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PRIVACY LAW AND THE UNION SHOP

RECENT DECISION FROM THE FEDERAL COURT OF CANADA ADDRESSES PRIVACY LAW IN UNIONIZED WORKPLACE

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In one of the first court decisions to address the merits of a complaint under the *Personal Information Protection and Electronic Documents Act* (PIPEDA), the Federal Court of Canada considered how the law is to be applied in unionized workplaces.

PIPEDA is Canada's new private sector privacy legislation. It came into force on January 1, 2001 for the federally regulated private sector and will be binding upon the provincially regulated private sector on January 1, 2004.[2] It places strict limits on how organizations can collect, use, disclose and retain personal information. Notably, the law requires informed consent for the collection, use and disclosure of personal information about an organization's employees if that information is collected in connection with a federal work, undertaking or business.

The law itself is silent about how it is to apply in a unionized workplace, and gives no indication as to how conflicts between PIPEDA and collective bargaining agreements are to be resolved. The Federal Court of Canada, however, has recently provided some guidance.

L'ÉCUYER V AÉROPORTS DE MONTRÉAL

Diane L'Écuyer was employed as a supervisor of Information and Reception Services at Dorval Airport. She had been the subject of a number of complaints, some of which resulted in disciplinary processes. She applied to her supervisor to have access to documentation related to those complaints, saying that she had a right of access to them under PIPEDA. The supervisor sent Ms. L'Écuyer a letter refusing this request, and also copied that letter to representatives of the Ms. L'Écuyer's union and to the Airport's Employee Relations Coordinator.

Ms. L'Écuyer brought a complaint against her employer, the Airports of Montréal, alleging that it had violated PIPEDA on two counts. In the first complaint, Ms. L'Écuyer alleged that her

[1] The author is grateful to John Rice of McInnes Cooper's Labour and Employment Group for editorial and other advice.

[2] A quick test of whether a company is federally or provincially regulated is to ask whether the company is subject to the *Canada Human Rights Act* and the *Canada Labour Code*. If the answer is yes, the company is most-likely federally regulated for the purposes of PIPEDA .

employer violated PIPEDA by refusing her access to her own personal information, in the form of complaints about her performance. The second complaint alleged that her employer had disclosed her personal information without her consent by providing union representatives and the Employee Relations Coordinator with a copy of the refusal letter.

At first instance, the complaints were heard by the Privacy Commissioner. He dealt with the complaints on their merits and found that the employer had violated PIPEDA by copying the union representative without Ms. L'Écuyer's consent. By refusing the complainant access to the information in question, the Commissioner further found the airport was not in compliance with PIPEDA. The airport ultimately provided the complainant with access to this information. On the complaint related to the Employee Relations Coordinator, the Privacy Commissioner found that her compliant was not well-founded.

FEDERAL COURT OF CANADA

The complainant then made an application to the Federal Court of Canada for a hearing pursuant to section 14(1) of PIPEDA. (Even if a complainant is successful before the Privacy Commissioner, he or she may seek a hearing before the Court. This is because only the Court is able to award damages or issue a binding order against the respondent.) Justice Pinard's decision will have a lasting impact on how PIPEDA is applied in unionized workplaces. Justice Pinard followed the leading Supreme Court of Canada decision of *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 to find that, notwithstanding the provisions of PIPEDA, the Privacy Commissioner had no jurisdiction to hear the complaint brought by Ms. L'Écuyer and the Federal Court had no jurisdiction to hear her application under s. 14(1) of PIPEDA.

The information that the complainant sought and the alleged disclosure of information were both inextricably linked to the employment relationship between Ms. L'Écuyer and Airports of Montréal. Ms. L'Écuyer was a member of a union and, pursuant to the collective agreement between her union and the employer, all matters and disputes related to that relationship had to be resolved by way of arbitration under the terms of the collective agreement and the *Canada Labour Code*. The collective agreement provided that the union would be the exclusive spokesperson for the employees.

This decision was groundbreaking because it may remove any jurisdiction the Privacy Commissioner may have had to hear disputes brought by unionized employees related to their personal information that is collected, used or disclosed by their employer in connection with workplace discipline, or other matters which arise out of the collective agreement, if such information is addressed in the collective agreement itself.

Every organization that has employees collects and uses information related to those employees as a matter of necessity. Information about an individual employee that is collected, used or disclosed in the course of an employment relationship is only subject to PIPEDA if the employer

is within the federally regulated private sector.[3] Already, provincially-regulated employees are beyond the Act's reach. Justice Pinard's decision may also remove from the Privacy Commissioner's jurisdiction many federally-regulated employees who are subject to collective agreements.

Justice Pinard noted that the collective agreement in this case specifically addressed rights of access to personnel files and said this portion of the collective agreement, rather than PIPEDA, would govern the situation. The Court did not have an opportunity to discuss what obligations of consent and rights of access would apply in circumstances where the collective agreement is silent on this point nor did Justice Pinard did address the issue of whether an arbitrator appointed under the collective agreement would have to apply the federal law. Like most cases following *Weber*, this question may be left as a matter of interpretation of the relevant labour legislation and collective agreements.

The L'Écuyer decision is very significant in the questions it answers, but still leaves some key issues unresolved. At a minimum, federally-regulated employers with unionized workplaces now have some certainty that the collective agreement will oust the jurisdiction of the Privacy Commissioner when it explicitly addresses issues of employee privacy and access to personal information.

[3] For more information on the application of PIPEDA to employees, please see the author's "Focus on Privacy: Does the New Privacy Law Apply to My Organization", which is available from the publications section of McInnes Cooper's website (http://www.mcinnescooper.com) or by contacting the author at david.fraser@mcinnescooper.com.

THE MCINNES COOPER PIPEDA TEAM

McInnes Cooper has assembled a Privacy Working Group, comprised of lawyers with expertise in advising businesses on PIPEDA, including its application to employee information. If you have any questions, please contact any of the following:

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