Shorter Oxford English Dictionary defines it as "relations between things one of which is bound up with or involved in another". These broad definitions appear to be in line with case law. In *Nowegijick v R.*, the Supreme Court of Canada grouped this phrase with "in respect of", "in relation to" and "with reference to":
>
> > The words "in respect of" are, in my opinion, words to the widest possible scope. They import such meanings as "in relation to", with "reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.
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> This view of a wide meaning was also accepted at the Ontario Court of Appeal in *Mantini v Smith Lyons LLP*:
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> > 74. In the case of Denison Mines Ltd. v. Ontario Hydro, [1981] O.J. No. 807 (QL) (Div. Ct.), the court interpreted the words "arising in connection with" as having "a very broad meaning". The court referred to the House of Lords decision in Heyman v. Darwins, [1942] A.C. 356, [1942] 1 All E.R. 337 (H.L.) where Lord Porter stated at p. 399 A.C. that the words "'arising out of' have a wider meaning" than "under". The Divisional Court went on to hold that "the words 'arising in connection with' are at least as wide as the words 'arising out of' and have a very broad meaning" (para. 15). I agree with these interpretations and in particular with the conclusion that the phrase "in connection with" has a very broad meaning. In my view, it has a broader scope than the phrase "out of", as the dispute need only be connected with the Partnership Agreement, even if it does not arise from or out of a specific

> provision of the agreement. I conclude that this clause represents a general or universal resort to arbitration, but for the exception for any matters expressly within the sole discretion or power of the Executive and Compensation Committees.

…

While I do not accept that a simple textual view of "in connection with" requires or introduces a concept of an integral connection, the case law does appear to suggest that the word cannot be looked at in a vacuum. Certainly, it is a broad expression but does not, I would suggest, even on a textual reading allow for the remotest of links, such as a link only arising by way of the "but for" test. Let me explore that further.

The Respondent raises the Supreme Court of Canada's decision in *Symes v Canada*[6] to dispute that a "but for" test is sufficient to link legal services at issue with the Spectrum Sale, even on a straight textual interpretation of the term "in connection with". The Respondent refers me to an interesting passage from the Supreme Court of Canada's decision in *Symes*:

> 73. Since I have commented upon the underlying concept of the "business need" above, it may also be helpful to discuss the factors relevant to expense classification in need-based terms. In particular, it may be helpful to resort to a "but for" test applied not to the expense but to the need which the expense meets. Would the need exist apart from the business? If a need exists even in the absence of business activity, and irrespective of whether the need was or might have been satisfied by an expenditure to a third party or by the opportunity cost of personal labour, then an expense to meet the need would traditionally be viewed as a personal expense. Expenses which can be identified in this way are expenses which are incurred by a taxpayer in order to relieve the taxpayer from personal duties and to make the taxpayer available to the business. Traditionally, expenses that simply make the taxpayer available to the business are not considered business expenses since the taxpayer is expected to be available to the business as a quid pro quo for business income received. This translates into the fundamental distinction often drawn between the earning or source of income on the one hand, and the receipt or use of income on the other hand.
>
> 74. It remains to consider the appellant's child care expenses in light of this discussion. First, it is clear on the facts that the appellant would not have incurred child care expenses except for her business. It is relevant to note in this regard that her choice of child care was tailored to her business needs. As a lawyer, she could not personally care for her children during the day since to do so would interfere with client meetings and court appearances, nor could she make use of institutionalized daycare, in light of her working hours. These are points which were recognized by the trial judge.
>
> 75. Second, however, it is equally clear that the need which is met by child care expenses on the facts of this case, namely, the care of the appellant's children, exists regardless of the appellant's business activity. The expenses were incurred to make her available to practise her profession rather than for any other purpose associated with the business itself.

> The Respondent makes the point, in line with these comments, that the cost of legal services to chase after directors, who the Appellant claims have absconded with its money, is a need that would have been fulfilled regardless of where the funds emanated from. I agree. I also agree with the Supreme Court of Canada that a "but for" test should be approached with caution. In this case, there seems little tie between the actual Spectrum Sale and the lawsuit to go after directors and executives who paid themselves funds that Look had in its account because of the sale. This seems to be the essence of the connection claimed, and it is very much a "but for" connection.

[para 34] The Court concluded:

> In any event, does the timing of the creation of the remuneration plan, create the connection to the Spectrum Sale? No, not in the sense I find a connection is required given the context and purpose. The directors' plan was in connection with funds arising from the completion of the Spectrum Sale, not with the sale itself. By the sale itself, I mean the negotiations leading up to the sale, the entering into of the sale, the implementation and enforcement of the sale. The legal activity two years later, which is the activity to be connected, is even one step further removed from the sale. I find the timing of the origin of the remuneration plan does not create the requisite connection.
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> …
> In summary, I distinguish between the termination of the business and the consequences flowing from such termination. I also distinguish between the wind up of the business and the wind down of the corporation. I emphasize it is the connection that is paramount, not the timing of the activity. And the connection must be one that on a textual, contextual and purposive interpretation recognizes the commercial expectation of a business supplying goods or services. In this case that means a connection between the litigation activity and the entering into, implementation of or enforcement of the Spectrum sale. There is simply no such connection. (At paras. 30 and 35)

[para 35] From the above passages, I conclude that "in connection with" is a broad term, but perhaps ought not to be interpreted as including *any* personal information that was collected, used and/or disclosed "but for" the commercial activity of a non-profit organization.

[para 36] An example where a "but for" test is overly expansive might be where a non-profit organization hires an accountant or bookkeeper to manage its funds; that employee would not be hired in connection with a commercial activity *just because* most (or all) of the funds were accumulated via a commercial activity.

[para 37] However, if an organization hires an individual for the purpose of carrying out a commercial activity, that individual is carrying out a commercial activity on behalf of the organization. Many past decisions of this Office have noted that organizations can act only through their employees. It seems logical to conclude that employees hired to perform functions necessary to carry out the commercial activity are hired "in connection with" that commercial activity. In my view, this is not an overly expansive application of a "but for" test.

[para 38] So on a textual analysis of section 56(3), employees hired for the purpose of carrying out a commercial activity of an organization are hired in connection with that commercial activity. Employee information collected, used and/or disclosed for the purpose of managing that employee is also done in connection with that commercial activity.

[para 39] However, a textual analysis of section 56(3) alone is not sufficient; the provision must be read in the context of the Act as a whole.

[para 40] The purpose of the Act is set out in section 3:

> *3 The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.*

[para 41] Non-profits under the Act fall within the definition of "organization" in section 1 of the Act; however, section 56(2) of PIPA excludes non-profit organizations from the scope of the Act entirely, except to the extent that personal information is collected, used and/or disclosed "in connection with any commercial activity carried out by the non-profit organization" (section 56(3)).

[para 42] This indicates that PIPA protects personal information that is collected, used and/or disclosed by a non-profit in the same manner as a for-profit organization would collect, use and/or disclose the personal information, in connection with an activity akin to one that a for-profit organization undertakes.

[para 43] In my view, finding that information about employees hired for the purpose of carrying out a commercial activity is captured by section 56(3), and therefore subject to PIPA, is consistent with the purpose of the Act.

[para 44] Further, had the Legislature intended to narrow the scope of section 56(3) to personal information collected, used, and/or disclosed in relation to a commercial activity, it could have used language to restrict the application of PIPA to financial transactions, or to personal information of customers or clients for example. It also could have used the language of section 4(1)(a) of PIPEDA ("in the course of") rather than the broader phrase appearing in section 4(1)(b) of PIPEDA ("in connection with").

[para 45] It is worth noting that the Alberta Legislature would have been cognizant of the PIPEDA language when drafting PIPA. This is because in order for Alberta organizations to be exempt from PIPEDA, PIPA has to be found to be "substantially similar" to PIPEDA. Section 26(2)(b) of PIPEDA states:

> *26(2) The Governor in Council may, by order,*
>
> …
>
> *(b) if satisfied that legislation of a province that is substantially similar to this Part applies to an organization, a class of organizations, an activity or a class of activities, exempt the organization, activity or class from the application of this Part in respect of the collection, use or disclosure of personal information that occurs within that province;*

[para 46] Therefore, the Alberta Legislature had narrower and broader examples of language used to delineate the scope of the legislation in terms of commercial activities and employees, and chose the broader language for section 56(3).

[para 47] Reading section 56(3) within the context of the Act as a whole supports my conclusion that employees hired for the purpose of carrying out a commercial activity of an organization are hired in connection with that commercial activity, and employee information collected, used and/or disclosed is also done in connection with that commercial activity.

Conclusion regarding the application of PIPA to an employee's personal information

[para 48] Personal information about employees who are hired to perform functions necessary to carry on a commercial activity is collected, used and/or disclosed in connection with a commercial activity. Therefore, the collection, use and/or disclosure must follow the rules in PIPA.

[para 49] This becomes more complicated when employees perform functions in relation to a commercial activity but also functions in relation to a non-commercial activity. In my view, personal information of employees hired by non-profit organizations to fulfil duties in relation to a commercial activity is generally subject to PIPA; this is the case even if those employees perform relatively minor or occasional duties related to non-commercial activities (such as updating contact information on membership lists). However, personal information of employees hired by non-profit organizations to fulfill duties in relation to non-commercial activities is generally not subject to PIPA; this is the case even if those employees perform relatively minor or occasional duties incidentally related to commercial activities (such as an occasional theatre production for which tickets are sold).

[para 50] When initiating an employment relationship, a non-profit organization must determine whether that relationship is in connection with a commercial activity, in whole or in part. If an employee is hired to undertake functions primarily in connection with a commercial activity, the collection, use and/or disclosure of their personal information will fall within the scope of PIPA.

[para 51] If an employee is hired for a non-commercial activity, then undertakes a new (or additional) activity that *does* relate to a commercial activity, this new relationship that must be reassessed. In other words, additional collection of personal information (or a new use of personal information already collected) may be subject to PIPA.

[para 52] This does not mean that personal information of an employee who works primarily on non-commercial activities, but who sells t-shirts once a year for a fundraiser, will necessarily fall within the scope of PIPA because a minor percentage of their work duties relates to a commercial activity. Personal information of that employee collected for the non-commercial activities is not subject to PIPA; if a new collection, use and/or disclosure is not necessary in relation to an incidental commercially-related activity, then PIPA may not be engaged with respect to that employee.

[para 53] In this case the Complainant's job duties seem to relate only to the sale of alcohol and food at the Lounge. The Organization has said that the duties of some employees may relate to both the Lounge and the bingo, but did not indicate this is the case for the Complainant. The Complainant has stated that her job duties related only to the Lounge. Therefore, I find that her personal information was collected, used, and/or disclosed in connection with a commercial activity.

Issue C: Did the Organization disclose the information contrary to, or in compliance with, section 7(1) of PIPA (disclosure without either authority or consent)? In particular, did the Organization have the authority to disclose the information without consent, as permitted by sections 20 and/or 21 of PIPA?

[para 54] The Complainant has the initial burden of proof, in that she has to have some knowledge, and adduce some evidence, regarding what personal information was disclosed; the Organization then has the burden to show that its disclosure of the Complainant's personal information was in accordance with PIPA (Order P2005-001 at para. 8; Order P2006-008 at para. 11).

[para 55] The Organization states that the Facebook posts were read on a laptop belonging to the Organization. An employee had been using the laptop for personal reasons and left his Facebook page open.

[para 56] The Organization states that the Facebook messages were read by employees of the Organization, but were not disclosed to other parties. The Organization also denies disclosing the information from the Facebook messages with other bingo or gaming lounges, as the Complainant alleges. It states in its initial submission:

> …if patrons and staff were having conversations regarding the messages it may have been as a result of the time the laptop could have been viewed by the public and prior to it being secured by the Organization. It is beyond the Organization to control the words and thought of the public. As far as the Organization is aware, there were no patrons at the bar at the time the laptop was removed and at no time were patrons of the bar advised of the contents of the laptop.

[para 57] The Complainant states that on November 17, 2015, an employee of the Organization disclosed her personal information to third parties; the Complainant states that this information was obtained from the Facebook messages copied by the Organization. In her complaint, she alludes to (but doesn't provide details of) a disclosure by an employee of the Organization to a family member. She states: "[I] am confident that even a manager is not allowed to share information from work that is private and personal even with family."

[para 58] The Organization argues that the Complainant did not provide evidence to support her allegations regarding disclosure:

> The Complainant has provided no information with respect to her November 27, 2015 incident. We have no information or proof as to who called whom, what information was requested, provided or any substantial evidence of same.

> The Complainant's personal information was never shared as alleged by her complaint.
> …

[para 59] The Complainant has not provided any evidence to support her allegation that the Organization disclosed her personal information contained in the Facebook messages to third parties. Although most of the Facebook messages were between the Complainant and one other individual, some of the messages include other users; it seems possible that information from these messages was shared with third parties by someone other than an Organization employee. It also seems possible, as the Organization pointed out, that the Facebook messages were read on the laptop by other individuals.

[para 60] There is no evidence before me that the Complainant's personal information from the Facebook messages was disclosed to third parties, or if it was disclosed, that it was disclosed by the Organization. Given this, and the existence of other reasonable avenues for third parties to have obtained the information (if they did), I find on a balance of probabilities that the Organization did not disclose the Complainant's personal information.

Issue D: Did the Organization disclose the information contrary to, or in compliance with, section 19 of PIPA (disclosure for purposes that are reasonable and to the extent reasonable for meeting the purposes)?

[para 61] As I have found that the Organization did not disclose the Complainant's personal information, I do not need to consider this provision.

Issue E: Did the Organization comply with section 34 of the Act (reasonable security arrangements)?

[para 62] Section 34 of the Act states:

> *An organization must protect personal information that is in its custody or under its control by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure, copying, modification, disposal or destruction.*

[para 63] The Organization states that "[u]pon realizing the contents [the laptop] was immediately removed to the manager's office and kept under lock and key." (May 19, 2017 submission)

[para 64] The Facebook messages were visible on a laptop owned by the Organization that was being used by an employee of the Organization for personal use, on the Organization's premises. While the Organization may permit its laptops to be used for personal reasons, that does not necessarily mean that the Organization is responsible for ensuring that personal information appearing on the laptops is secured.

[para 65] In this case, the Organization was not required to ensure that the employee accessing Facebook did not display his Facebook page in such a way that it could be seen by patrons of the Organization or other employees. This is true even though some of the personal information on that page was about another employee of the Organization.

[para 66] Once the Organization took the laptop and printed the Facebook messages, it had a duty to maintain those records so as to prevent unauthorized access, collection, etc. In this case, the Organization states that it maintains these records in a locked location. I have no evidence before me that the Organization has failed to make reasonable security arrangements to protect this information.

[para 67] The Complainant is also concerned about the maintenance of her personal information by the Organization. In her initial submission she states:

> I have not had an incident since submitting my request for Inquiry March 24, 2016 so I am to assume that [the Organization] stopped all outsiders from attacking me going forward. I am concerned that my personal information is still available for employees to see so would like to know that anything involving me personally is destroyed.

[para 68] I will first address the Complainant's request that the Organization destroy her personal information in the Facebook messages.

[para 69] The Organization states that the information was used solely for the purposes of section 15(1) and 21(1) of the Act. Those provisions authorize the collection and disclosure of personal employee information for the purpose of establishing, managing or terminating an employment relationship. The Organization also argued that the Facebook messages revealed "proof of dereliction of duty and possible misappropriation of the Organization's property and the Complainant was subsequently terminated." (Initial submission).

[para 70] In response, the Complainant states:

> How would my health issues, [an individual] being violently attacked, Scentsy party, funny memes etc...have anything to do with grounds to fire me? I have no issue with the fact that the association fired me for comments I made privately amongst friends but I most certainly have an issue with the amount of information the association felt necessary to print off and maintain that did not have anything to do with firing me. (May 24, 2017 submission)

[para 71] In her initial complaint, and request for inquiry, the Complainant did not object to the Organization's collection or use of her personal information, only its alleged disclosure. Therefore, I have not sought submissions regarding whether the Organization had authority to collect or use the Complainant's personal information for its stated purpose, and I will not make a determination on those issues. If the Organization had authority to collect and use the Complainant's personal information contained in the Facebook posts for employment purposes, then it might also have valid reasons (or be required) to retain that information. For these reasons, I cannot order the Organization to destroy the Complainant's personal information in these Facebook messages.

[para 72] The Complainant also expressed concern regarding the availability of her personal information to other Organization employees.

[para 73] Even though the Organization may be authorized to continue to keep the Complainant's personal information, that information cannot be used or disclosed (including to other employees of the Organization) without authority under the Act. The Organization must maintain these records in a manner that ensures they will not be used or disclosed further without authority, including to Organization employees that do not need to have access to that information.

IV. ORDER

[para 74] I make this Order under section 52 of the Act.

[para 75] I find that PIPA applies to the Organization's collection, use and disclosure of the Complainant's personal information, as it was collected, used and/or disclosed "in connection with" a commercial activity.

[para 76] I find that the Organization did not disclose the Complainant's personal information without authority.

[para 77] I find that the Organization did not fail to make reasonable security arrangements as required by the Act.

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Amanda Swanek
Adjudicator