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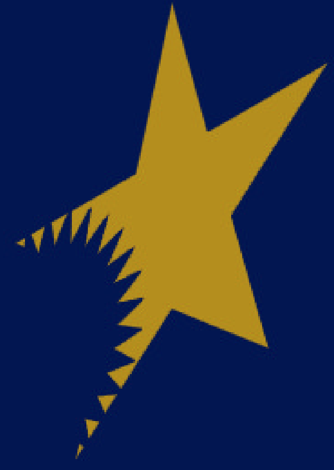
Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaneys on Business



"Federal law on the collection and use of personal information will apply to all commercial activity in Canada, whether federally or provincially regulated, effective January 1, 2004."

This newsletter is designed to bring news of changes to the law, new law, interesting deals and other matters of interest to our commercial clients and friends. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the head of our Corporate/Commercial group, Alex Mesbur at 416.593.3949 or amesbur@blaney.com.

FEDERAL PRIVACY LAW APPLIES TO ALL BUSINESSES JAN. 1

Jill E. McCutcheon

Federal law on the collection and use of personal information will apply to all commercial activity in Canada, whether federally or provincially regulated, effective January 1, 2004.

Quebec has had its own personal information law, applying to commercial activity there, since 1994.

Alberta and British Columbia are debating bills. Ontario has been developing legislation since 2001 but last October's change in government means it will likely be some time before an Ontario bill can be debated and enacted.

Once Parliament declares legislation enacted by provinces to be substantially similar to its own, the federal law will not apply to provincially regulated business activity wholly within those provinces.

Beginning at the turn of the year, however, the federal statute (and the regulations under it) will govern provincially-regulated business everywhere in Canada.

Blaney McMurtry, in collaboration with Grant Thornton, the accounting and management consulting firm, has held three standing-room-only seminars for clients in recent months – drawing more than 300 – to brief them on the federal Personal Information Protection and Electronic Documents Act ("PIPEDA") and its implications.

Here are some of the frequently asked questions that the seminars have addressed, along with answers from Jill McCutcheon. Ms. McCutcheon has advised business on privacy law for more than a decade both as head of Blaneys' privacy practice and as in-house counsel in the insurance industry.

WHAT IS PERSONAL INFORMATION?

- Information about any identifiable individual, including something as simple as a name and address.

WHAT DOES THE LAW REQUIRE?

- That you get a person's permission to collect, use and disclose personal information about them, and that you hold the information secure.
- That you give a person access to the personal information about them that you hold

"There are two kinds of consent, implied and express, and the kind you need relates to the nature of the transaction in which you are engaging"

Jill McCutcheon practices corporate and commercial law with a particular emphasis on corporate insurance. The chair of Blaneys' privacy practice group, Ms. McCutcheon has considerable experience advising business on their privacy practices.

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ARE THERE EXCEPTIONS?

- Yes, there are a number, for example, information subject to solicitor-client privilege or required to collect a debt.
- Personal information also may be collected, used and disclosed without consent when the collection is "reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province."

WHAT CONSTITUTES CONSENT?

- There are two kinds of consent, implied and express, and the kind you need relates to the nature of the transaction in which you are engaging
- Implied consent means nothing is said about the purpose for which the information is being collected or used because this "primary" purpose is plainly obvious by the very nature of the transaction.
- When relying on implied consent you may *not* use the information for non-obvious or "secondary" purposes.
- Nor may you "disclose" the information to a third party
- These require *express* consent.
- When you seek express consent, you must say something specific at the time of the transaction, such as "May I add your name to our promotional mailing list?" (enabling the customer to opt *into* this secondary use) or "Your name is being added to our promotional mailing list. If at any time you would like it removed…" (enabling the customer to opt *out* of this secondary use).
- In particular, if relying on an opt-out form of consent, you must provide a clear statement of what you will do with the information and an immediate, inexpensive and easy to execute way for the opt-out to be exercised. (e.g. signing or ticking off a form; calling a 1-800 number or preferably giving the individual the option of both).

HOW DO I KNOW IF THE FEDERAL PRIVACY ACT APPLIES TO MY BUSINESS?

- Effective January 1, 2004 it applies to *all* organizations in all provinces that are engaged in commercial activity and that collect, use or disclose personal information identifiable to an individual until those provinces enact their own legislation, which must be deemed by Parliament to be "substantially similar" to the federal law. Federal businesses like banks and airlines have been for some time and will stay subject to the federal law. So will other organizations which transmit personal information across provincial or international borders.

DOES PIPEDA APPLY TO THE PERSONAL INFORMATION I HOLD ON MY EMPLOYEES?

- No, unless you are a federal undertaking like a bank or airline.
- However, you should expect that provincial legislation, when it is enacted, will cover your employees. Quebec's law, for example, does apply to the personal information of employees.
- It is likely prudent to act as though PIPEDA applies to your employees.

I AM IN A B2B SETTING. NEED I COMPLY WITH PIPEDA?

- Yes, to the extent that you are involved in commercial activity and that you collect, use or disclose personal information identifiable to an individual. The only thing not included

BLANEYS ON BUSINESS

"There is no cookie cutter solution for compliance; you have to tailor your compliance plan to the specifics of your business."

Paul Schnier chairs Blaney McMurtry's tax group. He restricts his practice to income tax law with emphasis on tax planning and implementation and advising as to the tax consequences of proposed transactions. He has advised a variety of public and private corporations on numerous domestic and international undertakings.

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is the name, address and contact information of an employee of an organization.

OUR AFFILIATES PROVIDE SUPPORT SERVICES. IF WE GIVE THEM PERSONAL INFORMATION ABOUT A CUSTOMER, IS THIS A DISCLOSURE UNDER PIPEDA?

- If an organization is separate, whether it's an affiliate or not, a disclosure is still a disclosure.
- However, a transfer of information for processing purposes is not necessarily a disclosure requiring consent.
- It is important to remember that when you transfer information for processing purposes you remain responsible for the information practices of the transferee.
- There should be appropriate controls in place.
- If the information is sensitive, it is best to seek advice on what to do.

OUR COMPANY HAS HAD A PRIVACY POLICY IN PLACE FOR A LONG TIME. NEED WE DO MORE?

- Most everyone has a privacy policy.
- Having a policy does not constitute compliance.
- What matters is what you do.
- There is no cookie cutter solution for compliance; you have to tailor your compliance plan to the specifics of your business. ■

TAX-FREE RECEIPTS? NOT ANY MORE

Paul L. Schnier

This is one of those it-was-nice-while-it-lasted stories. It involves the tax treatment of payments for restrictive covenants, such as non-competition agreements.

Up to several years ago, this tax treatment had been fuzzy. The Canada Customs and Revenue Agency ("CCRA") couldn't quite seem to make up its mind about whether the payments should be taxed as income, as capital gains or as a third category of receipts, known as "eligible capital receipts".

Income and capital gains are fairly clear. Eligible capital receipts treatment is normally reserved for payments made for intangible property like goodwill. While eligible capital receipts are not considered to be capital gains, they are taxed in the same way. (Only 50 per cent of the receipt is included in income.)

In two well-known court cases, the CCRA lost all of the arguments it made for taxing payments for entering into restrictive covenants. As a result, the payments were considered non-taxable.

Naturally, this led to a flurry of non-competition agreements being negotiated in the context of sales of shares of companies, or sales of business assets, and amounts consequently being identified specifically as payments for the agreements not to compete.

Many people celebrated the tax-free dollars they were receiving, or were about to receive.

But while the party was going on, the Department of Finance was entertaining other ideas.

In a press release – some wags are calling press releases the new form of tax legislation – the Minister of Finance announced on October 7, 2003 that, effective that day, any

"In a press release...the Minister of Finance announced on October 7, 2003 that, effective that day, any payments received for restrictive covenants, including agreements not to compete, would be taxed as ordinary income."

payments received for restrictive covenants, including agreements not to compete, would be taxed as ordinary income.

An exception will be available for payments received in connection with a share sale so that the payment can be added to the sale price of the shares, thus preserving capital gains treatment.

In the context of an asset sale, there is no treatment specified for an agreement not to compete; however, most vendors will allocate such proceeds to goodwill, which is also taxed at a 50 per cent rate.

A payment for an agreement not to compete in any other context will be taxed as income.

(It should be noted that payments from an employer to an employee for an agreement not to compete have always been, and will continue to be, taxed as income under a specific section of the Income Tax Act.)

Of course, a bill to enshrine this new tax in law has not yet been introduced to Parliament and, considering the changing leadership of the current government, a bill likely will not be introduced or enacted for some time.

The press release states, however, that the new tax will be effective after October 7, 2003, except with respect to payments received before 2005 that are pursuant to written agreements between parties dealing at arms length signed on or before Oct. 7, 2003. (This is the usual sort of "grandfathering" that is provided when legislation is introduced in this fashion.)

Exactly what types of agreements are contemplated for exemption is not clear; nor is it clear just who might be covered by such agreements. The requirement is that the parties be dealing at arm's length – but this term has no definition.

Unfortunately, we will likely be operating in a vacuum until such time as legislation is enacted, and that could well be at a much later date.

But be forewarned, because you can count on the CCRA to argue that you have been forewarned! ■

WE ARE PLEASED TO ANNOUNCE

that Regina Lee has joined the firm's corporate/commercial group.

Regina completed her Law degree in 2001 at the University of Western Ontario, articled with Blaney McMurtry, and returned to the firm upon her call to the Bar in 2002.

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EXPECT THE BEST

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We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Chris Jones at 416 593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.