

Privacy Law and Pension Benefits

Presented at the Ontario Bar Association
“Pension and Benefits Hot Spots: Essential Updates on Key Legal Issues”

April 14, 2004

Mary Picard



FRASER MILNER CASGRAIN LLP

MONTREAL

OTTAWA

TORONTO

EDMONTON

CALGARY

VANCOUVER

NEW YORK

www.fmc-law.com

Do privacy laws matter?

Why should pension lawyers care about privacy law?



Pension plan impact of privacy laws

Ten privacy principles of PIPEDA ... how would they apply to pension plans?

If privacy law applies, an organization which has “personal information” about an individual must **get consent** from the individual to use the information. The organization must **disclose the purpose** of its collection and use of the information to the individual. The organization must **use** the information only for the disclosed purposes, and must **safeguard** the information, and have a **plan to discard** it when it is no longer needed for the disclosed purpose. The organization must grant rights of **access** to the information to the individual. Finally, the organization must have a written **policy** about its compliance with privacy laws, and appoint a **privacy officer**.



Two key privacy concerns

Why should pension lawyers be concerned?

- pension administration involves a lot of personal information about the plan members ... and their beneficiaries and spouses ... requirement to get their consent is problematic ... how detailed should the consent be ... should it identify the third-party providers who will handle the personal information ... what happens if the individual refuses to consent ...
- privacy law requires policy on retention/ destruction of personal information ... most companies' privacy policies rush to destroy information, and don't address the obvious need to keep pension information forever + a day



Status of privacy laws

Know what privacy legislation applies:

- all federally-regulated employers are subject to PIPEDA's requirements regarding personal information, which would include pension information
- Ontario private sector employers aren't subject to any privacy legislation regarding pension administration – PIPEDA applies to the “commercial activities” of Ontario companies, but it doesn't apply to employment information of provincially-regulated employers

“Fact Sheet” recently issued by the Office of the Privacy Commissioner of Canada:

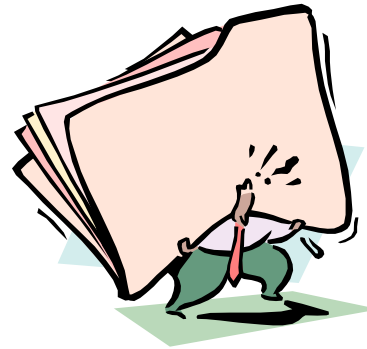
“[PIPEDA] applies to employee information only in organizations that are engaged in federal works, undertakings or businesses. The extension of [PIPEDA's] scope in 2004 does not change that.”

- Quebec (since 1994), B.C. and Alberta each have their own privacy legislation



How real is the issue?

- How big a deal will this be?



- Why haven't we heard about Quebec?

One PIPEDA privacy complaint re RRSP

There's been a little action under PIPEDA:

PIPEDA Case Summary # 17, Commissioner's Findings issued October 18, 2001:

“Complaint. An employee of a large corporation complained that his employer was improperly disclosing his and other employees' personal information, including information related to cash bonuses, without the employees' consent or prior knowledge, to the investment firm involved in an RRSP and savings plan sponsored by the corporation.”

“Summary of Investigation: The corporation in question has admitted that it discloses employees' personal information without their explicit consent to the investment firm involved in its RRSP and savings plan ...”

Commissioner's Findings: “The corporation in question is neither a federal work, undertaking or business as defined in the Act, nor does it disclose the personal information at issue across borders for consideration.”



Application of privacy laws to Ontario

As a pension lawyer, should you advise your Ontario pension clients to comply with privacy law? Usual refrain ...



- Privacy law is coming to Ontario, so you might as well start complying
- You're applying the PIPEDA privacy law protections to the customers and suppliers of your business, so you should do the right thing and apply it also to your employees
- If you have employees in Quebec, B.C. or Alberta, they're covered by privacy law, so you should be consistent with your employees across the country

CONSENT

What kind of CONSENT is required for pension personal info?

- *PIPEDA* (excerpts from Schedule 1): “The form of the consent sought by the organization may vary, depending upon the circumstances and the type of information. In determining the form of consent to use, organizations shall take into account the sensitivity of the information. ... The way in which an organization seeks consent may vary, depending on the circumstances and the type of information collected. An organization should generally seek express consent when the information is likely to be considered sensitive. Implied consent would generally be appropriate when the information is less sensitive.”
- *B.C. and Alberta*: consent of employees is not required if the information is required in connection with administering and terminating an employment relationship, as long as the employee or potential employee is advised of the employer’s purpose in collecting and disclosing the information, and those purposes are reasonable (note that B.C. & Alberta also “grandfather” pre-2004 consents)



Get consents when you can?

For Ontario-regulated private sector employers, consider suggesting that plan sponsors get consents whenever the opportunity arises? ... for example ...

- enrollment forms for all new members
- investment or contribution or flex selections – if new options being offered, or whenever someone goes on-line to review/switch existing investment options
- last resort: simply inform plan members on intranet sites, employee booklets, websites of providers ... links to the employer's privacy policy, which discloses use, retention, protection, access, etc. etc. (the “ten privacy principles”), and suggests that consent is assumed (“opt-out”)



Forms of consent

What should the consent look like?

Short and sweet – refer to complete information in the privacy policy or some other document:

I consent to the collection, use and disclosure of my personal information, and that of my spouse and beneficiaries, pursuant to the terms of the Privacy Policy. I acknowledge that a copy of the Privacy Policy has been made available to me.

or...

I authorize [the administrator of the pension plan], its agents and service providers to use and exchange information collected on this form to administer my pension benefit. I understand that information about how my personal information relating to my pension benefit is protected, is set out in the Privacy Policy at [website].



Longer consent ...

Or, try to deal with it all in one place (especially if the privacy policy doesn't expressly refer to the administration of pension information):

[The administrator of the pension plan] is committed to protecting the privacy of your personal information. The personal information on this and other Plan forms is collected to comply with the requirements of the Plan, the *Pension Benefits Act* and the *Income Tax Act*. You consent to the collection of personal information from you, and from your beneficiaries and spouse, from time to time as may be needed by [the administrator] and its agents in order to administer your pension benefit. [The administrator] will use and disclose your personal information only in order to administer the Plan and comply with applicable laws. You authorize [the administrator] to disclose your personal information to the consultants, record-keepers, funding agents and other third-party providers it retains from time to time to assist with administration of the Plan. You acknowledge that your personal information will be maintained by [the administrator] until your pension benefit has been paid in full to you. You can find out more about [the administrator's] privacy protection procedures by contacting the Privacy Officer at ...

Should it give examples of the specific uses of the personal information? Should it name the "agents"?



The wheel's been invented?

There's a lot already out there ...

Surf the web for privacy policies applicable to pension plan administration – they are out there for MEPP's, public sector pension plans, and large pension providers (insurance and trust companies) ...



Third-party provider issues

If you're acting for a plan sponsor who's hiring or renegotiating with a third-party provider (trustee, investment manager, record-keeper, insurance provider, actuary), raise these issues:

- ❑ does the plan sponsor's parent company have a privacy policy applicable to employee benefits? (sometimes there's a "global privacy policy" that your HR contact wasn't aware of)
- ❑ get the provider to agree that it will comply with the plan administrator's privacy policy
- ❑ *battle of the privacy policies*: does the provider have a privacy policy, and if so how does it differ from the plan administrator's?



Third-party provider issues

- ❑ *battle of the consent forms*: does the provider have a consent form, and if so how does it differ from the plan administrator's?
- ❑ clarify who will deal with privacy complaints from plan members, and inquiries from the privacy regulators; who will pay for the costs of dealing with it, and any prosecutions/lawsuits
- ❑ *more important than ever*: clarify who owns the personal information, and how it's dealt with on termination of the relationship

Watch out for third-party providers who require plan sponsors to obtain consents, or worse, to comply with PIPEDA, even though PIPEDA doesn't apply. A plan sponsor who volunteers to adopt privacy principles shouldn't assume an unnecessary contractual obligation to comply with PIPEDA.

Don't wait for your client to ask for your advice on negotiations ... tell your client to raise these issues with existing providers.



“agency” concept & “flow-through”

If you’re acting for a third-party provider, you should know:

- PIPEDA, excerpt from Schedule 1: “An organization is responsible for personal information in its possession or custody, including information that has been transferred to a third party for processing. The organization shall use contractual or other means to provide a comparable level of protection while the information is being processed by a third party.”
- George Radwanski (former federal Privacy Commissioner) stated in a March 20, 2003 speech (available at www.privcom.gc.ca) that any consent that an organization obtains “flows through” to an “agent” retained by the organization. The agent is subject to the same limitations regarding the use, disclosure, retention, etc. that apply to the organization that obtained the consent.

