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## Privacy and due diligence for the deal

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In buying and selling shares or assets, or financing a deal, the solicitors for the vendor, buyer and lender, engage in due diligence, to ensure among other things, the risks and liabilities being undertaken by their clients, and price adjustments as necessary. Obviously personal information will be produced and reviewed dealing with *inter alia*, current employees, pensioners, officers, directors, shareholders, customer marketing lists, customer warranty programs, customer contracts and receivables, and collection efforts.

In addition the solicitors for each side may need third party expertise to assist their due diligence review, such as actuaries for pension plans and accountants.

We are all acutely aware that the federal *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, ("PIPEDA") requires the informed consent by the individual to the collection, use and disclosure of his or her information, absent a valid basis for implied consent or a statutory exemption. There is no statutory exemption in PIPEDA permitting the disclosure of personal information for the purpose of due diligence by prospective purchasers and lenders or transfers of personal information in share and asset transactions. It is a glaring omission.

There are statutory exemptions for business transactions in the British Columbia and Alberta privacy legislation and these sections are found in Schedules "A" and "B" to this paper. Note Alberta and British Columbia at least have 'rules for the road' to assist us, but their respective rules are not identical.

The federal Privacy Commissioner's Office ("PCO") has informally noted this omission in PIPEDA and indicated it will be resolved in the statutory revisions to the Act likely to occur several years from now. In the meantime, the PCO feels the public expects business sales and financings to continue and there is consequent implied consent to the disclosure and transfer of personal information to effect such deals.

This is an informal policy of the PCO with no force of law. So what does the Ontario lawyer do to protect his or her client required to produce personal information as part of a pending sale or financing?

After advising the client as to the lack of statutory authority under PIPEDA to make disclosures in business deals without consent, consider:

- (i) the likelihood of success in asking for and obtaining the needed specific consents. For example, some receivers and bankruptcy trustee's are seeking specific consent from employees of the debtor corporation, before disclosing their employment records to prospective buyers. Apparently few employees fail to give consent; or
- (ii) discuss the risks of not obtaining such consent and whether a complaint to the PCO would be held to be well founded.

Where the client determines to proceed without seeking specific consent, then following the guidelines set out in Alberta and British Columbia legislation may go to lessen the likelihood of a complaint to the PCO being held to be well founded.

The solicitor should at least ensure:

- (i) a confidentiality and non-disclosure agreement is signed by the prospective purchaser or financier and its advisers;
- (ii) the client produces copies of only the personal information the purchaser or lender needs to see;
- (iii) the copies given are either kept in a secure 'documents room' for third party review, or, given as marked copies and the recipient per copy recorded;
- (iv) the marked copies are returned or certified to be destroyed by unsuccessful parties or by all parties if the deal fails to close;
- (v) the vendor, purchaser and lender enter into an agreement to restrict the use of the transferred personal information to the purposes for which it was given and carrying out the objects for which the transaction took place; and
- (vi) note in British Columbia the additional need to give the employees, customers, officers, directors and shareholder notice that the deal has occurred and that their personal information has been disclosed to the other party to the deal.

Attached as Schedule "C" is an extract from the initial stay order pursuant to the *Companies' Creditors Arrangement Act* granted by Justice Farley dated January 29, 2004 in the *Stelco* restructuring. At paragraph 28 of this Order, Justice Farley sets out the rules for disclosure of personal information in the possession of Stelco to parties involved in its restructuring.

With this gap in PIPEDA for business deals, clients have to make informed business decisions. The materials in Schedules "A", "B" and "C" may assist the client who cannot obtain specific consents, to proceed cautiously inside the guidelines of the British Columbia and Alberta legislation and Justice Farley's rules.

## SCHEDULE "A"

### PERSONAL INFORMATION PROTECTION ACT

Statutes of Alberta, 2003  
Chapter P-6.5

#### Division 6 Business Transactions

##### Disclosure respecting acquisition of a business, etc.

22(1) In this section,

- (b) "business transaction" means a transaction consisting of the purchase, sale, lease, merger or amalgamation or any other type of acquisition or disposal of, or the taking of a security interest in respect of, an organization or a portion of an organization or any business or activity or business asset of an organization and includes a prospective transaction of such a nature;
  - (c) "party" includes a prospective party.
- (2) Notwithstanding anything in this Act other than this section, an organization may, for the purposes of a business transaction between itself and one or more other organizations, collect, use and disclose personal information in accordance with this section.
- (3) Organizations that are parties to a business transaction may,
- (a) during the period leading up to and including the completion, if any, of the business transaction, collect, use and disclose personal information about individuals without the consent of the individuals if
    - (i) the parties have entered into an agreement under which the collection, use and disclosure of the information is restricted to those purposes that relate to the business transaction, and
    - (ii) the information is necessary
      - (A) for the parties to determine whether to proceed with the business transaction, and
      - (B) if the determination is to proceed with the business transaction, for the parties to carry out and complete the business transaction,
  - (d) where the business transaction is completed, collect, use and disclose personal information about individuals without the consent of the individuals if

- (i) the parties have entered into an agreement under which the parties undertake to use and disclose the information only for those purposes for which the information was initially collected from or in respect of the individuals, and
  - (ii) the information relates solely to the carrying on of the business or activity or the carrying out of the objects for which the business transaction took place.
- (4) If a business transaction does not proceed or is not completed, the party to whom the personal information was disclosed must, if the information is still in the custody of or under the control of that party, either destroy the information or turn it over to the party that disclosed the information.
- (5) Nothing in this section is to be construed so as to restrict a party to a business transaction from obtaining consent of an individual to the collection, use or disclosure of personal information about the individual for purposes that are beyond the purposes for which the party obtained the information under this section.
- (6) This section does not apply to a business transaction where the primary purpose, objective or result of the transaction is the purchase, sale, lease, transfer, disposal or disclosure of personal information.

## SCHEDULE "B"

### PERSONAL INFORMATION PROTECTION ACT

Statutes of British Columbia, 2003  
Chapter 63

#### Transfer of personal information in the sale of an organization or its business assets

20(1) In this section:

**"business transaction"** means the purchase, sale, lease, merger or amalgamation or any other type of acquisition, disposal or financing of an organization or a portion of an organization or of any of the business or assets of an organization;

**"party"** means a person or another organization that proceeds with the business transaction.

- (2) An organization may disclose personal information about its employees, customers, directors, officers or shareholders without their consent, to a prospective party, if
  - (a) the personal information is necessary for the prospective party to determine whether to proceed with the business transaction, and
  - (b) the organization and prospective party have entered into an agreement that requires the prospective party to use or disclose the personal information solely for purposes related to the prospective business transaction.
- (3) If an organization proceeds with a business transaction, the organization may disclose, without consent, personal information of employees, customers, directors, officers and shareholders of the organization to a party on condition that
  - (a) the party must only use or disclose the personal information for the same purposes for which it was collected, used or disclosed by the organization,
  - (b) the disclosure is only of personal information that relates directly to the part of the organization or its business assets that is covered by the business transaction, and
  - (c) the employees, customers, directors, officers and shareholders whose personal information is disclosed are notified that
    - (i) the business transaction has taken place, and
    - (ii) the personal information about them has been disclosed to the party.
- (4) A prospective party may collect and use personal information without the consent of the employees, customers, directors, officers and shareholders of the organization in the circumstances described in subsection (2) if the prospective party complies with the conditions applicable to that prospective party under that subsection.

- (5) A party may collect, use and disclose personal information without the consent of the employees, customers, directors, officers and shareholders of the organization in the circumstances described in subsection (3) if the party complies with the conditions applicable to that party under that subsection.
- (6) If a business transaction does not proceed or is not completed, a prospective party must destroy or return to the organization any personal information the prospective party collected under subsection (2) about the employees, customers, directors, officers and shareholders of the organization.
- (7) This section does not authorize an organization to disclose personal information to a party or prospective party for purposes of a business transaction that does not involve substantial assets of the organization other than this personal information.
- (8) A party or prospective party is not authorized by this section to collect, use or disclose personal information that an organization disclosed to it in contravention of subsection (7).

SCHEDULE "C"

Court File No. 04-CL-5306

Ontario Superior Court of Justice (Commercial List)

The Honourable )  
Mr. Justice Farley )

Thursday, the 29<sup>th</sup> day  
of January, 2004

"Paragraph 28: THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, the Applicants are permitted in the course of these proceedings to disclose personal information of identifiable individuals in their possession or control to stakeholders or prospective investors, financiers, buyers or strategic partners and to their advisers (individually, a "Third Party"), to the extent desirable or required to negotiate and complete the Restructuring or the preparation and implementation of the Plan or a transaction in furtherance thereof, provided that the Persons to whom such personal information is disclosed enter into confidentiality agreements with the Applicants binding them to maintain and protect the privacy of such information and to limit the use of such information to the extent necessary to complete the transaction or Restructuring then under negotiation. Upon the completion of the uses of personal information for the limited purpose set out herein, the personal information shall be returned to the Applicants or destroyed. In the event that a Third Party acquires personal information as part of the Restructuring or the preparation and implementation of the Plan or a transaction in furtherance thereof, such Third Party shall be entitled to continue to use the personal information in a manner which is in all material respects identical to the prior use of such personal information by the Applicants."