

Remarks by Teresa Scassa to the Standing Committee on Social Policy of the
Ontario Legislature

Hearing on Bill 88, An Act to enact the Digital Platform Workers' Rights Act,
2022 and to amend various Acts

March 29, 2022

Thank you for this invitation to appear before the Standing Committee on Social Policy. My name is Teresa Scassa and I hold the Canada Research Chair in Information Law and Policy at the University of Ottawa.

The portion of Bill 88 that I wish to address in my remarks is that dealing with electronic monitoring of employees in Schedule 2. This part of the Bill would amend the *Employment Standards Act* to require employers with 25 or more employees to put in place a written policy on electronic monitoring and to provide employees with a copy. This is an improvement over having no requirements at all regarding employee monitoring. However, it is only a small step forward, and I will address my remarks to why it is important to do more, and where that might start.

Depending on the definition of electronic monitoring that is adopted (and I note that the bill does not contain a definition), electronic monitoring can include such diverse practices as GPS tracking of drivers and vehicles; cellphone tracking; and video camera surveillance. It can also include tracking or monitoring of internet usage, email monitoring, and the recording of phone conversations for quality control. Screen-time and key-stroke monitoring are also possible, as is tracking to measure the speed of task performance. Increasingly, monitoring tools are paired with AI-enabled analytics. Some electronic monitoring is for workplace safety and security purposes; other monitoring protects against unauthorized internet usage. Monitoring is now also used to generate employee metrics for performance evaluation, with the potential for significant impacts on employment, retention and advancement. Although monitoring was carried out prior to the pandemic, pandemic conditions and remote work have spurred the adoption of new forms of electronic monitoring. And, while electronic monitoring used to be much easier to detect (for example, surveillance cameras mounted in public view were obvious), much of it is now woven

into the fabric of the workplace or embedded on workplace devices and employees may be unaware of the ways in which they are monitored and the uses to which their data will be put. The use of remote and AI-enabled monitoring services may also see employee data leaving the country, and may expose it to secondary uses (for example, in training the monitoring company's AI algorithms).

An amendment that requires employers to establish a policy that gives employees notice of any electronic monitoring will at least address the issue of awareness of such monitoring, but it does very little for employee privacy. This is particularly disappointing since there had been some hope that a new Ontario private sector data protection law would have included protections for employee privacy. Privacy protection in the workplace is typically adapted to that context – it does not generally require employee consent for employment-related data collection. However, it does set reasonable limits on the data that is collected and on the purposes to which it is put. It also provides for oversight by a regulator like the Ontario Information and Privacy Commissioner (OIPC), and provides workers with a means of filing complaints in cases where they feel their rights have been infringed. Privacy laws also provide additional protections that are increasingly important in an era of cyber-insecurity, as they can address issues such as the proper storage and deletion of data, and data breach notification. In Canada, private sector employees have this form of privacy protection in Quebec, BC and Alberta, as well as in the federally-regulated private sector. Ontarians should have it too.

Obviously, Bill 88 will not be the place for this type of privacy protection. My focus here is on changes that could be made to Bill 88 that could enhance the small first step it takes on this important issue.

First, I would encourage this committee to recommend the addition of a definition of ‘electronic monitoring’. The broad range of technologies and applications that could constitute electronic monitoring and the lack of specificity in the Bill could lead to underinclusive policies from employers who struggle to understand the scope of the requirement. For example, do keypad entry systems constitute electronic monitoring? Are vehicular GPS systems fleet management devices or electronic employee monitoring or both? I propose the following definition:

“electronic monitoring” is the collection and/or use of information about an employee by an employer, or by a third party for the benefit of an employer, by means of electronic equipment, computer programs, or electronic networks. Without limiting the generality of the forgoing, this includes collection and use of information gathered by employer-controlled electronic equipment, vehicles or premises, video cameras, electronic key cards and key pads, mobile devices, or software installed on computing devices or mobile devices.

Ontario’s Privacy Commissioner has made recommendations to improve the employee monitoring provisions of Bill 88. She has proposed that it be amended to require a digital copy of all electronic-monitoring policies drafted to comply with this Bill to be submitted to her office. This would be a small additional obligation that would not expose employers to complaints or liability. It would allow the OIPC to gather important data on the nature and extent of electronic workplace monitoring in Ontario. It would also give the OIPC insight into current general practices and emerging best practices. It could be used to understand gaps and shortcomings. Data gathered in this way could help inform future law and policy-making in this area. For example, I note that the Lieutenant Governor in Council will have the power under Bill 88 to make regulations setting out additional requirements for electronic monitoring policies, terms or conditions of employment

related to electronic monitoring, and prohibitions related to electronic monitoring. The Commissioner's recommendation would enhance both transparency and data gathering when it comes to workplace surveillance.

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The following definition will be proposed as part of the remarks by Teresa Scassa, Canada Research Chair in Information Law and Policy, to the Standing Committee on Social Policy of the Ontario Legislature

Proposed definition of “electronic monitoring” for Bill 88, Schedule 2:

“electronic monitoring” is the collection and/or use of information about an employee by an employer, or by a third party for the benefit of an employer, by means of electronic equipment, computer programs, or electronic networks. Without limiting the generality of the forgoing, this includes collection and use of information gathered by employer-controlled electronic equipment, vehicles or premises, video cameras, electronic key cards and key pads, mobile devices, or software installed on computing devices or mobile devices.