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Labour & Employment Law in Canada

A Newsletter on Canadian Labour and Employment Law for American Practitioners and Employers

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INTRODUCTION

This issue covers two topics in employer-employee relations which are rapidly moving towards the top of legislative and policy agendas. The first is employee privacy at work and what that privacy can or should encompass, given the accelerating changes in technology and the organization of work in recent years. The second is the question of the protection afforded to whistle blowing employees in light of the newly sharpened public focus on corporate governance.

Legislation, government directives, regulations and "codes of practice" on these subjects have been the result in Canada, the United States and the European Union.

EMPLOYEE PRIVACY PROTECTIONS

European Union privacy directives in force since the mid-1990's have been the inspiration for more recent Canadian legislation on employee privacy. The similarities have enabled the two jurisdictions to benefit from a policy of reciprocity in the cross-border flow of employee information.

The Canadian *Personal Information Protection and Electronic Documents Act* [PIPEDA] came into force on January 1, 2004. It applies to all organizations, and establishes rules on how employers can collect, use, and disclose personal information about their employees.

PIPEDA brings Canadian law in line with privacy rules regarding the protection of personal data developed by the European Union. Like the European Privacy Directive, PIPEDA broadly defines personal information as: "any information about an identifiable individual". Hence, as soon as any data processing or storage concerns a person, PIPEDA applies. In an employment context, this would include an employee's job title, business address/telephone number, in addition to information regarding the ▸

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person's work performance, salary, seniority, birth date, social insurance number, identification number, marital status, children, religion, race, sexual orientation, medical record, and personal interests – to list only a sample!

Under these privacy laws, employers may find themselves faced with litigation for having transferred even the most basic employee information to an entity located in a country with less stringent privacy laws. The following are examples of such situations:

- a transfer of employee records to its headquarters for strategic planning of personnel development or individual career planning;
- transfers of employee data to the parent company for management benefit; or
- outsourcing the processing of employee data.

All these scenarios entail the employer making what previously might have been considered routine management decisions.

The Canadian federal government has harmonized its standards with those of the European Directive.

Under the European rules, transferring of an employee's personal data to non-EU countries is generally allowed only if the latter provide an "adequate" level of privacy protection (Canada, because of PIPEDA, has now been recognized by the European Commission as guaranteeing such protection). Consequently, it is now possible to transfer data between European countries and Canada under the same conditions as within EU member states.

WHAT ABOUT EMPLOYEE PRIVACY PROTECTION ACROSS THE U.S./CANADA BORDER?

Vast amounts of personal information about Canadians continually finds its way into the databanks of businesses in the United States.

In response to the EU-required "adequacy standard" for personal data protoection, the U.S. Commerce Department and the Federal Trade Commission have developed the "Safe Harbor Privacy Principles". These allow American employers to certify that their company: (i) has joined a self-regulating body that adheres to a set of recognized principles; or (ii) has implemented its own privacy policies in conformity with those same principles.

Canada, like the EU, has also inserted a form of "adequacy standard" clause in PIPEDA to protect an employee's personal data from being exported to jurisdictions with lower protection standards. It states that organizations transferring personal information to a less secure jurisdiction must use "contractual or other means" to ensure that the foreign entity provides a level of protection for employee personal information comparable to what it would receive in Canada.

Since no Safe Harbor agreement exists between the U.S. and Canada, specific precautions are required when Canadian employers outsource data to U.S. companies and their subsidiaries. This precise issue was litigated in 2004 before the British Columbia Supreme Court in *BC Govt Serv. Empl. Union v. British Columbia (Minister of Health Services)* [*BCGSEU*][1]. The union there challenged the provincial government's decision to outsource the administration of the public health insurance regime to Maximus BC Health Inc., a wholly owned subsidiary of Maximus US. Although Maximus BC Health Inc. had safeguards in place, the privacy concerns arose over whether it could be subject to the U.S. *Patriot Act*.

The *Patriot Act* was enacted in the wake of the September 11, 2001 attacks. It enhances access by the FBI to an employee's personal information records held by employers in the United States or elsewhere which are under the "control" of an American entity.

The union's main argument was that the administration of the scheme involved access to highly sensitive personal employee information and that the contracting out would require disclosure of this data. It ominously warned that the "sceptre of a United States of America *Patriot Act* order looms large."

Both parties filed expert opinions on whether an American court could order both a United States-based employer and its subsidiaries to produce employees' records in its possession or subject to its control. The experts agreed that the United States-based company could be ordered to produce documents, but they differed as to the effect such an order could have on a Canadian subsidiary. Faced with this conflict between expert opinions, the Court relied on the wording of the contract and legislative interpretation in concluding that Maximus B.C. had provided "more than reasonable security" for the sensitive Canadian data.

While perhaps inconclusive as far as the extraterritorial reach of the *Patriot Act* is concerned, this decision does offer helpful guidelines for employers outsourcing data to U.S.-based entities and U.S. companies bidding on Canadian contracts.

The core of the *BCGSEU* decision lies in the determination that the parties in the arrangement had taken all reasonable steps to ensure the confidentiality of the employee information which Maximus BC Health Inc. would receive in the course of discharging its contractual obligations. The Court's test is one of "reasonable steps," since, in its own words: "Privacy is not absolute."

WHISTLEBLOWER PROTECTION

Like privacy legislation, whistleblower protection is becoming increasingly important in Canadian labor and employment law. Whistleblower legislation seeks to reconcile employees' duty of loyalty to their employer with the public interest in disclosure of unlawful activity or misconduct.

Canada does not have a federal whistleblower protection law and constitutional limits on federal powers over employment relations would mean that any such statute would apply only to the small portion of the workforce subject to federal jurisdiction. Concerns over capital markets fraud, notably the Enron debacle, and other high-profile scandals, though, led the federal parliament to amend the Canadian *Criminal Code*.[2] This change extends comprehensive protection to employees who provide

information to law enforcement officials. Because of federal powers in the criminal law field, this section applies to all employers in Canada.

New Brunswick and Saskatchewan have also adopted whistleblower legislation. Essentially, these statutes state that employers are prohibited from discharging employees who have reported to a lawful authority any activity that is an offence or is likely to result in the commission of one. Employers are also prohibited from threatening to discharge such employees or taking reprisals or otherwise discriminating against them.

A five-year court battle surrounding the meaning of "lawful authority" recently culminated in a ruling by the Supreme Court of Canada in *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*.[3]

Linda Merk was employed as the union's bookkeeper and office manager. She was fired after she blew the whistle by informing union representatives of alleged financial misconduct by her immediate supervisor, another union employee. Under the Saskatchewan *Labour Standards Act*, employers cannot discharge employees because they "... reported... to a lawful authority any activity that is or is likely to result in an offence".[4] While the trial judge was satisfied that the financial misconduct amounted to "an offence," she nevertheless concluded that Ms. Merk had not complained to a "lawful authority". In her view, "lawful authority" was limited to a person or institution authorized by law to deal with the activity as an offence and did not include employers. Both the summary conviction appeal judge and the majority of the Court of Appeal agreed with the trial judge's interpretation of "lawful authority". The Supreme Court allowed the appeal and found the union guilty.

The majority stated that the expression "lawful authority" includes not only the police or other agents of the state, but also individuals within the employer organization who exercise lawful authority over the employee(s) who are alleged to have engaged in misconduct. Furthermore, the employee's duty of loyalty is best reconciled with public interest in whistleblowing by an "up the ladder" approach (i.e. protecting employees who first blow the whistle to their immediate supervisor or to other persons inside the organization) who have the "lawful authority" to deal with the misconduct. The majority also stated that a narrow interpretation would discourage the internal resolution of alleged misconduct, and that failure by whistleblowing employees "to try to resolve the matter internally" is condemned by courts and labour arbitrators as *prima facie* disloyal and inappropriate. The court also recognized that there may be circumstances where an employee is fully justified in not seeking an internal remedy and going directly to the police, e.g. fear that the employer may destroy evidence.

The *Merk* case supports a liberal scope of protection for whistleblowing employees, but the important question of whether an employee can be fired for *not* blowing the whistle on a course of misconduct to which he or she is not a party but knows of is still unsettled in Canada. The answer to this question may depend in part on whether the misconduct involves the employee's peers or a superior. The scope of the duty to blow the whistle may also involve the employees' position in the organization.

One recent case in Europe, for example, found that an employer could not impose such a duty on its most junior employees.[5] This decision shows how the demands of good corporate governance may need to be tempered by the realities of the employment world.

CANADIAN WHISTLEBLOWERS AND SARBANES-OXLEY

The *Sarbanes-Oxley Act* of 2002 prohibits discrimination against employees reporting possible fraud or misconduct at publicly traded corporations; it also protects those who cooperate with government investigations into possible corporate wrongdoing. In addition to civil protections, *Sarbanes-Oxley* amended the U.S. federal *Criminal Code* to prohibit interference with the employment of whistleblowers.[6] *Sarbanes-Oxley* provides that its whistleblower protections have extra-territorial application.

Early case law under these provisions, though, indicates that employees employed and resident outside of the United States are not covered by these provisions.[7] Thus employees of American corporations who are employed in Canada, or who are employed in Canada by Canadian subsidiaries of American corporations, are probably left to the protection of Canadian statute or common law.

CONCLUSION

While the exterritorial reach of privacy and whistleblower legislation may still be questionable, what we do know is that employers cannot dismiss the importance of assuring employees privacy protection and understanding the legal ramifications for actions relating to whistleblowing rules. Employers everywhere must be made aware of the importance of drafting such codes that will comply and coexist with national legal systems of the country in which their subsidiary is situated. ■

1 2005 BCSC 446.

2 With the addition of section 425.1 to the *Criminal Code*, employers who intimidate or retaliate against whistleblowers now risk criminal liability with the possibility of imprisonment for up to five years.

3 771, 2005 SCC 70.

4 *Labour Standards Act*, R.S.S. 1978, c. L-1, para. 74(1)(*a*) [as am. 1994, c. 39, s. 41].

5 Labour Court (Wuppertal), 5 BV 20/05 (Wal Mart, Trial Court decision June 15, 2005); State Labour Court (Dusseldorf), 10 TaBV 46/05 (Appeal Court decision November 14, 2005).

6 18 U.S.C. § 1513(e).

7 See *Smith v. United States*, 507 U.S. 197 (1993); *Foley Bros. v. Filardo*, 336 U.S. 281 (1949); See also *Carnero v. Boston Scientific Corp.*, No. Civ.A.04-10031-RWZ, 2004 WL 1922132 (D. Mass. Aug. 27, 2004); *Concone v. Capital One Financial Corporation*, 2005-SOX-6 (ALJ Dec. 3, 2004).

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Heenan Blaikie has not expanded through massive mergers. Over the years, we have grown progressively by attracting and retaining top calibre professionals, ensuring that each new member of the team embodies the culture of dedication to excellence that has made the firm's reputation. Today the firm is 400+ lawyers strong and still growing steadily.

Labour and employment law has been a core practice area at Heenan Blaikie since the firm's beginning. This is reflected in Heenan Blaikie's having the largest management-side labour and employment practice in Canada. The practice is a national one and collaboration between offices in particular files or specialized practice areas is frequent.

Heenan Blaikie brings innovative, imaginative and practical solutions to business problems in areas of labour relations, employment law and, increasingly, human rights law. Our lawyers regularly appear before all levels of courts in Canada, and represent clients before labour relations boards, human rights tribunals, workers' compensation boards, collective agreement arbitrators and statutory adjudicators in both federal and provincial jurisdictions. Heenan Blaikie often represents clients in collective bargaining. We are also active in developing policies and strategies for clients to foster compliance with employment-related laws to minimize client risks in the event of litigation. These practice areas are complemented by Heenan Blaikie's representation of employer organizations in government relations at both the national and provincial levels.

Members of the firm are active in teaching and writing, and our publications *Canadian Labour and Employment Law for the U.S. Practitioner* (BNA Books) and *Quebec Labour and Employment Law: Frequently Asked Questions* (Carswell) are widely used as reference guides by legal and human resources practitioners.

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