SHERRARD KUZZ LLP
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Management Counsel

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THE RISING COST OF PRIVACY

CURRENT LEGISLATION

The *Personal Information Protection and Electronic Documents Act (PIPEDA)* greatly restricts the types of "personal information" that an organization may collect, the manner in which it may be collected, the way it can be used and who can access the information. As such, 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. However, on January 1, 2004, *PIPEDA* will apply to all commercial activities in any province that has not already put into place "substantially similar" legislation.

The term "personal information" is broad and includes almost any information about an identifiable individual, including medical records, employee records, a Social Insurance Number, income, age, etc. An organization's legal obligation to comply with *PIPEDA* can therefore be burdensome. Each organization must designate one or more individuals to be accountable for the organization's compliance with the *Act*, implement policies and practices which protect personal information, and train staff to apply those policies and practices. Personal information must be protected by security safeguards which are appropriate to the nature and sensitivity of the information, including physical measures (such as locks), organizational measures (such as limiting the distribution of information to a need-to-know basis) and technological measures (such as computer encryption and passwords).

PIPEDA also contains a mechanism for investigating complaints and allows the Privacy Commissioner to audit the practices of an organization if there are reasonable grounds to believe there has been a contravention of the *Act*. At this time, given the relative newness of the legislation, it is unclear precisely how such an audit would proceed, but the Privacy Commissioner's authority in this area is vast.

The privacy legislation will have a significant impact on the way in which all employers collect, use and store information about their employees.

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

PRIVACY OF PERSONAL INFORMATION ACT, 2002

In Ontario, the Ministry of Consumer and Business Services has drafted the *Privacy of Personal Information Act, 2002 (PPIA)*. Expected to be introduced this fall, the *PPIA* appears to be more focused on the regulation of consumer activity than the employment relationship. Nevertheless, the legislation will have significant impact on Ontario workplaces if passed in its current form.

The Ontario government has received more than 600 comments and submissions on the initial draft of the *PPIA* from various stakeholders and interested parties. However, whatever changes are made prior to the introduction of the legislation will likely not reduce its impact on the employment relationship.

In some respects, in its present form Ontario's draft legislation already goes further than *PIPEDA*. For instance, whereas *PIPEDA* 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.

To ensure compliance with the *PPIA*, Ontario employers will be required to, among other things:

- *Be responsible for personal information under their custody or control;*
- *At or prior to collection, identify the purpose for which personal information is being collected or will be disclosed;*
- *Obtain the consent of the individual prior to collecting, using or disclosing the personal information (including*

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such basic information such as name, home address or telephone number), except in limited, clearly identified circumstances;

- *Limit the collection, use and disclosure of personal information to what is necessary to meet agreed upon purposes;*
- *Not use or disclose personal 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 personal information once it is no longer required to meet the purposes for which it was originally collected;*
- *Keep personal information as accurate, complete and up-to-date as possible to meet the purposes for which it was 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;*
- *Upon request, inform the individual of the existence, use and disclosure of their personal information and give access to that information; and*
- *Because the PPIA requires that information be destroyed once the purpose for which it was collected has been exhausted, establish mechanisms to ensure the periodic review of all files containing personal information.*

The current draft of *PPIA* also specifically identifies and deals with health information as a separate category of "personal information" 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 upon employers attempting to communicate with an employee's physician in order, for example, to deal with accommodating an employee's medical condition.

Under the *PPIA* personal health information must also 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. Specific exceptions permit the disclosure of health information, including disclosure for the purposes of legal proceedings (including grievance arbitrations), or compliance with a summons.

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

Once the *PPIA* has been introduced and its requirements made clear, Sherrard Kuzz LLP will prepare a comprehensive summary of the Act as well as a list of steps we suggest employers ought to consider in preparation for the *PPIA* becoming law. Stay tuned.

Breakfast Seminar

Sherrard Kuzz LLP invites you to join us for our ongoing series of employment and labour law update seminars.

TOPIC: Managing Medically Based Employee Absenteeism
SPEAKER: Dr. Neal Sutton
DATE: November 25, 2002, 7:30 a.m. – 9:00 a.m. (program to start at 8:00 a.m.; breakfast provided)
VENUE: Canadiana Room, Delta Toronto East, 2035 Kennedy Rd. (401 and Kennedy Rd.) Toronto, ON

Watch for your faxed invitation the week of November 11, 2002 or call 416.603.0700 to request an invitation.

HReview Seminar Series

DID YOU KNOW...?

That Employers may provide a surveillance video to the Workplace Safety and Insurance Board for use in a prosecution as long as:

1) **it is accompanied by a letter of authenticity;**
2) **it is date and time stamped;**
3) **there is written confirmation that the recording is un-altered;**
4) **it is a true representation of the subject; and**
5) **there is no sound on the recording whatsoever.**

ALCOHOL AT COMPANY EVENTS - WHEN IS THE PARTY OVER?

As the holiday season fast approaches, your organization may be planning its annual holiday party. As an employer, your party preparation will be incomplete until you have made plans to limit your employees' alcohol consumption and take steps to ensure that your employees arrive home safely after the party. Organizations that do not do this risk significant liability for damages either sustained or caused by an impaired employee.

HUNT V. SUTTON GROUP REALTY (THE TRIAL DECISION)

Hunt v. Sutton Group Realty (2001), 52 O.R. (3d) 425 (S.C.J.) ("Hunt") is the leading Ontario case to consider the scope of the duty of care owed by an employer to an employee who consumes alcohol at a company event. The trial judge found the employer, Sutton Group Realty ("Sutton"), partially liable for injuries which an employee, Ms. Hunt, suffered during a car accident which occurred while she was on her way home from the office Christmas party. At the party, Ms. Hunt had consumed alcohol provided by Sutton at an unsupervised open bar. After the party, Ms. Hunt and a number of other employees went to a pub where they consumed more alcohol.

The significance of Hunt is the impact of the Court's pronouncements on the scope of an employer's duty to provide its employees with a safe workplace. The Court appears to have expanded the scope of this duty beyond the traditional common law understanding that an employer owes a duty to its employees to ensure that the plant, premises and/or methods of work are safe for employees. In Hunt, the Court determined that this duty could extend beyond the employer's premises:

As an employer, I find that the defendant Sutton not only owed its employees an obligation to take reasonable care to avoid acts or omissions which it could reasonably have foreseen would likely cause her some harm, it also owed its employee an overriding managerial responsibility to safeguard her from an unreasonable risk of personal injury while on duty... this duty cannot be delegated to third parties and, therefore, the defendant Sutton owed the plaintiff a duty to personally intervene and prevent an intoxicated employee from driving home and certainly more so in the weather conditions at the time. It owed a duty to the plaintiff to take positive steps in that regard. It was open to the defendant to send the plaintiff home in by taxi, if necessary to take her car keys away and to take custody of her car. Alternatively, it should have taken steps to call her common-law husband to come and pick her up. Alternatively, he could have taken her to a local hotel or found some else who had not been drinking to do so or to drive her home.

Of particular significance is the Court's finding that:

- The employer's duty of care was not discharged by offering a cab to employees generally, nor even by specifically offering to drive Ms. Hunt home;
- The employer's duty of care was not discharged merely by asking Ms. Hunt if she wanted her husband to be called to pick her up (a toxicologist had testified that the worst person to ask for guidance in such circumstances is the drunk person whose judgement is impaired). In the Court's view, the employer should have phoned Ms. Hunt's husband directly;
- If necessary, the employer could have called the police;
- Putting Ms. Hunt in a cab would not have amounted to false imprisonment or even kidnapping as Sutton had argued at trial;
- By maintaining an open and unsupervised bar, the employer was incapable of monitoring the alcohol consumption of its employees; and
- In the context of the office party, it was "inconceivable" that the employer did not know that a group of employees had planned to stop for a drink on the way home from the party.

Ultimately, the Court concluded that Sutton had breached its duty of care and was negligent. It and the pub were held jointly liable for 25 percent of the damages suffered by Ms. Hunt who in turn was held liable for 75 percent of her own damages on the basis of self induced alcohol consumption.

THE DECISION OF THE COURT OF APPEAL

In August 2002, the Ontario Court of Appeal ordered a new trial - in respect of both liability and damages - on the basis that the trial judge did not properly charge the jury.

According to the Court of Appeal, the trial judge failed to consider several key facts which may have had an impact on the finding that the employer's negligence was a cause of Ms. Hunt's damages. In the circumstances it is possible that at the new trial there will not be a finding of liability as against Sutton, or that the extent of the liability will change.

In any event, it is significant that the Court of Appeal did not overturn the trial judge's description of the employer's duty of care. It remains very high.

OPTIONS FOR EMPLOYERS

In light of the Hunt decision, prudent employers must be proactive to ensure that employees do not abuse alcohol at employer sponsored functions and that employees do not drive after consuming alcohol at these

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functions. Employers must accept that they face a significant risk of being held responsible, at least to some degree, for the subsequent actions of employees who consume alcohol at employer sponsored events.

The most cautious employers will simply dispense with serving or providing alcohol at employer sponsored events. However, short of eliminating alcohol entirely, we suggest the following measures which may serve to minimize an employer's potential liability:

1. *Hold social events outside regular working hours and off the company premises. Attendance at the events should be voluntary.*
2. *If events are on company premises, retain the services of a professional bartender and servers who have experience and training in identifying intoxicated individuals. Do not have a self-serve bar.*
3. *Instruct bartenders and servers that they are not to serve employees who appear to be intoxicated.*
4. *Address intoxicated employees immediately and cut them off; do not wait until they are about to leave for home.*
5. *Restrict alcohol consumption. Consider imposing a two drink limit or alternatively provide drink tickets or a cash bar. Close the bar at a specific time.*
6. *Provide non-alcoholic beverage options and food for all employees.*
7. *Consider organized activities and/or entertainment.*
8. *Senior management must lead by example.*
9. *Provide employees with alternative methods of transportation home, including a designated driver program and/or free taxi transportation.*
10. *Insist that intoxicated employees turn over their car keys. Do not take "no" for an answer.*
11. *Designate a non-drinker to monitor employee drinking and to assist anyone who has become impaired and requires transportation.*
12. *Have appropriate liability insurance in place.*

Finally, we suggest that every workplace have a policy regarding the use of alcohol at work events. The policy should emphasis your concern for employee safety and the fact that employee events are not to be considered an opportunity to drink to excess. By fostering a work environment that recognizes appropriate limits to alcohol use, employees will be more inclined to respect those limits at social events.

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Providing management with practical strategies that address workplace issues in proactive and innovative ways.

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