



EXPECT THE BEST

**Blaney
McMurtry**
BARRISTERS & SOLICITORS LLP

CRITICAL ISSUES IN THE HIRING PROCESS

December 1, 2007

Elizabeth Forster

Blaney McMurry LLP

416.593.3919

eforster@blaney.com

and

Goli Garakani

Blaney McMurry LLP

416.593.2982

ggarakani@blaney.com

Conducting an Effective Interview: Do's and Don'ts During the Hiring Process

1. Introduction

By the interview stage, the employer has usually obtained some relevant job-related information from the employment application and the candidate's resume. Most employers, however, want to supplement the application process with at least one interview in order to determine if the applicant has the appropriate qualifications for the position, is suitable for the position, 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 interview stage, employers must be aware of 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 including: privacy law obligations, *Human Rights Code* (the "Code") obligations, negligent misrepresentation, and inducement of candidates during the interview process.

2. Privacy Obligations

In recent years, Ontario courts have begun recognizing invasion of privacy as a separate cause of action. In *Somwar v. McDonald's Restaurants of Canada Ltd.*,² 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 jurisprudence.³

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 (2006), 79 O.R. (3d) 172 (Sup. Ct. J.).

³ *Ibid* at para 29.

Justice Stinson then concluded that it was time for invasion of privacy to be recognized as a tort in its own right.⁴

In *Shred-Tech Corp v. Viveen*⁵ the court stated that the recognition of tort of invasion of privacy was the logical result of the acknowledgement of privacy rights.⁶ In determining whether invasion of privacy has occurred, the Small Claims Court decision in September 2007 set out the following:

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?
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?⁷

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.⁸

The Supreme Court of Canada in *LAC Minerals v. International Corona Resources*⁹ held that where a party receives private information in confidence, there is an expectation that

⁴ Ibid at para 32.

⁵ [2006] O.J. No. 4893 (Sup. Ct. J).

⁶ Ibid at para 30.

⁷ *Caltagirone v. Scozzari-Cloutier*, [2007] O.J. No. 4003 (Sup. Ct. (Sm. Cl.)) at para 21.

⁸ Ibid at para 22.

⁹ [1998] 2 S.C.R. 575.

it will not misuse that information for its own benefit. Despite these decisions, the law in Ontario is still unsettled in regards to whether a tort of invasion of privacy exists.

Nevertheless, cases dealing with common law privacy issues help in establishing some guidelines for employers in regards to when and how, the personal information obtained during an interview can be used or released. For example, the interviewer should inform the candidate the reasons why the information is required; 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; 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.

In addition to the common law privacy obligations, employers have to also be aware of statutes that deal with privacy issues. The federal government enacted the *Personal Information Protection and Electronic Documents Act*¹⁰ ("PIPEDA" or the "Act") in April of 2000. The Act prescribes ground rules for the 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 went into effect on January 1, 2001, and except for personal health information, it initially applied only to federal work 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.

"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. Furthermore, a recent clarification by the privacy commissioner of Canada has indicated that an employee's email address also falls under the protection of PIPEDA.¹¹

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

¹⁰ S.C. 2000, c. 5.

¹¹ Stewart D. Saxe, *Ontario Employment Law Handbook: An Employer's Guide*, 8th ed., (LexisNexis Butterworths, 2006) at 110.

1. Collection of resume and/or application: the collection of resumes, regardless of whether the resumes are solicited or unsolicited, creates privacy obligations on organizations.¹²
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 disclosed.¹³
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.¹⁴ 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.¹⁵ Indiscriminate collection of personal information that does not reasonably relate to the hiring process will expose organizations to unnecessary liability.¹⁶
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 purpose.¹⁷

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

¹² Terry McQuay, "Privacy Considerations for the Hiring Process in Canada" (2006) 3 Canadian Privacy Law Rev. 73 at 77.

¹³ Ibid.

¹⁴ Ibid at 79.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

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 is needed for the purposes for which it was collected.

3. Obligations Under the Human Rights 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 *Human Rights Code*¹⁸ (the “Code”) prohibits discrimination in employment on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability. It should be noted that several of these terms are defined in section 10 of the *Code*.

The following discussion is intended to assist interviewers with examples of permissible and prohibited questions based on enumerated grounds under section 5(1) of the *Code*:

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

Questions regarding birth place, 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 prohibited questions.¹⁹ 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.²⁰ 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.²¹

¹⁸ R.S.O. 1990, c. H. 19.

¹⁹ David A. Ryan & Kimberly A. Parry, ed., “Do Your Application Forms and Employment Interviews Meet Human Rights Standards?” (2007) 28 *Employment Law* 101 at 116. See Philip H. McLarren, *Employment in Ontario*, 2d ed., (LexisNexis Butterworths, August 2007) at 1.30.

²⁰ *Ibid.*

²¹ David A. Ryan & Kimberly A. Parry, ed., “Do Your Application Forms and Employment Interviews Meet Human Rights Standards?” (2007) 28 *Employment Law* 101 at 116.

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.²²

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.²³

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.²⁴

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

Do ask: Are you eligible to work in Canada?

Do not ask: Any questions such as which 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.²⁵

²² Supra note 6.

²³ Philip H. McLaren, *Employment in Ontario*, 2d ed., (LexisNexis Butterworths, August 2007) at 1.33.

²⁴ Ibid at 1.34.

²⁵ Ibid at 1.30.

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.²⁶

Do not ask: Will you be needing to take time off the job to observe religious holidays?

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.²⁷ 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.²⁸

Do ask: Can you legally work in Canada?

Do not ask: Where are you from?

Do not ask: Were you born here?

Sex

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.²⁹ 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.³⁰

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

²⁶ Ibid at 1.21.

²⁷ Supra note 8 at 117.

²⁸ Ibid.

²⁹ Supra note 10 at 1.21.

³⁰ Ibid at 1.30

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.³¹

Do not ask: Who do you live with?

Do not ask: Is your wife 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.³² 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.³³ 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.

Do not ask: 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.³⁴

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*.³⁵ Furthermore, it is permissible to ask whether a person has

³¹ Ibid at 1.31.

³² Supra note 8 at 117.

³³ Supra note 10 at 1.22.

³⁴ Ibid.

³⁵ Ibid.

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.³⁶ 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.³⁷

Do not ask: Are you married?

Do not ask: Does your husband mind you working?

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.³⁸ However, questions regarding family status, if family status is a reasonable and genuine job requirement are permissible.³⁹

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

³⁶ Ibid at 1.23.

³⁷ Supra note 8 at 117.

³⁸ Ibid.

³⁹ Supra note 10 at 1.23.

to whether an applicant for employment is a spouse, child or parent of a current employee are therefore permissible.⁴⁰

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. Also requirements that applicants undergo a pre-employment medical examinations, eligibility for or possession of a drivers license, unless there is a *bona fide* requirement (for example the position is for a bus driver), are prohibited questions.⁴¹

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.⁴² 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.⁴³

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.⁴⁴ However, test subjects should not be treated as a class and each examination should be assessed on an individual basis.⁴⁵

⁴⁰ Supra note 8 at 118. See Ontario Human Rights Code section 24(1)(d).

⁴¹ Supra note 10 at 1.23.

⁴² Ibid at 1.32.

⁴³ Ibid at 1.33. See supra note 8 at 117.

⁴⁴ Supra note 1 at 26.

⁴⁵ Ibid.

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

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

Do ask: Is there any accommodation you may require?

Do not ask: Do you have a disability?

4. Negligent Misrepresentation / Enforceable Commitments

Having discussed the important things that employers should keep in mind during the interview process, it should also be remembered that special care should be taken by employers in setting out the conditions of employment, and the description of the new positions. Furthermore, 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 significant liability.⁴⁶

The Supreme Court of Canada in *Queen v. Cognos Inc.*⁴⁷ provided guidelines for circumstances under which an employer can be held liable for inaccurate or misleading 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.⁴⁸ 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 misleading.⁴⁹

⁴⁶ Supra note 1 at 21.

⁴⁷ (1993), 99 D.L.R. (4th) 626 (S.C.C.).

⁴⁸ Peter Wilson & Allison Taylor, *The Corporate Counsel Guide to Employment Law*, 2d. ed., (Aurora: Canada Law Book Inc., 2003) at 32.

⁴⁹ Supra note 54 at 654.

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 loss.⁵⁰

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.⁵¹

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, based on his/her past experience and present knowledge, 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 having made this misrepresentation.⁵² 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.⁵³

Employers should be careful not to make overreaching promises at the interview stage. This is specially 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 of which the employer is unsure, or which are subject to change or approval, the employer should be candid about such circumstances.⁵⁴

In summary, employers must be mindful of the following points:

⁵⁰ Supra note 1 at 22.

⁵¹ Ibid.

⁵² Ibid at 23.

⁵³ Randal Scott Echlin, "How to Avoid Traps When Hiring or Applying", *The Globe and Mail*, (7 December 1998).

⁵⁴ Ibid.

1. Statements, verbal communications and any documents provided to candidates during the hiring process concerning the employer and the employment opportunity must be accurate.⁵⁵
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 true.⁵⁶
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 opening.⁵⁷

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, 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.⁵⁸

It should be noted that 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.⁵⁹

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

⁵⁵ Supra note 55 at 33.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Supra note 1.

⁵⁹ Supra note 1 at 25.

or her current employer, this former employer may have a claim against the new employer, based upon the tort of inducing breach of contact.⁶⁰

6. **Conclusion**

Although the interview process provides an excellent opportunity to determine the suitability of a proposed candidate for employment, a poorly conducted interview 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.
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 a recognition of any increased liability which may be incurred by the employer in making those inducements.
4. Carefully craft the questions to be asked at the interview in advance. Make sure everybody conducting interviews is fully aware of the types of questions which are prohibited.

⁶⁰ Ibid at 32.