

**PIPA CONFERENCE 2007:  
AN EDUCATIONAL FORUM FOR  
BUSINESSES & NON-PROFITS**

***1A: TREAD SOFTLY: THE STRAIGHT GOODS  
ON COLLECTING, USING AND DISCLOSING  
EMPLOYEE MEDICAL INFORMATION***

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## PIPA CONFERENCE MATERIALS

### **The Duty to Accommodate and Administering a Return to Work**

The privacy issues that arise in the context of the employer administering either a return to work or duty to accommodate for an employee are obvious. The employer has an obligation to ensure that the employee can work safely in the workplace. The employer also has an obligation to accommodate to the point of undue hardship. In the case of a physical or mental disability, the employer requires sufficient medical evidence in order to assess its obligations and meet its duties. However, in the course of administering its obligations, employers often find themselves faced with restrictions on how much medical information they are entitled to obtain. The employee wants to retain their right to privacy – the employer seeks to meet its duties.

Arbitrators have been faced with this issue for many years – balancing the privacy rights of the individual employee as against the rights of the employer to obtain medical information. Since the balancing is based on reasonableness, the context for the collection guides the conclusion regarding the information the employer is entitled to. Thus, in the case of a return to work in the normal course an employer may not be entitled to anything other than a certificate that states that the employee is fit to return to work. . Where specific circumstances exist, such as a lengthy absence, the employer may be entitled to additional information. In the case of sick leave, an employer's entitlement to medical information may increase, depending on the nature of the sick leave benefit. In the case of a duty to accommodate, an employer may be entitled to detailed information, guided by the principle that in the case of a duty to accommodate, the employer has a duty to inquire and a duty to inform itself about the disability.

Thus, the scope of the medical information the employer is entitled to collect depends first upon the purpose for the collection. The other part of the equation is the type of information the employer is entitled to, ranging from doctor's notes to functional capacity evaluations (FCE) to independent medical examinations (IME). In some cases, the employer may be entitled to very limited information however, even where the employer can show that it requires more specific information, the privacy rights of the employee are taken into account. The usual course will be to require the employer to go back to the employee's own doctor, ask additional questions and

obtain clarification. If employer cannot obtain clarification, the next step may be to ask the treating physician to refer the employee to a specialist and then if circumstances warrant, in some cases, the employer may obtain an independent medical examination.

In the usual course, absent language in a collective agreement, an employer does not necessarily have a right to request a medical certificate in the case of a return to work. However, in specific cases such as where there is a suspicion as to the *bona fides* of an illness, excessive absenteeism, an employee returning to work after a long absence and there are concerns about the employee's return to work safely, arbitrators have ordered that certificates be produced even in the absence of a collective agreement provision. The employer has the right to satisfy itself as to information confirming the return to work. For example, the employer could go back to the employee's own doctor with a job description or job demands analysis to ensure that the doctor understands the true requirements of the job, not just based on what the patient has told the doctor. The employer could also request that the employee's doctor send the employee to a specialist to get a more specific opinion on an issue. All of this would have to be accomplished through the employee with the employee's consent. The employer cannot contact the employee's doctor directly unless specific consent has been provided to do so.

In the context of administering attendance management programs, a number of arbitrators have held that employers are not entitled to diagnosis but rather information about the nature of an illness; i.e., enough information to determine if the illness affects the ability of the employee to perform their job: *Westcoast Energy*, [2004] C.L.A.D. No. 504. In a series of cases dealing with school districts, it was determined that the information sought must be shown to be reasonably necessary in the administration of sick leave benefits. Privacy concerns may limit the amount and type of information that can reasonably be demanded: *Surrey School District No. 36*, [2006] B.C.C.A.A.A. No. 47. In another case, Arbitrator Hickling stated that an employer is entitled to information to determine if the particular absence was genuinely due to sickness or injury: *Health Employers Association of B.C.*, [2006] B.C.C.A.A.A. No. 162.

As an example of the types of information that can be provided, in a 2006 case, *Health Employers' Association of BC v. BCNU* [2006] B.C.C.A.A.A. No. 162, Arbitrator Hickling considered the reasonableness of collecting information in the context an attendance

enhancement program. He relied extensively on the four BCPSEA arbitration decisions and came to the conclusion that the following changes should be made to the form:

- The words “date of examination” should be substituted for “date of initial examination for current absence.”
- The nature of the absence should be amended to specifically ask the general nature of the employee’s illness or injury and put in brackets that “diagnosis is not required”.
- Questions about functional limitations and future absences should not be asked at the initial stage of an absence from work.
- Authorizations to release medical information should be amended to indicate that the information would be provided in a confidential envelope to the employee health and wellness advisor for retention in the employee’s confidential health file.

The arbitrator agreed with an authorization to provide information concerning a long-term disability claim for the purpose of allowing the employer access to information which would assist in understanding the nature of the absence. However, the form was revised to be very specific that the information would be provided only with respect to the nature of the claim in question; who it would be provided to; that all information would be handled in a confidential manner; and only used for the purpose of following up with the employee during the course of that particular disability claim.

In *Canadian Merchant Service Guild v. Seaspan International Ltd.* [2007] No. 57 Arbitrator Taylor dealt with another case involving the conflict between the right of the employer to manage the business and the protection of the employee’s right to privacy. In that case, Arbitrator Taylor referred to the arbitral jurisprudence as well as the privacy legislation. He noted in particular a finding of the Federal Privacy Commissioner, *PIPEDA Case Summary #233* in which the Office of the Privacy Commissioner stated as follows:

*“Application: Principle 4.4 of Schedule 1 to the Act states that the collection of personal information shall be limited to that which is necessary for the purposes identified by the organization.*

*The Office of the Privacy Commissioner has long recognized that every employer has the right to ensure that its employee’s absences are justified, and the obligation to determine whether its employees are fit to return to work after a period of illness or whether other measures must be taken. It also recognizes that it may be necessary to obtain personal medical information on the employee for this reason. The question is thus, ‘What quantity of information suffices in a given situation?’ ”*

In that case, at issue was the provision of information under a benefit plan wholly funded by the employer and provided by the union, in this case the Canadian Merchant Service Guild (“Guild”). The grievor had gone off work on a disability leave and the employer had asked the grievor to take to his attending physician a letter which asked questions about the current impairments, the dates the grievor had been seen, and the dates of any specialists appointments, a prognosis as to a return to work to regular occupation and suggestions as to any assistance to return the worker to the work force. A limited amount of information was provided. The grievor was still off work some two years later and the employer repeated its request for medical information. The Guild advised that the medical questions posed were inappropriate and advised the employer that the grievor was receiving LTD and was disabled with no return to work date established. The employer cautioned that the employee would be terminated for failure to provide the information.

The Guild took issue with the medical information being requested as well as the threat of termination for non-compliance. The arbitrator referred to the medical questionnaire. In particular, with respect to the question about current impairments, the employer’s position was that the question went to its interests in facilitating a return to work. It also asked what activities the employee could currently not perform. The question was intended not to elicit a diagnosis but to assist in a return to work analysis. Arbitrator Taylor referred to the recent authorities which distinguish between a medical diagnosis and the nature of illness or disability. The arbitrator found that the question did not ask for a medical diagnosis but instead asked for impairments. The question was therefore reasonable given the employer’s legitimate business interests in facilitating the employee’s return to work.

With respect to the second question regarding the dates of any specialist's assessments, the arbitrator found that the employer was not over reaching by requesting confirmation that the employee was undergoing treatment and the dates, if any, of specialist's assessments.

With respect to the question asking whether there was any assistance that the employer could provide to assist the employee in returning to the work force, the arbitrator again found this question was not unreasonable. However, the medical questionnaire also invited the employee's physician to contact the employer's occupational health physician. The arbitrator found that this aspect of the medical questionnaire went beyond what the employer was reasonably entitled to receive and put at risk the privacy of the employee. The arbitrator found that the employer was entitled to ask the medical restrictions on limitations that prevented the employee from performing duties; whether the employee was expected to make a full recovery from the current disabling condition; whether there is a rehabilitation or treatment plan in place; whether the employee was actively participating in this treatment plan; whether modified duties would be appropriate; and what the work prognosis would be for the employee.

While there are no specific PIPA decisions on the issue of the employer's right to medical information, the Federal Privacy Commissioner has issued findings (see case summaries nos. 118, 119, 120, 191, 233, 257 and 284). In these decisions the Privacy Commissioner has confirmed that employers must show that their requests for medical information are reasonable in the circumstances. In case No. 233 the employer was requiring mandatory diagnoses from all employees in all cases. The employer agreed to change its policy so that only those in safety-sensitive positions were required to provide the diagnosis on the certificate. The Privacy Commissioner has also upheld employers' practices of holding diagnostic information in strict confidence within the occupational health unit, sharing information with employees' managers only on a need-to-know basis (Case Summary No. 284).

A further recent decision of the Federal Privacy Commissioner, *PIPEDA Case Summary #364* involved a complaint about a consent form regarding an exchange of health information. The employer had contracted with a third party medical services provider to assist in managing a group benefits disability plan administered in turn by an insurance company. The complainant alleged that the employer was requiring employees to sign a new authorization form in order to

obtain the benefits. In the form, the employee was required to consent to an exchange of confidential medical information to and from health care providers, the insurance company, the third party medical services provider, the company and other agencies and organizations as a precondition of applying for benefits.

The third party had been contracted to assist the insurance company in managing the benefits program. The employer's position was that with respect to the employees who had not signed the consent form and had sent their claim directly to the insurance company, the Human Resources Department for the employer would then follow up with the employee with respect to their ongoing absence and managing that absence as well as obtaining information as to whether or not the employee could be accommodated in the work place. The previous arrangement continued to be in place: that is, the insurance company would not exchange information with any of the entities unless it was relevant and necessary and then only to the extent required to fulfil the purpose. In other words, the insurance company would not disclose medical information but would advise the employer when a claim was accepted and when an employee was going to be returning to work on a rehabilitation or full, unrestricted basis. The purpose of using the third party medical services provider was to assist the employer in these processes. Employees were not being forced to consent to an open-ended collection by the third party medical services provider. However, the Commissioner did say that the language on the form was problematic in that it contemplated an open-ended communication with no limit on how the information would be used. The Commissioner recommended that the employer clarify the wording of its consent language to ensure that employees understood that consent to the third party's collection was not a condition of receiving benefits.

As noted, the concept of what is reasonable impacts on the analysis of the employer's entitlement, and depends on the circumstances. Thus in the case of the duty to accommodate, an employer has a duty to inquire into and a duty to inform itself about the extent of the accommodation requirements. The Supreme Court of Canada has described a three-part test for determining a justification defence to a *prima facie* case of discrimination in what has become known as the *Meiorin* decision, [1999] 3 S.C.R. 3, with the test being as follows:

1. that the employer adopted the standard for a purpose rationally connected to the performance of the job;

2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose;
3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. (at para. 54)

A case which was decided by the Canadian Human Rights Tribunal shortly after the *Meiorin* decision is *Conte v. Rogers Cable Systems Ltd.* B.C.H.R.T.D. 4/99. In that case, the employer had some medical information about the employee. The Tribunal held that in order to initiate the process to determine whether accommodation was required, the employer should have examined the current medical condition as well as the prognosis for recovery. The employer drew conclusions based on what it knew of the employee's current medical condition without getting more specific medical information from the employee's position about her condition, and therefore had failed to accommodate her. Arbitrators and human rights tribunals have held that employees have an obligation to participate in the accommodation process which includes an onus on the disabled employee to present convincing evidence about the requirement for the accommodation.

The decision of *Gordy v. Oak Bay Marine Management*, [2004] B.C.H.R.T.D. No. 180 sets the standard for the employer's obligation to inquire and be informed. This was the BC Human Rights Tribunal's second analysis of the issue after it had been sent back to the Tribunal by the B.C. Court of Appeal. The Tribunal referred to a number of cases which established the employer's obligation to make enquiries to understand the nature of the employee's medical condition and how restrictions can be accommodated, citing, for example, *Country Leather Manufacturing Ltd.* (2003), S.K.Q.B. 416, and *Ontario Human Rights Commission v. Falconbridge Limited* (2001), 39 C.H.R.R.D. /153. At paragraph 144 the Tribunal states:

In my view, if an employer is to be considered "informed" such that he is not required to undertake any further enquiries regarding the accommodation of an employee with a disability, that employer, in addition to bearing the onus of proving that he was knowledgeable about both the abilities of the employee with a particular disability and the disability itself, must also bear the

onus of proving that he was informed about the possible accommodations which could be made for the employee in the workplace.

This puts the employer in a conundrum if the employee refuses to provide the medical information. The employer has the duty to inquire and to understand how the medical and health assessment impacts on its obligation to accommodate. For example, in one arbitration decision, an arbitrator ordered that an employer had failed to meet its duty to accommodate because it had not required that the employee attend a functional assessment based on current medical and health care advice. In that case the employer had not met the onus of accommodating the grievor (*Alberta Union of Provincial Employees*, [2005] A.G.A.A. No. 60). Another case where an arbitrator found that it was reasonable for an employer to require an FCE to ensure that all options for an appropriate accommodation could be canvassed is *Maple Leaf Meats*, [1998] M.G.A.D. No. 69.

Other circumstances where arbitrators are more likely to order that medical information be provided arise in the context of litigation where the employee or grievor has put their medical condition in issue. In that case, arbitrators will sometimes order independent medical examinations in order to ensure a fair hearing: *R.M.H. Teleservices International*, [2002] B.C.L.R.B.D. No. 155; *Canada Post Corp. and C.U.P.W.*, 69 L.A.C. (4<sup>th</sup>) 393.

On the other hand, arbitrators have not ordered that employees submit to IMEs in every case of a request for duty to accommodate. In *Overwaitea Food Group*, [2003] B.C.C.A.A.A. No. 311, the arbitrator did not order an independent medical examination, although the issue included not just an ability to return to work, but also the extent and nature of disability and its effect on the accommodation issue. The arbitrator stated at paragraph 18:

I find, however, a balancing of the interests mandates further inquiry from the grievor's physician rather than a order the grievor submit to a medical examination by a doctor chosen by the employer. This latter request should not be granted lightly as it is evident from the analysis above.

Another case where it was found that the employer did not have reasonable and probable grounds for requesting that the grievor undergo an independent medical examination, is a decision involving a federal government ministry. The case was appealed on judicial review to

the Federal Court. The Federal Court judge referred to the often-cited principle that employers are entitled to seek medical information to ensure that a returning employee is able to return to work safely and poses no hazard to others. If the employer has reasonable grounds on which to believe that the medical condition presents a danger, the employer may ask for additional information.

The Court found that it was necessary to balance the employee's right to privacy which required that the employer must explore other options to obtain the information first. If the employer was dissatisfied with the other options, it must clearly explain to the employee or state the reasons why the information is insufficient, respecting the employee's right to privacy. The Court did allow that in exceptional and clear circumstances, a request for an IME may be allowed: *Canada (Attorney General) v. Grover*, [2007] F.C.J. No. 58.

## **Drug and Alcohol Testing**

There has been significant jurisprudence on the issue of the right of an employer to require alcohol and drug testing since the mid-eighties, with the majority view being that employers do not have the right to implement mandatory random drug testing. The issue is analyzed both from a human rights perspective as well as the privacy perspective, the latter taking into account the individual's expectation of privacy.

Over the years, however, there has been a recognition that some alcohol and drug testing is in compliance with privacy and human rights jurisprudence. Some of the situations where drug testing has been found to be justified include for just cause, where there is reasonable suspicion of impairment, or there has been a significant incident or near-miss incident. In 2004, Arbitrator Taylor accepted that in safety sensitive work places, employers do not have to prove that a drug problem exists: *Weyerhaeuser* [2004] B.C.C.A.A.A. No. 71.

In a non-safety sensitive workplace, a two-part test must still be met which is for the employer to establish that there is an existing problem in the workplace and that other less invasive measures to attempt to minimize the drug problems have not been effective. Some of the issues that have arisen following these cases involve situations where employers invoke the right for automatic mandatory drug testing in the face of a near miss or an actual incident. However, even in these cases, arbitrators have found that management must balance the privacy rights of the individuals by ensuring that there is some investigation of the near-miss incident and not simply a rote application of the rule.

An interesting decision which considered whether or not a drug and alcohol policy complied with not only human rights obligations but also with the B.C. *Personal Information Protection Act* (PIPA) is *Vancouver Shipyards Co.*, [2005] B.C.C.A.A.A. No. 296; [2006] B.C.C.A.A.A. No. 186; [2006] B.C.C.A.A.A. No. 187. Arbitrator Hope in this case reviewed the employer's substance abuse policy, which provided for both reasonable cause and post-incident drug and alcohol testing. At issue were mandatory disclosure provisions in the policy which required employees to disclose to their supervisor current drug or alcohol dependency problems as well as past dependency problems involving alcohol or drugs within the past six years.

The union at arbitration argued that these mandatory disclosure provisions were contrary to the B.C. PIPA. Arbitrator Hope began by analyzing the policy's compliance with human rights law. Since the drug testing provisions allowed for drug testing where there was reasonable cause to assume that the employee was impaired or where there was an accident or a near miss or unexplained dangerous behaviour, the policy was not inconsistent with human rights obligations. Arbitrator Hope also found that the mandatory disclosure provisions were not contrary to human rights legislation.

The union argued that the authorities that Arbitrator Hope had relied on in coming to his conclusion, that the mandatory disclosure provisions were not contrary to human rights legislation, must no longer be considered as binding in light of B.C. PIPA and its provisions with respect to collection of personal information. Arbitrator Hope noted that the decision he had relied on, *Entrop v. Imperial Oil*, [2000] O.J. No. 2689, applied the BFOR test established by the Supreme Court of Canada in the *Meiorin* decision of the Supreme Court of Canada. Arbitrator Hope found that if a policy is found to meet a BFOR under the *Meiorin* test, it would therefore satisfy the PIPA test, since the PIPA test requires that the collection only be required for the purpose of managing the employment relationship between the employee and the employer.

Arbitrator Hope did not find that the reasonableness test under PIPA, is the same as the BFOR test under *Meiorin*. Far from it, his finding was to the effect that as the BFOR test established by the Supreme Court of Canada sets a very high threshold, that a standard be reasonably necessary to accomplish a purpose, and that to show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees, the test by its very nature sets a higher standard than a reasonableness test for managing the employment relationship. However, the case is useful for analyzing the comparison of the BFOR analysis to the reasonableness under PIPA. Arbitrator Hope found that the employer was entitled under B.C. PIPA to collect the mandatory disclosure information, as in his view it was reasonable for the purposes of managing the employment relationship.

## **Potpourri**

Interesting developments in the last few years include the growth in the area of damages for breaches of privacy. In one case, an arbitrator awarded \$5,000.00 in damages to a worker who was required to get a psychological assessment. In that case, the employer was concerned that the employee might be involved in violence to his fellow workers if he returned to the workplace. The employer advised the employee that he must attend for a psychological assessment before returning to work. He eventually attended the psychological assessment and was returned to work, but his union filed a grievance grieving, among other things, that he should be entitled to damages for mental distress and for the infringement on his privacy rights.

In that case, the arbitrator upheld the employer's right to obtain an independent medical examination, balancing the privacy right of the individual against the employer's right to maintain a safe workplace. However, the arbitrator found that in obtaining the medical examination, the employee had a right to have his privacy rights infringed as little as possible. The arbitrator found that the employer had not afforded the grievor that right when it allowed several members of management to review the assessment report. The arbitrator found that the employer should have had its own doctor receive and review the assessment report and then advise the employer about the employee's fitness to return to work. The grievor was entitled to damages which were awarded for mental distress, but arguably awarded in light of the privacy breach of the employer: *Molson Breweries*, [2005] O.L.A. No. 515.

In another decision involving a privacy breach, a grievor was awarded \$10,000.00 for personal indignities and mental suffering. That was a case where the employer had a drug and alcohol policy in place that allowed for drug testing to be conducted in the face of an accident. The grievor had an accident, she was sprayed with a resin at a strand board mill operation. Luckily she was not seriously injured, but subsequently the manager told her she must seek a drug test in accordance with the new policy.

The arbitrator reviewed both the threshold for conducting a test as well as the way in which the test was conducted. The arbitrator found that the employer had failed to take into account setting a threshold for the type of accident that would result in post-incident testing, in order to avoid intruding on employee privacy. Since the policy failed to give any thought to investigation of

the circumstances of the accident or incident prior to moving towards the drug testing, the policy was not reasonable. Moreover, the conditions under which the test was conducted were not reasonable. The grievor was driven to a local hotel where she was required to attend in a hotel room where a test was conducted under quite unsavoury circumstances. The arbitrator commented, not only on the hotel chosen and the implication that might arise from citizens seeing a woman attending that type of hotel with two other men, but also on the lack of privacy in which the test was conducted: *Weyerhaeuser Company*, [2006] A.G.A. No. 48.

In other cases, organizations have found themselves being involved in reported investigations which disclose that the organization was involved in a privacy breach. In one case, the information in question was a psychological assessment that had been conducted on an employee who had tested positive for marijuana. The consultant, Wilson Banwell, sent both the employer and the employee's union not just a summary of the report but the entire psychological assessment. The employee complained to the Alberta Privacy Commissioner's office which conducted an investigation and issued an investigation report: *Wilson Banwell Human Solutions Inc.*, Investigation Report #P2007-IR-001.

The Commissioner's delegate wrote in the investigation report that the organization had breached Section 19(2) of the Alberta *Personal Information Protection Act*. There was no reasonable purpose for disclosing the personal information. While there was a reasonable purpose to facilitate a return to work, the issue was that the psychologist report contained large amounts of extraneous matter that was not required for the purpose of assessing the return to work.

A last issue that arises in the context of medical information and privacy is the issue of the independent medical examination, whether the individual being examined can access that opinion or other documents related to it, and what information can be provided to the independent medical examiner. In *PIPEDA Case Summary No. 284*, the employee complained that her personal information had been disclosed to an independent medical examiner without her consent. The information in question related to the employee's argument with her immediate supervisor before leaving work, and giving her medical condition as a reason for not being able to return to work. The employee had consented to the independent medical examination and

signed a consent authorizing her doctor to disclose medical information regarding her current absence. The employer had also disclosed information to the independent examiner, in particular, health records from her file relating to previous absences for the same reason as well as information regarding the interaction with her manager. The Privacy Commissioner noted that information about the workplace incident was reasonable in the circumstances, as was disclosing the information about her previous absences. These were an important consideration in assessing her potential to return to work. The Commissioner found that requiring express consent on every occasion where information about employee performance would be disclosed, would impose an unreasonable burden on organizations.

In the context of access requests for independent medical examinations, this has been considered by the Federal Privacy Commissioner. An individual who had been examined by an independent medical examiner on behalf of an insurance company, applied for access to his personal information and was refused some of the information. The doctor provided the applicant with a copy of the report but refused to provide notes taken during the examination. Under the *Personal Information Protection and Electronic Documents Act*, (“PIPEDA”) the examiner could only rely on either solicitor/client privilege or information generated in the course of a formal dispute resolution process, to deny access to the information. The Assistant Commissioner found that the circumstances did not constitute a formal dispute resolution process. Therefore, the applicant was entitled to the records: *PIPEDA* Case Summary No. 306.

In another similar case, the Federal Court ordered production of a doctor’s notes taken during an independent medical examination. In applying *PIPEDA* to the dispute, the Federal Court determined that the definition of personal information in *PIPEDA* is broad enough to catch medical history and other medical information. The notes taken by the doctor were therefore personal information. None of the exceptions to refusing access in Section 9(3) of *PIPEDA* applied. The notes were not part of an on-going dispute resolution process and therefore the notes were required to be produced: *Rousseau v. Wyndowe*, [2006] F.C.J. No. 1631.

As an illustration of how the language in the *PIPA*s between BC and Alberta and the Federal legislation must be respected in terms of interpreting decisions, organizations based in Alberta governed by the Alberta *PIPA* should refer to the Alberta Commissioner’s Order P2007-002.

This case dealt with a request to a psychologist for a copy of all the psychologist's file relating to a custody assessment relative to the applicant, his former wife and their two children. The adjudicator conducted an extremely lengthy analysis of the application of Section 24 of the Alberta *PIPA* to the psychologist's files and reached a determination on Section 24(3)(b) that appears to change the law on this issue. The applicability of this decision to the interpretation of BC *PIPA* remains to be seen through future BC decisions.