

**CRITICAL ISSUES IN THE HIRING PROCESS:
THE DO'S AND DON'TS OF HIRING**

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Conducting an Effective Interview: The Do's and Don'ts of Hiring

1. Introduction

By the interviewing stage, the employer has already obtained much of the applicant's relevant job-related information from the employment application and the candidate's resume. Most employers, however, want to and are well advised to supplement the application process with at least one interview in order to determine if the applicant has the appropriate qualifications and will be compatible with other employees in the company.¹ Meeting the potential candidate in person provides the employer with the opportunity to assess his or her suitability for the particular position.

While it is important for employers to be able to ask a number of questions during the interviewing stage, employers should be aware of the many issues that could arise and result in violations of their statutory and common law obligations.

This paper will focus on some of those important issues relating to: privacy law, the Ontario *Human Rights Code*, negligent misrepresentation, inducement of candidates during the interview process and the *Accessibility for Ontarians with Disabilities Act* and its Regulations.

2. Privacy Obligations

(a) Common Law Privacy Obligations

Historically, there was no right to privacy. This change in 2012 with the seminal Court of Appeal for Ontario decision in *Jones v Tsige*,² which established the existence of the tort of "intrusion upon seclusion". In the decade prior to this decision, Ontario's courts had already begun addressing the issue of whether an invasion of privacy could form the basis of a separate cause of action.

In *LAC Minerals v. International Corona Resources*,³ the Supreme Court noted that there is an expectation that a party who receives private information will not misuse that

¹ Randall Scott Echlin & Christine M. Thomlinson, *For Better or For Worse: A Practical Guide to Canadian Employment Law*, 2d ed. (Aurora, Ont.: Aurora Professional Press, 2003) at 17

² *Jones v Tsige* 2012 ONCA 32 (CanLII)

³ [1998] 2 SCR 575

information for its own benefit. However, that case dealt with a misuse of confidential information and was not technically based upon a breach of privacy.

The need for greater protection of privacy began to be addressed in the context of advancing technology. In *Somwar v. McDonald's Restaurants of Canada Ltd.*,⁴ Justice D.G. Stinson stated:

With advancement in technology, personal data of an individual can now be collected, accessed (properly and improperly) and disseminated more easily than ever before. There is a resulting increased concern in our society about the risk of unauthorized access to an individual's personal information. The traditional torts such as nuisance, trespass, and harassment may not provide adequate protection against infringement of an individual's privacy interest. Protection of those privacy interests by providing a common law remedy for their violation would be consistent with Charter values and an "incremental revision" and logical extension of the existing jurisprudence⁵

Justice Stinson concluded that it was time for invasion of privacy to be recognized as a tort in its own right.⁶

In keeping with this trend, in *Shred-Tech Corp v. Viveen*,⁷ the Small Claims Court stated that the recognition of tort of invasion of privacy was the logical result of the acknowledgment of privacy rights.⁸ The court set out a list of considerations to assess if an invasion of privacy had occurred, which included:

1. Is the information acquired, collected, disclosed or published of a kind that a reasonable person would consider private?
2. Has the Plaintiff consented to acquisition or collection of the information?
3. If not, has the information been acquired or collected for a legal process or public interest reason? If so, what is that reason?
4. Has the Plaintiff consented to disclosure or publication of the information?

⁴ (2006), 79 OR (3d) 172 (SCJ)

⁵ Ibid at para 29

⁶ Ibid at para 32

⁷ [2006] OJ No. 4893 (SCJ)

⁸ Ibid at para 30

5. If not, has the information been disclosed or published for a legal process or public interest reason? If so, what is that reason?
6. Is the legal process or public interest reason put forward for acquisition, collection, disclosure or publication one that a reasonable person would consider outweighs the interest of the individual in keeping the information private?⁹

If the answers to the above questions reveal that the legal process or public interest reasons are outweighed by the private interest, or that no legal process or public interest reasons for acquisition, collection, disclosure or publication of the information existed, then an actionable breach of privacy has occurred.¹⁰ However, as this was a Small Claims Court decision it was not binding on any other court.

The law in Ontario remained unsettled in regards to whether a tort of invasion of privacy existed until 2012 when the Court of Appeal recognized a right of action for intrusion upon seclusion. Relying upon the decisions before it, including those referenced above, the court focused on privacy as an important value within the existing legal framework and upon the need to ensure breaches of privacy could be appropriate remedied.

The cause of action for intrusion upon seclusion was described as follows:

One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person¹¹

The elements of the cause of action include:

1. The defendant's conduct must be intentional (which includes recklessness);
2. The defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and
3. A reasonable person having regard to the invasion must find it highly offensive, causing distress, humiliation or anguish¹²

⁹ *Caltagirone v. Scozzari-Cloutier*, [2007] OJ No. 4003 at para 21

¹⁰ *Ibid* at para 22

¹¹ 2012 ONCA 32 (Can LII) at para 70

¹² 2012 ONCA 32 (Can LII) at para 71

In requiring the latter, the Court of Appeal signalled that only deliberate and significant invasions of personal privacy are compensable.

The cases dealing with common law privacy issues and intrusion upon seclusion help to establish some guidelines for employers in regards to when and how the personal information obtained during an interview can be used or released.

For example:

1. the interviewer should inform the candidate the reasons why the information is required;
2. the interviewer should ensure that the candidate's consent is obtained before using or disclosing any personal information to third parties for any reason; and
3. reasonable measures should be taken to make sure that information disclosed during the interview process is kept in a safe and private place.

By taking these measures, the employer will minimize the potential for unauthorized use of the candidates' personal information, and hence reduce the risk of violating its common law privacy obligations.

(b) Privacy Legislation

In addition to the common law privacy obligations, employers should also be aware of privacy legislation.

In April 2000, the federal government enacted the *Personal Information Protection and Electronic Documents Act*¹³ ("PIPEDA"). PIPEDA prescribes ground rules for the collection, retention and use of employee's personal information by employers, how that information should be treated, the procedure for monitoring compliance with the Act, and the consequences for failure to do so.

PIPEDA came into effect on January 1, 2001, and except for personal health information, it initially applied only to federal works and undertakings such as banks and airlines. Thereafter, the scope of the Act was extended to personal health information on January 1, 2002, and to all organizations within the constitutional authority of the provinces on January 1, 2004 except with respect to employment law governed by provincial legislation.

¹³ SC 2000 c 5

“Personal information” is defined in Section 21 of PIPEDA as all information about an identifiable individual, except for his or her name, title, business address or telephone number. The Privacy Commissioner of Canada has indicated that an employee’s email address also falls under the protection of PIPEDA.¹⁴

In the employment context, PIPEDA only applies to organizations which are classified pursuant to the Act as a federal work, undertaking or business. However, respecting privacy in the workplace makes good business sense. Therefore, organizations should keep the following guidelines in mind during the hiring process:

1. Collection of resume and/or application: the collection of resumes, regardless of whether the resumes are solicited or unsolicited, creates privacy obligations on organizations¹⁵
2. Identifying the purposes of collection of personal information at or before the time the information is collected: at the earliest opportunity the organization should notify the individual about what information is collected, why it is collected and how the information will be used and disclosed¹⁶
3. Consent to the collection, use and disclosure of personal information: explicit consent should be obtained by organizations at the earliest opportunity, this usually means at the interview stage.¹⁷ Only after this consent is obtained, should an employer conduct appropriate level of reference and background checks of candidates
4. During and after the interview process, organizations should ensure that any additional personal information collected from candidates and or other sources is reasonably within the scope of the identified purpose.¹⁸ Indiscriminate collection of personal information that does not reasonably

¹⁴ Stewart D. Saxe, *Ontario Employment Law Handbook: An Employer’s Guide*, 8th ed., (LexisNexis Butterworths, 2006) at 110

¹⁵ Terry McQuay, “Privacy Considerations for the Hiring Process in Canada” (2006) 3 Canadian Privacy Law Rev. 73 at 77

¹⁶ Ibid

¹⁷ Ibid at 79

¹⁸ Ibid

relate to the hiring process will expose organizations to unnecessary liability¹⁹

5. Retention of decision records: the notes that interviewers take during and after the interview process should be limited to information that is relevant and necessary to satisfy the identified purpose²⁰

The impact of PIPEDA on the interview process is similar to that of the common law privacy obligations. Employers should adopt the policy of informing the candidates, during the interview, the reasons why their personal information is required and how the company intends to use their personal information. Furthermore, before any reference and background checks of the candidates are made, interviewers should obtain the written consent of the candidates. PIPEDA also has an impact upon the types of notes and the extent of the notes an interviewer should take. The notes should be limited to relevant information and they should be kept only as long as it needed for the purposes for which it was collected.

3. Obligations Under the *Human Rights Code* (the “Code”)

Employment interviews are subject to the requirements of human rights legislation, which have been designed to ensure that applicants are not discriminated against on any prohibited grounds. Therefore, in the job application or the interview process, employers must be careful not to directly or indirectly ask any questions that fall under the prohibited grounds of the human rights legislation.

Section 5(1) of the *Code* prohibits discrimination in employment on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. Several of these terms are defined in section 10 of the *Code*.

Employers must be careful to ask only appropriate questions during the interview process and avoid questions that may directly or indirectly identify an individual based upon a prohibited ground under the *Code*.

¹⁹ Ibid

²⁰ Ibid

Race/Colour/Ancestry/Place of origin/Ethnic origin

Questions regarding birthplace, nationality of ancestors, spouse or other relatives, Canadian citizenship, landed immigrant status, permanent residency, naturalization, place of origin and request for proof of Canadian citizenship are all prohibited.²¹ Also, request for social insurance numbers (SIN) (since it can reveal information about place of origin or citizenship, however you can ask for this information once you have made a conditional offer of employment), birth or baptismal certificates and the name and location for schools attended are prohibited questions.²² Furthermore, questions about or relating to membership in organizations which are identified by a prohibited ground of discrimination such as an Anglo-Canadian organization are prohibited. Questions relating to “Canadian experience” and also likely prohibited.²³

However, questions regarding membership in a group served by a “service organization” if membership in the group served can be justified as required to do the job are permissible questions.²⁴

Section 24(1)(a) of the *Code* provides that a “service organization” is a religious, philanthropic, educational, charitable, fraternal or social institution or organization that primarily serve the interest of people identified by race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability. These organizations may give preference in the hiring to members of that group provided that such a preference is a reasonable and *bona fide* qualification due to the nature of the employment.²⁵

For example, a denominational school may make inquiries relating to creed (i.e. membership in a particular religion) if the job involves communicating religious values.²⁶

Do ask: Are you eligible to work in Canada?

²¹ David A. Ryan & Kimberly A. Parry, ed., “Do Your Application Forms and Employment Interviews Meet Human Rights Standards?” (2013) 34 *Employment Law* 121 at 135. See Philip H. McLaren, *Employment in Ontario*, 2d ed., (LexisNexis Butterworths, August 2007) at 1.30.

²² *Ibid*

²³ *Ibid* at 136

²⁴ *Ibid* at 136

²⁵ Philip H. McLaren, *Employment in Ontario*, 2d ed., (LexisNexis Butterworths, August 2007) at 1.33

²⁶ *Ibid* at 136

Do not ask: Any direct questions relating to the candidates national or ethnic origin

Do not ask: Any questions such as the location of primary and secondary schools the applicant attended.

Creed

Questions regarding religious affiliation, religious institutions attended, religious holidays, customs observed, willingness or unwillingness to work on a specific date which may conflict with the requirements of a particular faith (i.e. Saturday or Sunday Sabbath Days), requests for character references that would indicate religious affiliations and names of schools attended (this could also indicate religious affiliation) are prohibited questions.²⁷

However, if the employer serves a particular religious group and creed is a reasonable and genuine qualification because of the nature of the employment, questions regarding creed are permissible.²⁸

Do not ask: Do you observe religious holidays that require you to take time off the job?

Citizenship

Questions about or relating to the applicant's citizenship that do not fall within the exceptions provided in other sections of the *Code* are prohibited.²⁹ Where citizenship or permanent residence is required to foster participation in cultural, athletic, educational or trade activities which are restricted to Canadian citizens and permanent residents, or where an organization requires a senior executive position to be held by a Canadian citizen or someone who intends to obtain citizenship, questions relating to citizenship are permissible.³⁰

Do ask: Are you eligible to work in Canada?

Do not ask: Where are you from?

²⁷ Supra note 19 at 135

²⁸ Ibid at 136

²⁹ Supra note 19 at 135

³⁰ Ibid

Do not ask: Your name is very interesting, were you born here?

Sex/Gender Identity/Gender Expression

Questions regarding plans to get pregnant or use of birth control, and questions regarding surname (or birth name), form of address (i.e. Mr., Mrs., Miss), and relationship to person to be notified in case of emergency or insurance beneficiary (name can be provided but not their relationship) are prohibited questions.³¹ On the other hand, questions regarding or relating to gender, if it is a reasonable and genuine requirement for a particular job, such as employment in a shelter for battered women, are permissible questions.³²

Do not ask: Are you planning to get pregnant in the near future?

Sexual Orientation

All questions about or relating to sexual orientation including marital status (i.e. married, divorced, common law single or separated), spouse or partner, relationship to the person to be notified in case of emergency or insurance beneficiary (name can be given but not the relationship) are all prohibited questions.³³

Do not ask: Who do you live with?

Do not ask: Is your spouse or partner willing to transfer?

Age

Questions relating to age including, date of birth or request for birth or baptismal certificates, driver's license or school transcripts, etc. that might indicate age are prohibited.³⁴ However, if the employer serves a particular age group and/or if age requirements are reasonable and genuine to qualify for employment, questions about or relating to age are permissible.³⁵ Furthermore, although you should avoid questions relating to age or date of birth, you can ensure that an applicant is 18 years of age or older.

³¹ Ibid

³² Ibid

³³ Ibid at 137

³⁴ Ibid

³⁵ Supra note 10

Do not ask: I hope you don't mind, but how old are you?

Record of Offences

Questions regarding whether an applicant has ever been convicted of any offence (since this reveals a pardoned offence), has ever spent time in jail, has ever been convicted under provincial statute (*Highway Traffic Act*), or been convicted of an offence for which a pardon has been granted are prohibited questions.³⁶

However, where the job requires driving (school bus driver) questions relating to record of offence may be asked to determine if the applicant has a record of convictions under the *Highway Traffic Act*.³⁷ Furthermore, it is permissible to ask whether a person has ever been convicted of a federal criminal offence for which a pardon has not been granted.

Do ask: Have you ever been convicted of an offence under the *Criminal Code* which has not been pardoned?

Do not ask: Have you ever been arrested by a police officer or convicted of a crime under the *Criminal Code*?

Marital Status

Questions relating to marital status including, i.e. married, divorced, common law relationships, single or separated, surname before marriage, form of address (i.e. Mr., Mrs. Miss, Ms.), questions about spouse, relationship to person to be notified in case of emergency or insurance beneficiary (name can be given but not the relationship) are prohibited questions.³⁸ However, if the employer serves a particular group identified by marital status (i.e. single woman), and/or if marital status is a reasonable and genuine job requirement, questions regarding marital status are permissible.³⁹

Do not ask: Are you married?

Do not ask: Does your husband mind you working?

³⁶ Supra note 19 at 137

³⁷ Ibid

³⁸ Ibid at 135

³⁹ Ibid at 137-138

Family Status

Questions relating to family status including whether the person is married, divorced, is in a common law relationship, single or separated, maiden or birth name, form of address, children or dependents, childcare arrangements, questions about spouse, second income, relationship to person to be notified in case of emergency or insurance beneficiaries are prohibited questions.⁴⁰ However, questions regarding family status, if family status is a reasonable and genuine job requirement are permissible.⁴¹

It should be noted that section 24(1)(d) of the *Code* allows for an employer to grant or withhold employment or advancement in employment to a person who is a spouse, child or parent of the employer or an employee. Inquiries which would solicit information as to whether an applicant for employment is a spouse, child or parent of a current employee are therefore permissible.⁴²

Do ask: Will you be able to work the number of hours required in this job?

Do not ask: Do you have children?

Do not ask: How much time on average do you devote to your children on a daily basis?

Disability

Questions relating to disability including questions regarding health, illness, mental disorders, physical and intellectual limitations, handicaps, or intellectual impairments, medical history, learning disability, injuries or workers compensation claims, medication, membership in a medical or patient association (i.e. alcoholics anonymous) are prohibited questions.⁴³ Also, questions relating to or requirements that applicants undergo pre-employment medical examinations, unless there is a *bona fide* requirement (for example the position is for a bus driver), are prohibited questions.⁴⁴

⁴⁰ Ibid at 135

⁴¹ Ibid at 138

⁴² Ibid at 138. See Ontario *Human Rights Code* section 24(1)(d). Also see section relating to AODA compliance

⁴³ Ibid at 136

⁴⁴ Ibid at 137

Employers are required to provide reasonable accommodation, short of undue hardship to any disabled employee. If, during the interview the applicant requests accommodation for a disability related need, those needs can and should be discussed.⁴⁵ Questions about disability related needs should relate to the applicant's ability to perform the essential duties of the job. Any other disability related questions or requests, such as a request for a medical examination, should only be raised after a conditional offer of employment is made.⁴⁶

The offer of employment may be conditional upon a medical test designed to indicate the individual's ability to perform the job in a safe and satisfactory manner.⁴⁷ However, test subjects should not be treated as a class and each examination should be assessed on an individual basis.⁴⁸

Do ask: Is there anything which might prevent you from doing the job as we have described it?

Do ask: Is there any accommodation you may require?

Do not ask: How long have you been in a wheelchair?

Do not ask: Do you have a disability?

4. Negligent Misrepresentation / Enforceable Commitments

Special care should also be taken by employers in setting out the conditions of employment and the description of the new positions in order to avoid claims of misrepresentation. If interviewers make promises to a candidate that result in the candidate taking the job, only to discover later that he or she took the job based on inaccurate information and has suffered a loss because of it, the employer could face liability.⁴⁹

The Supreme Court of Canada in *Queen v. Cognos Inc.*⁵⁰ provided guidelines for circumstances under which an employer can be held liable for inaccurate or misleading

⁴⁵ Ibid at 137. See section relating to AODA obligations

⁴⁶ Ibid at 137

⁴⁷ Supra note 1 at 26

⁴⁸ Ibid

⁴⁹ Supra note 1 at 21

⁵⁰ (1993), 99 DLR (4th) 626 (SCC)

statements or representations made to prospective employees during the interview process. The Court stated that an interviewer has a duty to take reasonable care to avoid making misleading statements. The court also stated that the existence of a written contract of employment did not, of itself, void the legal effect of any pre-contractual representations made by the interviewer.⁵¹ As stated by Justice Iacobucci:

A duty of care with respect to representations made during pre-contractual negotiations is over and above a duty to be honest in making those representations. It requires not just that the representor be truthful and honest in his or her representation. It also requires that the representor exercise such reasonable care as the circumstances require to ensure that the representations made are accurate and not misleading⁵²

According to the Court's decision, judges will consider the following factors in determining whether the employer is liable for negligent misrepresentation:

1. The person making the representations to an applicant must have a "special relationship" with him or her sufficient to give rise to a duty of care;
2. The representation must be untrue, inaccurate or misleading;
3. The person making the misrepresentation must have been negligent;
4. The applicant must have relied on the misrepresentation in deciding to take the job;
5. The reliance must have caused the applicant to suffer a loss⁵³

Therefore, an organization and its representatives are under a duty of care, during the pre-employment interview, to exercise reasonable care and diligence in making representations regarding the employer, and the employment opportunity being offered.⁵⁴

It should be mentioned that companies are not always held liable for promises that they make during the interview process. For example, if a manager says that a job will likely be available soon, but due to matters outside of the manager's control, the job does not materialize, it is unlikely that a court will find the manager or the company negligent for

⁵¹ Peter Wilson & Allison Taylor, *The Corporate Counsel Guide to Employment Law*, 2d. ed., (Aurora: Canada Law Book Inc., 2003) at 32

⁵² Supra note 54 at 654

⁵³ Supra note 1 at 22

⁵⁴ Ibid

having made this misrepresentation.⁵⁵ Furthermore, an employer does not have to fully disclose all relevant information to the applicant, only what is required to give a fair representation of the job opportunity.⁵⁶

Employers should be careful not to make overreaching promises at the interview stage. This is particularly true if the company is aware of any reasons why it may not be able to follow through on its promises. Additionally, if there are aspects of a job that the employer is unsure of, or are subject to change or approval, the employer should be candid about such circumstances.⁵⁷

In summary, employers must be mindful of the following:

1. Statements, verbal communications and any documents provided to candidates during the hiring process concerning the employer and the employment opportunity must be accurate⁵⁸
2. It is not likely that a court will allow an employer to avoid liability for inaccurate or misleading statements, simply because the person making the statements believed them to be true⁵⁹
3. A written employment contract does not necessarily protect employers from liability arising from pre-employment statements. To minimize liability, the persons conducting the interview and meeting the applicant, should be instructed regarding the promises and assurances that they can, and cannot, make to the applicant regarding the job opening⁶⁰

5. Inducement

Similar to concerns regarding negligent misrepresentation, employers dealing with individuals who are thinking about switching jobs, should be careful that their efforts to convince the person to take the job do not involve promises that the employer cannot keep. If promises of job security, higher income or a chance at advancement are made during the interview process, and the applicant accepts the job based on those promises,

⁵⁵ Ibid at 23

⁵⁶ Randal Scott Echlin, "How to Avoid Traps When Hiring or Applying", *The Globe and Mail*, (7 December 1998)

⁵⁷ Ibid

⁵⁸ Supra note 55 at 33

⁵⁹ Ibid

⁶⁰ Ibid

and the employment relationship is then terminated by the new employer, the new employer may be required to provide a greater notice period upon termination.⁶¹

If new employees are lured from one job to another, but the new employer has been honest about the future of the organization, such as the possibility that the position will be subject to budget approval or that the employee will be considered probationary for the first six months, then the mere fact that switching jobs ultimately cost the employee, may not be a source of liability for the new employer.⁶²

One last note of caution, if the candidate is lured away and offered a position by the employer, and in doing so the candidate breaks an existing employment contract with his or her current employer, this former employer may have a claim against the new employer, based upon the tort of inducing breach of contract.⁶³

6. *Accessibility for Ontarians with Disability Act, 2005* (“AODA”)

AODA⁶⁴ was introduced in order to ensure the development, implementation and enforcement of standards for accessibility for Ontarians with disabilities related to goods, services, facilities, employment, accommodation and buildings. AODA’s mandate is to create greater accessibility in the province by 2025.

Various issues applicable to employment and hiring are contained in the Integrated Accessibility Regulation under AODA.⁶⁵ Large organizations (defined as those employers with greater than 50 employees) and small organizations (defined as those employers with at least one and fewer than 50 employees) will be required to comply with the employment standards prescribed in this Regulation by January 1, 2014 and January 1, 2015, respectively.

With respect to recruitment and hiring, employers must:

1. Notify employees and the public about the availability of accommodation for applicants with disabilities in its recruitment process;
2. Notify applicants selected to participate in the assessment or selection process that accommodations are available upon request. If an applicant

⁶¹ Supra note 1

⁶² Supra note 1 at 25

⁶³ Ibid at 32

⁶⁴ SO 2005 c 11

⁶⁵ O Reg

requests accommodation, the prospective employer must consult with the applicant about appropriate accommodation suited to the individual's needs.

3. When offering a position to an applicant, notify the applicant of the employer's policies for accommodating disabilities.

7. Conclusion

Although the hiring and interview process provides an excellent opportunity to determine the suitability of a proposed candidate for employment, a poorly conducted process can lead to legal liability. Proper preparation for an employer before the interview will include the following:

1. Identifying clearly the job responsibilities and expectations in all pre-interview publications, notices or advertisements, as well as during the interview process
2. Identifying any factors known to the employer, which may affect the nature of the position, or the security of the position
3. Consideration to what inducements, verbal or otherwise, may be provided to a potential candidate in return for their acceptance of the offer of employment, including recognition of any increased liability which may be incurred by the employer in making those inducements
4. Careful crafting of the questions to be asked at the interview in advance and ensuring everybody conducting interviews is fully aware of the types of questions which are prohibited
5. Ensuring compliance with statutory obligations with respect to privacy and other statutory requirements, including those under AODA.