ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

Report of an Investigation into the Disclosure of Personal Information During the Course of a Business Transaction

July 12, 2005

Builders Energy Services Ltd., Stikeman Elliott LLP, Shtabsky & Tussman LLP and Remote Wireline Services Ltd.

Investigation Report P2005-IR-005

I. INTRODUCTION

[1] On February 14, 2005, the Office of the Information and Privacy Commissioner ("the Commissioner") received a complaint that Builders Energy Services Ltd. ("Builders"), Remote Wireline Services Ltd. ("Remote") and two law firms, Stikeman Elliott LLP ("Stikemans") and Shtabsky & Tussman LLP ("Shtabsky & Tussman") failed to comply with Alberta's *Personal Information Protection Act* ("PIPA" or "the Act") by improperly disclosing personal information, gathered through a business acquisition, onto the world wide web.

II. JURISDICTION

[2] The Act applies to provincially regulated organizations in Alberta. The Commissioner has jurisdiction in this case because Builders is incorporated in Alberta, operating in Alberta and governed by the laws of the province of Alberta, and is therefore an "organization" under the Act. Remote has now been acquired by Builders, and continues to carry on business in Alberta. Likewise, both Stikemans and Shtabsky & Tussman

are law firms registered and doing business in the province of Alberta and, therefore, are "organizations" under the Act.

[3] On February 28, 2005, the Commissioner authorized this Office to conduct an investigation under subsection 36(2)(e) of the Act and to attempt to bring the matter to a successful conclusion. This report represents our findings.

III. INVESTIGATION

[4] In conducting this investigation, we interviewed the complainant (an affected Builders employee), members of Builders' management team, lawyers from Stikemans, and a lawyer representing Shtabsky & Tussman. We examined the purchase & sale agreements and schedules relating to all of the acquisitions in question, the Builders' Prospectus, Builders' Privacy Policy and Stikemans' draft privacy policy.

IV. STATEMENT OF AGREED FACTS

[5] In the autumn of 2004, Builders started the process to acquire securities of entities that provide oilfield services to the western Canadian oil and gas industry (hereinafter "the Transaction") and to conduct an Initial Public Offering ("IPO"). The IPO closed concurrently with the closing of acquisitions of nine oilfield service businesses: Brazeau Well Servicing Ltd., Decarson Rentals (2000) Inc., Circle D Transport Inc., Ken Polege Enterprises Ltd., the CTC Group (CTC Coil Tubing Completions Ltd., CTC Nitrogen Services Ltd. and CTC Production Testing Ltd.), Remote Wireline Services Ltd. ("Remote"), and CDT Rentals Inc. (collectively "the Acquired Companies"). On January 25, 2005, Builders amalgamated with all nine of the Acquired Companies but continued to operate each of the businesses of the Acquired Companies under their current operating name. As a result of the amalgamation, Builders became liable for all of the Acquired Companies' obligations.

[6] Builders retained Stikemans as its legal counsel. Each of the nine Acquired Companies retained their own separate legal counsel to advise them during the course of the Transaction. Specifically, Remote retained the law firm of Shtabsky & Tussman.

[7] During the course of the Transaction, purchase and sale agreements were drafted for the purpose of each individual acquisition. These agreements were largely similar, but each reflected specific circumstances that were unique to each Acquired Company. Each Acquired Company provided representations and warranties to Builders

in the course of the Transaction. The fulfilment of the representations and warranties by the Acquired Companies was a condition of the Transaction.

[8] Specifically in s. 3.2 of the purchase and sale agreement between Builders and Remote ("the Remote Agreement"), Remote and its shareholders provided to Builders certain representations and warranties in respect of employment matters:

> *"3.2(z) except as set forth in Schedule 3.2(z), the Corporation is not a party to any written employment contract, consulting agreement, collective bargaining agreement or employee association agreement; the Corporation has not conducted and is not now conducting any negotiations with any labour unions or employee associations; the Corporation has complied with all of its obligations in respect of employment insurance programs, Canada Pension Plan payments and Worker's Compensation payments;*
>
> *(aa) the only employees of the Corporation are listed in Schedule 3.2(z);*
>
> *(bb) all Employee Plans are listed in Schedule 3.2(z) and;*
>
> *(i) the Corporation has paid or provided for all liabilities for wages, vacation pay, salaries, bonuses, pensions and all other amounts payable under Employee Plans;*
>
> *(ii) each of the Employee Plans complies with and has been administered in substantial compliance with the terms thereof and Laws; and*
>
> *(iii) have been, or will by Closing be, terminated with no further Liability of the Corporation or Builders."*

[9] Builders requested information from each of the Acquired Companies to complete the schedules and satisfy the representations and warranties. The information required for the schedules would include a list of employee names, a list of any employment agreements, and details regarding any employee benefits plans. Stikemans advised us that typically on transactions of this nature, only names and position titles of employees are included in such schedules. Builders advised that it did not request either employee home addresses or Social Insurance Numbers ("SINs") from the Acquired Companies.

[10] Builders did not request the information for the employee

schedules in writing from the Acquired Companies. Because of the nature of the acquired businesses, and their size, Builders communicated many of the requirements for the Transaction over the telephone or in person instead of in writing. Information was supplied to Builders by principals and agents of the Acquired Companies and to Stikemans by principals and legal counsel of the Acquired Companies.

[11] Specifically with respect to the Remote Agreement, a Remote employee provided the employee schedule to Shtabsky & Tussman for use in the business transaction. Shtabsky & Tussman in turn disclosed the schedule to Stikemans. This employee schedule identified all of the Remote employees, with their home addresses and SINs (even though SINs had not been requested). We will hereinafter refer to the disclosure of this employee schedule by Shtabsky & Tussman to Stikemans as "the First Disclosure".

[12] The personal information disclosed by Shtabsky & Tussman was not provided to Stikemans subject to any solicitors' trust conditions or undertakings.

[13] It is unclear whether anyone at Shtabsky & Tussman reviewed the contents of the schedule before disclosing it to Stikemans.

[14] Stikemans received the Remote employee schedule and provided it to Builders for their review and sign-off. Stikemans did not notice that the schedule included home addresses or SINs. As with Shtabsky & Tussman, it is unclear whether anyone at Stikemans reviewed the contents of the schedule.

[15] Builders reviewed all of the schedules primarily with a view to ensuring that all documents were included; they submit that they relied on Stikemans to advise them of the legality and responsiveness of the information contained in the documents. Once Builders signed off on the schedules, Stikemans then attached them to the Remote Agreement.

[16] Securities legislation requires public companies such as Builders to disclose all material contracts on the System for Electronic Document Analysis and Retrieval ("SEDAR"). SEDAR was developed in Canada for the Canadian Securities Administrators to:

- facilitate the electronic filing of securities information as required by the securities regulatory agencies in Canada;
- allow for the public dissemination of Canadian securities information collected in the securities filing process; and

- provide electronic communication between electronic filers, agents and the Canadian securities regulatory agencies

[17] As the Remote Agreement is considered a material contract, Stikemans disclosed and filed the Remote Agreement on SEDAR on January 25, 2005, including all schedules. We will refer to Stikemans' disclosure of the employee schedule through posting on SEDAR as "the Second Disclosure".

[18] There is no log-in or password requirement to access documents that are posted on SEDAR's website. Information posted on SEDAR is accessible to anyone browsing its website. Indeed, one of SEDAR's objectives is the efficient public dissemination of securities information.

[19] Builders became aware of the resulting disclosure of employees' names, home addresses and SINs on SEDAR when a Remote employee brought it to their attention on February 9, 2005. As only the Alberta Securities Commission can remove information from SEDAR, Builders was unable to immediately retract the information from the website. Removal of the employee schedule from SEDAR's website occurred on February 11, 2005.

[20] It is not known how many individuals accessed this information on SEDAR's website between January 25, 2005 and February 11, 2005.

V. ISSUES

[21] To resolve this matter, two questions must be determined:

1. Were the First and Second Disclosures of personal information in compliance with Part 2 of PIPA?

2. If not, who is accountable for the unauthorized disclosures?

VI. ANALYSIS

1. Were the First and Second Disclosures of personal information in compliance with PIPA?

[22] Part 2, Division 6 of the Act deals with the collection, use and disclosure of personal information during the course of a business transaction. "Business transaction" is defined in subsection 22(1)(a) of the Act as follows:

> *"… 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."*

[23] The acquisition of Remote and the other Acquired Companies in this case was clearly a "business transaction" as contemplated by the Act.

[24] PIPA subsection 22(3)(a) allows parties to a business transaction to collect, use and disclose personal information without the consent of the individual if :

> *"(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…"*

[25] Prior to the Transaction, Builders entered into confidentiality agreements with each of the Acquired Companies. Specifically with respect to Remote, the confidentiality agreement provides that all confidential information shall only be used, dealt with or exploited for the purposes of evaluating a possible transaction. We are therefore satisfied that the parties complied with subsection 22(3)(a)(i) of PIPA.

[26] The remainder of this analysis will deal with whether there was compliance with subsection 22(3)(a)(ii): whether the information disclosed was necessary for the purposes of determining whether to proceed with the transaction, and of carrying out and completing the transaction.

a. The First Disclosure

[27] In respect of the First Disclosure, we find that it fails to satisfy the requirements of PIPA paragraph 22(3)(a)(ii); i.e., we find the personal information disclosed was not "necessary" for the purposes of the business transaction.

[28] Certain types of personal information about employees of an organization will be "necessary" for the purposes of a transaction involving acquisition of the shares or assets of that organization. The facts of each case will govern, of course, but examples of personal information that may be "necessary" include the names and titles of employees, descriptions of positions and functions, description of an individual's place in the acquired organization's management structure, and, in some cases, salary levels. Furthermore, outstanding employee litigation, whether the employee belongs to the organization's benefit plan, stock purchase plan, pension plan, or collective bargaining unit, are similarly factors that may be necessary in order to determine whether to proceed or conclude the business transaction. Again, depending on the facts of the case, these are examples of personal information that likely have the ability to affect the decision to proceed or the terms on which a transaction proceeds (including price).

[29] Builders did not request the employee home addresses or SINs as part of the information gathering for the schedules from any of the Acquired Companies. Typically, only employee names are requested as part of these schedules. Nonetheless, home addresses and SINs were supplied by Remote to its counsel Shtabsky & Tussman.

[30] We find that the employees' home addresses and SINs were not necessary for concluding the transaction. Both the home address and SIN would only ever be reasonably collected, used or disclosed once an individual became an employee of an organization.

[31] In summary, the personal information that is the subject of the First Disclosure (with the exception of the employees' names) does not meet the criteria in section 22 of the Act. As such, the business transaction exception does not apply to the employees' home addresses and SINs.

[32] Absent the business transaction exception, PIPA may nonetheless authorize the use and disclosure of personal information and personal employee information without the consent of the individual or employee. We will consider in turn the provisions of PIPA pertaining to personal employee information and personal information to determine whether the First Disclosure was otherwise authorized under the Act.

[33] "Personal employee information" is defined in PIPA subsection 1(j) as personal information in respect of an individual who is an employee or potential employee of an organization whose personal information is reasonably required by an organization for the sole purposes of establishing, managing or terminating the employment relationship, but

does not include personal information about the employee that is unrelated to that relationship.

[34] In this case, we find that the information in question was not used or disclosed for the sole purpose of managing the employment relationship of the affected Remote employees. Rather, the personal information was used or disclosed for the purposes of completing a business transaction between the employer and an unrelated third party. While the Transaction may have ultimately affected the employment relationship in that a purchaser may become the new employer, this was not the sole purpose of the use or disclosure, as required by PIPA. As such, the information in question constitutes "personal information" and not "personal employee information".

[35] In respect of "personal information", PIPA provides that personal information may only be used or disclosed without the consent of the individual if any of the provisions of section 17 or 20 apply. In particular, we have considered whether under subsections 17(b) and 20(b) the use or disclosure of the information is pursuant to a statute or regulation of Alberta or Canada that authorizes or requires the use or disclosure. We are satisfied that the use and disclosure of home addresses and SINs for the employees in question in this case are not authorized or required by securities laws.

[36] For all of these reasons, the First Disclosure contravenes the Act.

b. The Second Disclosure

[37] For the same reasons as cited above, we find that the home addresses and SINs that are the subject of the Second Disclosure are not "necessary" for the parties to carry out and complete the business transaction. Home addresses and SINs are not necessary to complete the transaction, and as stated in paragraph 35, above, neither their use nor disclosure is required by law as part of any securities filing. While the posting of the material contract is required by law, the Alberta Securities Commission allows for the removal of personal or sensitive information before a material contract is posted on SEDAR.

[38] We find that the disclosure of the addresses and SINs through the Second Disclosure did not meet the criteria of section 22 and thus the business transaction exception does not apply. Further, we find that the disclosure was not otherwise authorized under section 20, and therefore was not in compliance with the Act.

2. Who is accountable for the unauthorized disclosures?

[39] The relevant parts of section 5 of the Act read as follows:

> *"5(1) An organization is responsible for personal information that is in its custody or under its control.*
>
> *(2) For the purposes of this Act, where an organization engages the services of a person, whether as an agent, by contract or otherwise, the organization is, with respect to those services, responsible for that person's compliance with this Act.*
> *(…)*
> *(5) In meeting its responsibilities under this Act, an organization must act in a reasonable manner.*
> *(6) Nothing in subsection (2) is to be construed so as to relieve any person from that person's responsibilities or obligations under the Act."*

[40] Subsection 5(2) of PIPA establishes that an organization remains accountable for its contractors' and agents' compliance with the Act. Further, subsection 5(6) affirms that a person or agent retained by an organization, whether under contract or otherwise, is not relieved of its own responsibilities or obligations because it has been retained by another organization. The end result is there can be accountability on the part of both principal and agent, organization and contractor. As the following discussion indicates, we conclude that Remote and Shtabsky & Tussman are each responsible for disclosure of personal information to Stikemans that was not necessary to conclude the Transaction (the First Disclosure). We further conclude that Builders and Stikemans are each responsible for disclosure of personal information through SEDAR (the Second Disclosure). We comment below on the roles and responsibilities of each of the parties.

a. Remote Wireline

[41] The relationship between a client and the client's lawyer is essentially if not exclusively contractual and may involve an agency relationship. Remote provided its employees' personal information to Shtabsky & Tussman and assumed the lawyers would consider it with a view to determining what part was both proper and responsive for the required purchase and sale agreement schedules. In that way, Remote used the information to assist the lawyers in determining what needed to be disclosed on its behalf for the purposes of the Transaction. Shtabsky & Tussman had stepped into the shoes of their client and was retained to make a determination, on Remote's behalf, as to what information was required for the schedules.

[42] It is reasonable to expect that clients of a law firm will provide information, sometimes third party personal information, to their lawyer, so the lawyer can represent the client's interests. Clients of a law firm who are involved in business transactions cannot be expected to have the level or degree of expertise in the legal elements of the transaction of their legal counsel. This is particularly so in the case of a small operation such as Remote.

[43] We find it was reasonable for Remote to use this personal information by providing it to Shtabsky & Tussman as its legal counsel to determine what personal information was "necessary" for the purposes of the Transaction. We conclude that Remote has no accountability for Shtabsky & Tussman's subsequent improper disclosure under PIPA except through application of subsection 5(2) of PIPA:

> *"For the purposes of this Act, where an organization engages the services of a person, whether as an agent, by contract or otherwise, the organization is, with respect to those services, responsible for that person's compliance with this Act."*

[44] As such, while the operation of PIPA is such that accountability cannot be avoided by Remote, we find that Remote has shown some diligence in relying on its legal counsel.

b. Shtabsky & Tussman

[45] Shtabsky & Tussman was Remote's legal counsel. Remote did not have in-house legal counsel. It is reasonable that Remote would rely on its outside lawyers to assess the requirements for the Transaction in terms of both document production and legal compliance. As stated above, we find that it is not unusual for clients of a law firm to provide extensive information to their legal counsel and to rely on their counsel to determine the relevance and legality of the information provided.

[46] As we had found with the First Disclosure, Shtabsky & Tussman did not exercise adequate diligence in their review of the employee schedule, and in their subsequent disclosure of the schedule to Stikemans. Shtabsky & Tussman submitted only that the SINs and home addresses were disclosed "inadvertently" and that they did not know the Remote Agreement and schedules were going to be made public. This inadvertence does not allow Shtabsky & Tussman to avoid accountability under the Act.

[47] We suggest generally that Shtabsky & Tussman and other law firms have shown a lack of attention to the impact of privacy laws on the

myriad legal processes involving the collection, use and disclosure of personal information, including client information and third party information that are common in the type of work they perform on behalf of their clients. Privacy laws are complex, and have implications for their clients on many different types of transactions, including mergers and acquisitions such as in the present case. We believe that lawyers and law firms require heightened awareness and knowledge of privacy laws in order to properly recognize these implications.

[48] Shtabsky & Tussman disclosed the offending schedule to Stikemans. PIPA subsection 5(6) asserts that no person is relieved of responsibility under the Act by reason of having been contracted or retained by an organization. As such, Shtabsky & Tussman is also responsible for the First Disclosure.

c. Builders

[49] Shtabsky & Tussman provided the Remote employee schedule directly to Builder's counsel, Stikemans, who then attached the schedule to the Remote Agreement. Once the Remote Agreement and schedules were in place, Builders had an opportunity to review and sign off on them. We could not determine to what extent Builders actually reviewed the schedules. Builders told us that, from their perspective, the review and sign-off were solely for the purposes of ensuring that all relevant documents were in fact included; it was not to review the content and substance of the documents or comment on their legal compliance. Builders relied on Stikemans to ensure legal compliance of the schedules' contents.

[50] Builders advised us that it did not notice that the employee schedule contained SINs and home addresses of Remote employees.

[51] Builders retained Stikemans to represent them in respect of all aspects of the drafting and completion of the nine transactions involving the Acquired Companies. Builders relied on the expertise of their counsel in respect of what information was required for inclusion in the schedules to the purchase and sale agreements, and what information was required for public disclosure pursuant to the Canadian securities laws. Builders asserted that they were not aware that the employee schedules would form part of the SEDAR filing.

[52] Subsection 5(2) applies to Builders:

> *"For the purposes of this Act, where an organization engages the services of a person, whether as an agent, by contract or otherwise, the organization is, with respect to those services, responsible for*

that person's compliance with this Act."

[53] For this reason, Builders also remains accountable under PIPA for its contractors' contravention of the Act. As such, while the operation of PIPA is such that accountability cannot be avoided by Builders, in these circumstances we find that Builders has shown some diligence in attempting to avoid breaches of the law through their retention of external legal counsel.

d. Stikemans

[54] We find that Stikemans is also accountable for the improper disclosure to SEDAR. This disclosure is obviously the most serious transgression, in light of the potential for countless individuals to access the personal information from the SEDAR website.

[55] We do not accept that Stikemans escapes accountability under PIPA by obtaining sign-off on the schedules by Builders.

[56] We similarly do not accept Stikemans' argument that, on the basis of the representation given by Remote in section 3.2(e) of the Remote Agreement that it was in all material respects in compliance with all applicable laws, that Stikemans may assume that all information was received validly under PIPA. The personal information was in the custody of Stikemans, it was about to be made public on the world-wide-web, and Stikemans has acknowledged the personal information was included inadvertently. It is unclear whether Stikemans reviewed the employee schedule. We believe Stikemans had a duty to review the materials as it was about to post them on a publicly accessible site on the Internet.

[57] As we suggested in respect of Shtabsky & Tussman, we suggest generally that Stikemans and other law firms have shown a lack of attention to the impact of privacy laws on the myriad legal processes involving the collection, use and disclosure of personal information, including client information and third party information that are common in the type of work they perform on behalf of their clients. Privacy laws are complex, and have implications for their clients on many different types of transactions, including mergers and acquisitions such as in the present case. We believe that lawyers and law firms require heightened awareness and knowledge of privacy laws in order to properly recognize these implications.

[58] PIPA subsection 5(6) asserts that no person is relieved of accountability under the Act by reason of having been contracted or retained by an organization. As such, we also hold Stikemans

accountable for the breach of the Act in respect of the improper Second Disclosure.

VII. CONCLUSION

[59] Both the First Disclosure and the Second Disclosure of personal information contravened Part 2 of PIPA.

[60] While PIPA does not allow Remote and Builders to escape accountability under the Act, we find that these organizations exercised some care in attempting to discharge their duties under PIPA by retaining legal counsel to ensure the transaction complied with all aspects of the law. They remain responsible however for the First and Second Disclosures, respectively.

[61] Shtabsky & Tussman's disclosure of employee home addresses and SINs to Stikemans did not comply with the Act.

[62] Stikemans' disclosure of employee home addresses and SINs on the SEDAR website did not comply with the Act.

VIII. RECOMMENDATIONS

[63] We make no recommendations in respect of Remote, because they have amalgamated with Builders, and Builders has assumed all of Remote's obligations and liabilities.

[64] We similarly make no recommendations in respect of Builders. It is our understanding that during the course of this investigation, Builders created a privacy policy that was approved by its Board of Directors, and has appointed a Privacy Officer.

[65] <u>It is recommended that Shtabsky & Tussman</u>:

- conduct comprehensive in-house privacy training with all lawyers and staff;
- ensure that lawyers develop professional awareness and knowledge of privacy law by supporting participation in privacy law seminars and courses and encouraging ongoing education in this regard;
- communicate these findings to all lawyers and staff;
- review its processes when representing clients on business transactions where personal information may be collected, used or disclosed and address any gaps that are identified.

[66] It is our understanding that during the course of this investigation, Shtabsky & Tussman has enacted a privacy policy and has appointed a privacy officer.

[67] It is recommended that Stikemans:

- enact a privacy policy and appoint a Calgary-based Privacy Officer;
- conduct comprehensive in-house privacy training with all lawyers and staff;
- ensure that lawyers develop professional awareness and knowledge of privacy law by supporting participation in privacy law seminars and courses and encouraging ongoing education in this regard;
- communicate these findings to all lawyers and staff;
- review its processes when representing clients on business transactions where personal information may be collected, used or disclosed and address any gaps that are identified;
- review the processes and controls employed by Stikemans when material contracts or other filings are posted on SEDAR and address any gaps that are identified.

[68] Stikemans already has a national Privacy Officer, located in the Stikemans Toronto office. We recommend that Stikemans appoint a privacy contact in the Calgary office, who can deal quickly with privacy questions as they arise.

[69] During the course of this investigation, Stikemans disseminated a written memorandum to its Calgary securities practice group, advising of the particular care that should be taken when posting information on SEDAR.

IX. COMMENTS

[70] All parties cooperated fully with this investigation.

[71] This file is now closed.

Submitted by:

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