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Alberta Court of Queen's Bench finds Personal Information Protection Act, Regulations, section 7 Unconstitutional

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Decision Considered: *United Food and Commercial Workers, Local 401 v Alberta*, 2011 ABQB 415 ("*UFCW*")

This decision is interesting because it illustrates the interplay between the *Canadian Charter of Rights and Freedoms* ("*Charter*") subsection 2(b) freedom of expression, and Alberta's privacy legislation. The employees of Palace Casino in West Edmonton Mall were on strike, and both the United Food and Commercial Workers, Local 401 ("Union") and the employer photographed and videotaped the picket line. People who crossed the picket line and those who walked in and out of the casino were also photographed or taped. The Union posted a sign which stated: "by crossing the picket line you are providing your consent for your image to be posted at www.CasinoScabs.ca". The employer's Vice President complained to the Privacy Commissioner that his photo was displayed on a poster at the picket site, in the Union's newsletter and on pamphlets distributed at the site. Two other complainants who crossed the picket line said that they had been photographed or videotaped, although they never saw any images. The Office of the Privacy Commissioner's Adjudicator accepted that it was a long-standing historical practice for Unions and employers to photograph and videotape at picket line sites (*UFCW*, para 6).

The *Personal Information Protection Act*, SA 2003 c P-6.5, ("PIPA") regulates when non-governmental organizations, including labour unions, can collect, use, and disclose personal information (which includes "information about an identifiable individual"). *PIPA* (and its regulations) also provides a number of exceptions to its applicability, two of which were relied upon by the Union:

- Personal information collected, used or disclosed for journalistic purposes and "for no other purpose" (s 4(3)(c)); and
- Information that is "publicly available" (ss 14(e), 17(e) and 20(j) as defined in section 7 of the *PIPA Regulations* (Alta Reg 366/2003)).

The Adjudicator rejected the Union's argument that the exception with regard to use for journalistic purposes applied because the Union had other reasons for collecting the information. The Adjudicator did accept that the Union could collect personal information without consent on a picket line to be used as evidence in a police investigation or a proceeding before the Court or Labour Board. The Adjudicator also rejected the arguments that the Union had obtained consent from the individuals because of the presence of signs and cameras. The Adjudicator ordered the Union to cease videotaping, except for the limited purpose of gathering evidence.

The Union applied to the Alberta Court of Queen's Bench for judicial review of the Adjudicator's decision, and relied on the argument that the provisions of *PIPA* listed above are

overbroad in that they prevent the Union from collecting, using and disclosing information already in the public domain for any purpose, including a journalistic purpose. Thus, the argument of the Union was that the *PIPA* prohibits a Union from recording a picket line in plain view, and from publishing the record on their website or in Union publications (*UFCW*, para 22).

In addition, the Union asserted that these two exceptions violated its freedom of expression under *Charter* subsection 2(b). Since the exception in PIPA subsection 4(3) stated that the information could be used (disclosed, collected, etc.) for a journalistic purpose, but "for no other purpose," the Union could never be included in that exception, as it would also have some other purpose. On the other hand, the mainstream media would be the only ones that could rely on this exception (*UFCW*, para 23). Second, "publicly available" information as set out in the PIPA and regulations is defined very narrowly to include information such as that found in telephone books, directories, registries and judicial body records, but not photographs or videotapes of picket lines (*UFCW*, para 24).

In order to determine whether the two provisions of PIPA violate *Charter* subsection 2(b), Madam Justice J.H. Goss relies on two Supreme Court of Canada Cases for her analysis: *Montreal (City)* v *2952-1366 Quebec Inc*., 2005 SCC 62, and *Baier v Alberta*, 2007 SCC 31, and discusses the following three issues:

1. Does the recording of the picket line have expressive content?
2. Is the protection of subsection 2(b) removed by virtue of method, location or burden on government?
3. Does the purpose or effect of *PIPA* infringe subsection 2(b)?

Justice Goss concludes that video and photography do have expressive content and that the protection of *Charter* subsection 2(b) is not removed by virtue of the methods of expression used by the Union. In addition, the purpose and effect of the *PIPA* does infringe the Union's subsection 2(b) rights. Because there was more than a journalistic purpose to the collection, use and disclosure of the personal information, the Union cannot rely on the "journalistic purpose" exception, and thus the right to freedom of expression is trenched by *PIPA*.

Then, Justice Goss analyzes whether the infringement was nevertheless justified under *Charter* s. 1 —in particular using the analysis in *R v Oakes*, [1986] 1 SCR 103 which provides (UFCW, para 39):

1. The objective sought to be achieved by the impugned legislation related to concerns which are "pressing and substantial in a free and democratic society["]?
2. Are the means chosen by the government proportional to its objective?
    a. the limiting measures must be carefully designed, or rationally connected, to the objective;
    b. they must impair the right as little as possible; and
    c. their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights.

Justice Goss concludes that there was a pressing and substantial goal of the *PIPA*: to strike a balance between protecting personal information with organizations' needs to use such information. The exclusions for publicly available information and for journalistic purposes are part of this balancing exercise (*UFCW*, para 147). Second, finding that the complainants had no

reasonable expectation of privacy in the circumstances of the case, she concludes that there is no rational connection between protecting personal information and excluding public, political demonstrations (e.g., the picket line) from the definition of "publicly available" (*UFCW*, para 156). On the other hand, she concludes that there is a rational connection between privacy interests and prohibiting an organization from collecting, using or disclosing personal information because it has additional purposes beyond a journalistic purpose (*UFCW*, para 157).

With respect to the minimal impairment of the measures at issue, Justice Goss concludes that the impairment in this case is not minimal. First, the narrow definition of "publicly held information" protects information that is in public view where there is no reasonable expectation of privacy. She notes that by way of comparison, British Columbia's legislation permits the collection, use and disclosure of personal information collected by observation at a performance, sports meet or other event at which the individual voluntarily appears and one that is open to the public (*UFCW*, para 159). Second, prohibiting an organization which has both a journalistic purpose and some other purpose for collecting, using and disclosing personal information but not prohibiting the organization that only has a journalistic purpose has the effect of favouring some organizations over others, but does not protect the personal information (*UFCW*, para 160).

With respect to the proportionality of the *PIPA* provisions, Justice Goss concludes that the impairment is not proportionate. She states that "[t]he salutary effects of personal information is minimal where the individual has chosen to be at a public, political event, and where individuals and the media could take the photographs and video without similar restriction." (*UFCW*, para 171). In addition, she concludes that the deleterious effects on the Union's freedom of expression are severe (*UFCW*, para 172).

Justice Goss declares that these provisions of the *PIPA* infringe *Charter* subsection 2(b) and are not justified under *Charter* section 1. In addition, to the extent that the Adjudicator's decision relies on the impugned provisions of the *PIPA*, it must be quashed. Further, the declaration that these sections are unconstitutional is suspended for 12 months.

Clearly, freedom of expression is an important right in Canada. It is not, however, without its limitations. In appropriate cases, privacy interests might trump. However, it appears that Justice Goss was impressed by the history of the fundamental importance of expression of labour interests in a strike or lock-out situation. In addition, evidence provided by experts indicated that recording picket lines was a long-standing practice by both unions and employers. Finally, the context of the use, disclosure and collection of the private information —at a public place engaged in a public activity, where there is no reasonable expectation of privacy —also informed her decision. While there is a brief mention of the role of the publication of the information on the internet, there is no indication that the likely much wider audience for the information (e.g. the internet vs. a picture or poster) had any affect on her decision. In fact, she notes the evidence of one expert, Professor Taylor, who says "the internet has expanded the scope and nature of the picket-line to generate globate solidarity and create 'cyber-picket lines'" (*UFCW*, para 162). Interesting.