THE RISING COST OF PRIVACY

How privacy legislation is about to alter the employment relationship

By Erin R. Kuzz

The *Personal Information Protection and Electronic Documents Act (PIPEDA)* greatly restricts the types of – and access to – personal information that an organization may collect, the manner in which it may be collected, and the way it can be used. Among other things, it has had a significant impact on the way in which employers can deal with information relating to their employees.

PIPEDA currently applies to federally regulated workplaces engaged in commercial activities. On January 1, 2004, *PIPEDA* will begin applying to all commercial activities in any province that has not put in place "substantially similar" legislation.

The burden on employers to address the *PIPEDA* is significant. Companies must designate one or more persons in the organization to be accountable for the organization's compliance with the *PIPEDA* and implement policies and practices that protect personal information. Security safeguards must be put in place to protect the nature and sensitivity of information.

The legislation also contains a mechanism for investigating complaints arising under *PIPEDA* and allows the Privacy Commissioner to audit the practices of an organization. As of yet, it is unclear precisely how such an audit would proceed, but the Privacy Commissioner's authority in this area is vast.

For those provinces that are planning to put into place their own substantially similar legislation before January 1, 2004, that legislation must be equal or superior to *PIPEDA* in terms of privacy protection provided. So far only Quebec has passed such legislation, which came into effect January 1, 1994. Four other provinces, New Brunswick, British Columbia, Manitoba and Ontario, have all issued discussion papers on the issue.

In Ontario, the Ministry of Consumer and Business Services has drafted the *Privacy of Personal Information Act, 2002 (PPIA)*. Although it appears to be focused more on the regulation of consumer activity than the employment relationship, that does not lessen the significant impact that the legislation will have on Ontario workplaces if passed in its current form.

In some respects, the draft Ontario legislation actually goes further than *PIPEDA*. For instance, where the federal legislation applies only to commercial activities, the *PPIA* would apply to most Ontario organizations, such as those in the private sector, the health care sector, not-for-profit organizations, professional associations, religious groups, universities and trade unions.

In order to ensure compliance with the *PPIA*, Ontario employers would be required to, among other things:

- Be responsible for personal information under their custody or control;
- Identify the purpose for which personal information is being collected or will be disclosed;
- Obtain the consent of the individuals prior to collecting, using or disclosing their personal information;
- Not use or disclose information for purposes other than those for which it was originally collected, except with consent of the individual or as required by law;
- Not retain information once it is no longer required to meet the purposes for which it was originally collected;
- Protect personal information by having security safeguards in place, appropriate to the sensitivity of the information being held;
- Upon request, provide individuals with specific information about how the organization collects, uses and discloses personal information; and,
- Upon request, inform the individual of the existence, use and disclosure of their personal information and give access to that information.

The current draft of the *PPIA* specifically identifies and deals with health information as requiring special safeguarding. It is one of the classes of information for which consent to collect, use, store, etc. cannot be implied, but instead must be expressly given by the employee. This will significantly impact on employers attempting to communicate with an employee's physician in order to deal with accommodating an employee's medical condition.

In addition, personal health information must be stored separately from other files, such as an employee's personnel file, to ensure that the health information is not disclosed or accessed without the employee's express consent.

Because the *PPIA* requires that information be destroyed once the purpose for which it was collected is exhausted, employers must establish mechanisms to ensure the periodic review of all files containing such personal information.

Significantly, the proposed legislation would allow for individuals to sue for damages if an organization's practices breached the individual's privacy rights and the individual suffered actual harm as a result.

We have provided access to both the proposed Ontario legislation, as well as the Privacy Commissioner's Report through the links provided on our Web site at: *www.sherrardkuzz.com*

Erin R. Kuzz is a Partner at Sherrard Kuzz LLP, a firm providing a full range of employment and labour law services to employers.