CCH
a Wolters Kluwer business

PaySource®

ALBERTA PERSONAL INFORMATION PROTECTION AMENDMENTS NOW LAW

May 2010
Number 179

By: Theo Anne Opie, LL.B. © CCH Canadian Limited.

In late fall 2009, the Alberta government introduced legislation (Bill 54, the *Personal Information Protection Amendment Act, 2009*) to expand the protection of personal information set out in the *Personal Information Protection Act* ("PIPA").

Bill 54 (now S.A. 2009, c. 50) received Royal Assent on November 26, 2009, and was proclaimed law May 1, 2010. The commentary in the *Privacy* section of PAYSOURCE has been revised to reflect the changes.

Bill 54's amendments to PIPA include requiring significant security breaches to be reported to the Information and Privacy Commissioner as soon as possible; requiring that Albertans be notified if their personal information is processed outside of Canada; ensuring the application of consistent standards for handling the personal information of employees; and streamlining the Information and Privacy Commissioner's processes.

What follows below is an overview of the more significant changes contained in the amending legislation, especially those changes related to personal employee information:

- **Definitions**

  – The definition of "business contact information", which is excluded from the protection of PIPA if the collection, use, or disclosure of business contact information is for the purposes of enabling the individual to be contacted in relation to the individual's business responsibilities, has been amended to clarify that this includes e-mail addresses.

Inside

– The definition of "employee" has been expanded to include a partner or a director, officer, or other office-holder of the organization.

– "Personal employee information" now means, in respect of an individual who is a potential, current, or former employee of an organization, personal information reasonably required by the organization for the purposes of (i) establishing, managing, or terminating an employment or volunteer-work relationship, or (ii) managing a post-employment or post-volunteer-work relationship between the organization and the individual, but does not include personal information about the individual that is unrelated to that relationship.

- **Notification Respecting Service Provider Outside Canada**

– An organization that uses a service provider outside Canada to collect personal information about an individual or that transfers personal information about an individual to a service provider outside Canada, must, before or at the time of collecting or transferring the information, notify the individual in writing or orally as to how the individual may obtain access to written information about the organization's policies and practices with respect to service providers outside Canada, and the name or position name or title of a person who is able to answer on behalf of the organization the individual's questions about the collection, use, disclosure, or storage of personal information by service providers outside Canada for or on behalf of the organization.

– Notification is required under the Act only when personal information is collected with the individual's consent. For example, information about "clients" of the organization would require the individual's consent and therefore if transfered to a service provider outside Canada would require the above notification. However, consent does not apply to personal employee information.that is collected, used or disclosed without consent in accordance with PIPA's provisions for employee information.

- **Collecting, Using and Disclosing Personal Employee Information**

– An organization may collect, use, or disclose personal employee information about an individual without the consent of the individual if (a) the information is collected, used, or disclosed solely for the purposes of (i) establishing, managing, or terminating an employment or volunteer-work relationship, or (ii) managing a post-employment or post-volunteer-work relationship, between the organization and the individual; (b) it is reasonable to collect, use, or disclose the information for the particular purpose for which the information is being collected, used, or disclosed; and (c) in the case of an individual who is a current employee of the organization, the organization has, before collecting, using, or disclosing the information, provided the individual with reasonable notification that personal employee information about the individual is going to be collected, used, or disclosed and of the purposes for which the information is going to be collected, used, or disclosed. As well, an organization may disclose personal information about an individual who is a current or former employee of the organization to a potential or current employer of the individual without the consent of the individual if (a) the personal information that is being disclosed was collected by the organization as personal employee information, and (b) the disclosure is reasonable for the purpose of assisting that employer to determine the individual's eligibility or suitability for a position with that employer.

PAYSOURCE

Published monthly as the newsletter complement to PAYSOURCE, by CCH Canadian Limited. For subscription information, see your CCH Account Manager or call 1-800-268-4522 or (416) 224-2248 (Toronto).

For CCH Canadian Limited
DAVID IGGULDEN, B.A., M.L.S., Associate Editor
(416) 224-2224, ext. 6369
e-mail: David.Iggulden@wolterskluwer.com

CHERYL FINCH, B.A., LL.B., Director of Editorial
Legal and Business Markets
(416) 228-6128
e-mail: Cheryl.Finch@wolterskluwer.com

JIM ITSOU, B.Com., Marketing Manager
(416) 228-6158
e-mail: Jim.Itsou@wolterskluwer.com

Editorial Board
THEO ANNE OPIE, LL.B.,
Member, Canadian Payroll Association's
Federal Government Relations Advisory Council
e-mail: Teddy.Opie@wolterskluwer.com

90 Sheppard Ave. East, Suite 300
Toronto, Ontario M2N 6X1

- **Access to Records and Provision of Information**

  – Where an individual, including an employee, makes a request in writing to an organization (a) to provide the individual with access to personal information about the individual, or (b) to provide the individual with information about the use or disclosure of personal information about the individual, the organization must provide the applicant with access to, and/or the use of, the applicant's personal information where that information is contained in a record that is in the custody or under the control of the organization. Where an organization refuses to provide the information requested, the organization must inform the applicant of the name of the person who can answer on behalf of the organization the applicant's questions about the refusal, and that the applicant may ask for a review of the decision.

- **Notification of Loss or Unauthorized Access or Disclosure**

  – An organization having personal information under its control must, without unreasonable delay, provide notice to the Commissioner of any incident involving the loss of, or unauthorized access to, or disclosure of, personal information where a reasonable person would consider that a real risk exists of significant harm to an individual as a result of the loss or unauthorized access or disclosure. The Commissioner may require the organization to notify individuals to whom there is a real risk of significant harm as a result of the loss, unauthorized access, or disclosure.

- **Retention and Destruction of Information**

  – An organization may retain personal information only for as long as the organization reasonably requires the personal information for legal or business purposes. Within a reasonable period of time after an organization no longer reasonably requires personal information for legal or business purposes, the organization must (a) destroy the records containing the personal information, or (b) render the personal information non-identifying so that it can no longer be used to identify an individual.

- **Offences and Penalties**

  – Three new offences have been added to the to PIPA: (1.) obstructing the Commissioner by disposing of, altering, falsifying, concealing, or destroying evidence relevant to an investigation or inquiry by the Commissioner; (2.) failing to provide notice to the Commissioner of the loss of, unauthorized access to, or disclosure of personal information (discussed above), and (3.) contravening the existing prohibition of adverse employment action against a "whistleblower". The existing offences against the improper collection, use, or disclosure of personal information are now strict liability offences. That is, prior to the amendments, the actions leading to the offence were required to be "wilful". Bill 54 deletes this word from the offence provisions rendering it no longer necessary to prove an intent to commit the offence. The time limit for prosecuting an offence has been increased from six months to two years after the commission of the alleged offence. Finally, A person who commits an offence is liable, in the case of an individual, to a fine of not more than $10,000, and in the case of a person other than an individual, to a fine of not more than $100,000

- **Review of PIPA**

  – The required review of PIPA has been extended. A special committee of the Legislative Assembly must begin a comprehensive review of PIPA and the regulations made under it by July 1, 2015, and thereafter, every six years after the date on which the previous special committee submits its final report.

Hot News Items

Prince Edward Island Employment Standards Amendments In Force October 1, 2010

Bill 2, the *Employment Standards Act, 2009*, (now S.P.E.I. 2009, c. 5), which was previously summarized in November 2009 issue of PAYSOURCE, No. 173 and the February issue of PAYSOURCE, No. 176 will come into force on October 1, 2010.

The amendments will be incorporated into the employment standards section of PAYSOURCE prior to the October 1, 2010 effective date.

The amendments to the Act include changes that permit greater flexibility within the legislation for employers and employees to address overtime and vacation pay compensation. The amendments also include changes that provide enhanced benefits or access to existing employment standards as well as the introduction of new standards such as directors' liability and continuity of employment provisions.

What follows below is an overview of the more significant changes contained in the amending legislation:

- **Minimum Wage:** The amendments require that the three-hour call-in pay must be paid at the employee's

regular rate. As well, the amendments specifically provide that tips and gratuities are the property of the employee to whom or for whom they are given and provide restrictions on how an employer may deal with tips, how they may be pooled and how they are to be paid. Finally, the Employment Standards Board will not only be authorized to establish a general minimum wage but will also be able to establish different minimum wage rates for classes of employees.

- **Payment of Wages, Payroll Records and Protection of Pay:** The amendments clarify which modes of payment to an employee are acceptable; require the pay statements given to employees to include the gross amounts of vacation pay and pay in lieu of vacation; authorize the use of electronic pay statements by an employer; require an employer to give an employee at least one pay period of notice before reducing the employee's regular wage rate; authorize pay deductions from an employee's pay regarding group benefit and savings plans that the employee participates in or requests; prevent an employer from withholding or deducting amounts from the pay of an employee for faulty work, damaged property or in cases where a customer didn't pay for a product or service; require an employer to record an employee's overtime hours in the employer's payroll information; and provide for the giving and reimbursement of deposits for uniforms used by employees and dealing with cash shortages during an employee's shift.

- **Vacations and Vacation Pay:** The amendments provide for an additional week of paid vacation after eight continuous years of employment and to receive six per cent vacation pay. The amendments also permit an employee who works less than 90 per cent of the normal working hours during the vacation year to waive his or her entitlement to the vacation with pay and rather only receive the vacation pay he or she is entitled to.

- **Hours of Work and Overtime:** The amendments will permit an employee to bank overtime hours worked by that employee. The overtime hours banked by the employee must be paid by the employer at a rate of 1.5 hours of paid time off for each hour of overtime worked. The employee must be given such paid time off no later than three months after the overtime hours were worked.

- **Maternity and Parental Leave:** The amendments extend the leave to employees who have worked at least 20 weeks in the preceding 52 weeks. The amendments also provide for a five week extension of such leave where the child has a physical, psychological or emotional condition requiring an additional period of parental care.

- **Other Leaves of Absence:** The amendments: grant an employee who has been employed by the same employer for a continuous period of at least five years, one day of paid sick leave per year in addition to any unpaid leave that the employee is entitled; provides a new definition of family member with respect to compassionate care leave; grants of one day of paid bereavement leave and up to two consecutive days of unpaid bereavement leave, if the deceased person was a member of the immediate family of the employee or up to three consecutive days of unpaid bereavement leave, if the deceased person was a member of the extended family of the employee; and provides for court leave as an additional special leave under the Act. The amendments also add provisions that preclude an employer from dismissing an employee who takes a form of leave to which the employee is entitled under the Act and set out an employee's rights when on leave. One of those relates to the right of an employee on maternity, parental or adoption leave to continue to participate in a benefit plan.

- **Terminations:** The amendments exempt employers from the requirement to give notice to certain persons, such as those who are employed to perform a definite task for a period not exceeding 12 months, those who are being laid off for a period less than six consecutive days, or those who have been offered reasonable other employment; and require an employer to give an employee a second notice of termination or layoff if the employee continued to work for the employer for a month or more after the end of the notice period applicable to the first notice that was given to the employee. The amendments also continue the current requirement for an employee to give employers one or two weeks' written notice of their intention to terminate their employment.

- Finally, the Bill adds to the Act to provide for the continuity of the employment of employees when the businesses at which they work are sold and for director liability for pay owing from the corporation to an employee up to a maximum amount equivalent to six month's pay.

Need To Know

Minimum Wage Increases

The minimum wage rates are located in the "Employment Standards" section of PAYSOURCE at ¶5710; ¶5750; ¶5800 and ¶5810. For subscribers who receive the online version of PAYSOURCE the new minimum wage rates for Manitoba, Prince Edward Island and Quebec were added in last month's update For subscribers who receive the paper version of PAYSOURCE, the new minimum wage rates have been added to the commentary with this Report.

Manitoba

Effective October 1, 2010, the general minimum wage will increase by 50 cents to $9.50, up from the current rate of $9.00.

Prince Edward Island

Minimum wage on Prince Edward Island will increase in two phases in 2010 to $9.00. Executive Council has approved the decision to implement the 60 cent increase as follows: from $8.40 to $8.70 effective June 1, 2010, and by an additional 30 cents to $9.00 on October 1, 2010.

Quebec

Effective May 1, 2010, the general hourly minimum wage increased to $9.50 per hour, up from the current level of $9.00 per hour. The minimum wage payable to an employee who receives gratuities or tips will increase to $8.25, up from the current level of $8.00. Finally, the wages of apple pickers will no longer be established on the basis of yield, but will now fall under the general hourly minimum wage.

Recent Cases and Rulings

Erroneous To Rely on Third Party Statements To Determine Resignation or Dismissal

• • • **New Brunswick** • • • Martins moved from France to Canada under the France–Canada Youth Exchange Agreement, and worked for the employer as a pastry chef. He began work on June 15, 2006, and believed that the contract was for a period of 18 months, as set out in the Youth Exchange Agreement. On October 10, 2006, Martins was informed that he was dismissed without cause. Martins had moved from France on the basis of a guaranteed 18 months of employment, and brought an action for wrongful dismissal. The employer alleged that Martins decided to leave his employment in order to return to France. The trial judge determined that Martins ended the employment on his own, and was not dismissed for cause. Martins appealed.

The appeal was allowed. The trial judge erred in relying on third-party statements as the basis for finding that Martins terminated his employment. Other than the third-party statements, there was no evidence for the trial judge to find that it was Martins who ended his employment. In fact, the letter sent to him was incontrovertible evidence that he was terminated. This error was palpable and overriding and, therefore, the finding that Martins was not dismissed for cause was set aside. In addition, there was an employment contract for 18 months, which was valid even though it was unsigned. As a result, Martins was wrongfully terminated and was entitled to damages.

Martins v. 601360 N.B. Inc., doing business under the name and style Café Croissant Soleil, (N.B.C.A.), 2010 CLLC ¶210-019.

Mitigation Not Required When Termination is Pursuant to Fixed-Term Contracts

• • • **Nova Scotia** • • • Boutcher and Knickle were captains of scallop vessels owned by Clearwater Seafoods. When Clearwater Seafoods reduced the number of vessels on the water, all employees, including Boutcher and Knickle, were terminated. The employees then signed a new agreement providing for compensation, benefits, and a termination clause. Clearwater Seafoods once again changed their business, and this time they required Boutcher and Knickle to sign a new agreement each time they took their vessel on a trip. When Boutcher's vessel was taken off the water, he refused an offer of captain of a research and development boat, at a significantly reduced fixed salary. Knickle was told that there was no longer a position for him, after being off on an extended leave of absence. The trial judge found that both Boutcher and Knickle were wrongfully dismissed. However, Boutcher's claim was dismissed because of a failure to mitigate (see 2009 CLLC ¶210-021). Boutcher and Knickle appealed, while Clearwater brought a cross-appeal.

The appeal of Boutcher was allowed, in part, and all other appeals were dismissed. There was significant evidence to support the finding of the trial judge that Clearwater's initial termination notice to all employees was an

undiluted "clear message". The notice of termination awarded by the trial judge for this period was reasonable and sufficient, as a result. In addition, the trial judge did not err in calculating damages for the second termination by excluding the captains' service prior to their first termination. The award of reasonable notice for Knickle after his dismissal without cause was upheld. Under the contract, both captains were entitled to $25,000 for termination. The trial judge erred in dismissing Boutcher's claim for failing to mitigate damages, as the $25,000 damage award had been fixed by contract and, therefore, was not subject to mitigation. The trial judge also erred in finding Boutcher did not mitigate his damages by refusing to accept the research and development position with Clearwater. The new position was not going to begin until after the three-month notice period would have expired. Boutcher was entitled to both the $25,000 damage award and the payment of three months' salary in lieu of notice. He was not entitled to compensation for the costs of a fishing vessel, equipment and licence he obtained in order to start his own business.

Boutcher and Knickle v. Clearwater Seafoods Limited Partnership, a Nova Scotia Limited Partnership, (N.S.C.A.), 2010 CLLC ¶210-020.

Employee in Non-Managerial Position Entitled to 20 Months' Notice After 40 Years With Employer

• • • **British Columbia** • • • Waterman worked for IBM for over 40 years, in a non-managerial position. Waterman was given notice that he would be terminated one month later. Since Waterman and his wife were about to leave on their annual vacation, and would not return until the date his employment was to end, he was granted a one-month extension of his notice period. At the time of his dismissal, Waterman was 65 years old, and was unable to find another position within his field. He began an entirely new career as an insurance salesman. He brought an action for wrongful dismissal.

The action was allowed, in part. In determining the appropriate period of reasonable notice, the Court noted that Waterman was a long term and valued employee, but he had no supervisory or management role. The notice period was set at 20 months, and since he was given two months' notice, he was awarded damages for the remaining 18 months. Waterman was not entitled to a bonus, overtime, or stock benefits, although he was awarded damages for loss of standby pay and health and dental costs. Waterman made reasonable efforts to mitigate his losses. Given his specialized skill set, he was unable to find alternate employment within his own field. The pension payments were not deductable from the damage award for wrongful dismissal.

Waterman v. IBM Canada Limited, (B.C.S.C.), 2010 CLLC ¶210-021.

Employee's Demotion To a Dramatically Different Position Constituted Constuctive Dismissal

• • • **British Columbia** • • • Sifton was appointed shop manager in order to supervise operations at the dealership. A written proposal indicated that the shop foreman or manager would be returned to his former position of technician, with no loss of seniority or bias, if the position was not working out. In addition, the dealer agreed to negotiate a revised pay package. In response to an economic downturn, the employees accepted a voluntary wage reduction, on the understanding that their wages would return to their previous levels when a new owner took control of the dealership later that year. When the new ownership took over, Sifton was informed that he would now be a technician performing billable work, with some shop foreman duties. This involved a reduction in pay. Sifton was told that the changes were non-negotiable, and took effect immediately. Sifton worked for two weeks in this new position, during which time he claimed he was asked to perform menial jobs below his skills as a technician. Sifton decided to leave his employment after obtaining legal advice. He brought a wrongful dismissal action, alleging that he was constructively dismissed.

The action was allowed. The written proposal was a memorandum of understanding, which was only intended to last for a limited duration. As the parties had ceased to rely on this document many years ago, the agreement did not allow the dealership to unilaterally change Sifton's position from shop manager to technician. The unilateral change in Sifton's position, and his terms of employment, amounted to constructive dismissal. The decision to move him back to technician from shop manager was a rational business decision, given the economic climate at the time, but it was still a breach of Sifton's employment contract, and he was entitled to reasonable notice. Sifton was a 51-year-old lower level manager, and was therefore entitled to a reasonable notice period of 14 months. When Sifton was constructively dismissed, he was offered a job that was dramatically different than the job he had been doing for 11 years, and at a significantly lower rate of pay. He looked for similar supervisory positions in other industries, but was unable to find a suitable position. As a result, Sifton did not fail to mitigate his damages. The claims for mental and punitive damages were dismissed.

Sifton v. Wheaton Pontiac Buick GMC, (B.C.S.C.), 2010 CLLC ¶210-022.

Allowances Paid to Union Officers Were Taxable and Subject to EI

The taxpayers, who were elected officers of certain unions (the "Unions"), absented themselves from their regular employment (with the consent of their employers) to provide certain services to the Unions. During their absence, their employers continued to pay their regular salaries and were reimbursed by the Unions for that. The Unions also paid the taxpayers fixed allowances for meal, travel, and child care expenses incurred while they were on union business, without requiring the taxpayers to provide receipts, or to account for these allowances in any way (the "Allowances"). In assessing the taxpayers for 2002 to 2004, the Minister included the Allowances in their income as income from employment under ss. 5 and 6 of the *Income Tax Act* (the "Act"), and also treated them as amounts received on account of insurable employment within the meaning of the Employment Insurance Regulations. In allowing the taxpayers' appeals (2008 DTC 4708), Archambault, J. of the Tax Court of Canada concluded, in part, that the Allowances were neither income from employment nor amounts received in respect of insurable employment, because the taxpayers did not hold an "office" with the Unions, were not employed by them, and were performing services for them on a gratuitous basis without remuneration. The Crown appealed to the Federal Court of Appeal.

The Crown's appeal was allowed. Despite Archambault, J.'s findings to the contrary, the taxpayers were paid by the Unions for their services, even though this was done through their employers. They therefore occupied an "office" with the Unions. As a result, the Allowances were properly included in their income under the provisions of the Act, and were properly treated as payments related to insurable employment under the relevant provisions of the *Canada Pension Plan* and the Employment Insurance Regulations. Archambault, J.'s judgment was therefore set aside and the taxpayers' appeals from the Minister's assessments were dismissed.

Conseil central des syndicats nationaux du Saguenay/ Lac St-Jean (Csn) et al., (F.C.C.), 2010 DTC 5032

Employee Benefits – Reimbursement of Hearing Aids by the Employer

The situation considered by the CRA involved an employee of the federal public service having suffered a hearing loss and having been prescribed hearing aids by an audiologist. In accordance with a policy requiring the employer to take the appropriate measures for disabled employees, the employee applied for the reimbursement of his hearing aids. The employer reimbursed the employee for the net cost of the hearing aids after deducting the portion already refunded to him under his group health insurance plan. The hearing aids were made specifically for the employee who owned them and could be used anywhere (not only at the office) by the employee.

The CRA was asked if the reimbursement of the hearings aids was an employment benefit taxable under paragraph 6(1)(a) of the Act. The reimbursement is a taxable benefit and must be included in the employee's income under paragraph 6(1)(a) of the Act since the employee, not the employer, is the principal beneficiary of the hearing aids. The employee (not the employer) is the sole owner of the hearing aids. Even if he could use them to perform his employment duties, he could also use them for his personal daily activities. No benefit would arise if the employer remained the legal owner of devices used by a disabled employee to perform his work and if the devices were used only at work by the employee. Many expenses incurred by employees to acquire clothes, glasses, and lenses are necessary to allow them to perform their employment duties but are considered to be expenses of a personal nature because they are also necessary to allow the employees to perform their daily personal activities. Therefore, the reimbursement of such expenses would result in a taxable benefit.

Technical Interpretation, Business and Partnerships Division, February 23, 2010, Document No. 2010-035612117.

Health and Welfare Trusts

The CRA was asked for its view on the taxation of benefits paid from a health and welfare trust "HWT"). Paragraph 6(1)(*a*) provides that there shall be included in the income of a taxpayer for a taxation year from an office or employment the value of board, lodging and other benefits of any kind whatsoever, received or enjoyed by the taxpayer in the year, in respect of, in the course of, or by virtue of an office or employment. Certain specified benefits are expressly excluded from income calculations under paragraph 6(1)(*a*), including but not limited to, certain health and welfare benefits through contracts of insurance. However, where these types of benefits are not provided by an employer to its employees directly through a contract of insurance, there are no specific provisions in the Act to exclude from an employee's income the benefit arising on the provision of such benefits through a trust agreement.

In Interpretation Bulletin IT-85R2, "Health and Welfare Trusts for Employees" (July 31, 1986), the CRA stated that where certain conditions and requirements are met, employer contributions to an HWT will not give rise to an employment benefit for tax purposes. This tax treatment applies to an employee health and welfare benefit program that employers provide through a trust arrangement restricted to: (a) a group sickness or accident insurance plan; (b) a private health services plan; (c) a group term life insurance policy; or (d) any combination of (a) to (c).

Generally, employers can deduct reasonable expenses related to employee benefits as business expenses. However, the CRA notes that payments to a trust are generally considered to be non-deductible contributions of capital. Nevertheless, the CRA will permit a deduction to the extent that it is reasonable and laid out to earn income from a business or property and is deducted in the same year that the legal obligation to make the contribution arose.

We note that shortly before release of the 2010 federal Budget, the Minister of Finance proposed amendments to the Act to accommodate "employee life and health trusts" as a vehicle for providing certain employee benefits.

Ministerial Correspondence, March 8, 2010, Document No. 2010-0355041M4.