December 4, 2013

Supreme Court of Canada Expresses Its Opinion on Alberta Privacy Case

Written by: Linda McKay-Panos

Case commented on: *Alberta Information and Privacy Commissioner v United Food and Commercial Workers*, Local 401, 2013 SCC 62 ("*AIPC v UFCW*")

This case out of Alberta has been the subject of other ABlawg posts (see here and here), and now the Supreme Court of Canada has made its views known on the constitutionality of Alberta's privacy legislation. Clearly, the issues that were addressed were of interest across Canada as there were several interveners in the case, including the Attorneys General of Canada and Ontario, the Privacy Commissioners of Canada, Ontario and British Columbia, the Canadian Civil Liberties Association, the British Columbia Civil Liberties Association and labour and business groups.

The case involved a lawful strike by employees of the Palace Casino in Edmonton that lasted 305 days. Both the United Food and Commercial Workers ("UFCW") and the employer videotaped and photographed individuals who were crossing the picket line. The UFCW posted signs near the picketing indicating that the images of people who crossed the picket line might be placed on a website [www.casinoscabs.ca]. Several individuals who were photographed or taped crossing the picket line complained to the Alberta Information and Privacy Commissioner. An Adjudicator appointed by the Privacy Commissioner concluded that the UFCW had contravened Alberta's *Personal Information and Protection of Privacy Act*, SA 2003, c P-6.5 ("*PIPA*"). The UFCW applied to the Alberta Court of Queen's Bench for judicial review, where the *PIPA* was found to violate the UFCW's rights under the *Canadian Charter of Rights and Freedoms*, section 2(b) (freedom of expression). The Alberta Court of Appeal agreed and granted the Union a constitutional exemption from the application of the *PIPA*. The Supreme Court of Canada concurred with the Court of Appeal about the *Charter* violation, but changed the remedy. It quashed the Adjudicator's decision, and, at the request of the Alberta Government and the Information and Privacy Commissioner, declared the *PIPA* to be invalid, but suspended the declaration of invalidity for 12 months to give Alberta's Legislature the opportunity to revise the *PIPA* to make it constitutional.

The Supreme Court (all nine judges) easily concluded that the UFCW's freedom of expression was restricted by the *PIPA* (*AIPC v UFCW* at para 18). Next, the Court performed a detailed *Charter* section 1 analysis. The Court noted that it must first determine whether the *PIPA* serves a pressing and substantial objective, and, if so, whether its provisions are rationally connected to the objective, whether it minimally impairs the right to freedom of expression, and whether its effects are proportionate to the government's objective (*AIPC v UFCW* para 18). Applying the test, the Court found that the *PIPA* has a pressing and substantial objective: "providing an individual with some measure of control over his or her personal information… [which] is

intimately connected to their individual autonomy, dignity and privacy" (*AIPC v UFCW* at para 19). The Court further noted that these are fundamental values and that privacy plays a fundamental role "in the preservation of a free and democratic society" (*AIPC v UFCW* at para 19). The *PIPA* addresses this objective by imposing broad restrictions on the collection, use and disclosure of personal information. The Court determined that the broad restrictions were not justified because they are disproportionate to the benefits the legislation strives to promote (*AIPC v UFCW* at para 20). The objective of providing an individual with some control over his or her personal information is "intimately connected to individual autonomy, dignity and privacy", which are significant social values (*AIPC v UFCW*, at para 24). However, in limiting collection, use and disclosure of personal information, the *PIPA* does not regard the situational context for that information (*AIPC v UFCW* at para 25). The *PIPA* does not provide any way to accommodate the expression of unions engaged in lawful strikes. It does not balance the union's constitutional right to freedom of expression with the interests the *PIPA* protects (*AIPC v UFCW* at para 25). The personal information collected by the Union was readily and publicly observable. Those who crossed the picket line could reasonably expect that their image would be caught and disseminated by others. Further, the information was limited to the images of the individuals and did not include any intimate personal details (e.g., lifestyle or personal choices) (*AIPC v UFCW* at para 26).

The Court held that the deleterious effects of the *PIPA* outweigh its beneficial effects. *PIPA* prohibits the collection, use or disclosure of personal information for legitimate expressive purposes related to labour relations, such as: ensuring safety of union members; persuading the public not to do business with the employer and bringing the labour conditions to the attention of the public. These activities are considered to be at the core of freedom of expression under *Charter* section 2(b) (*AIPC v UFCW* at para 28). Since the *PIPA* restricts a union's ability to communicate and persuade the public of its cause, this infringement of the right to freedom of expression is "disproportionate to the government's objective of providing individuals with control over personal information that they expose by crossing a picketline" (*AIPC v UFCW* at para 38). Thus, the Court concluded that the infringement of *Charter* section 2(b) rights was not saved by *Charter* section 1.

Unlike the Alberta Court of Appeal, the Court decided to strike the *PIPA* down entirely, rather than "pick and choose among the various amendments that would make the *PIPA* constitutionally compliant" (*AIPC v UFCW* at para 40). This declaration was suspended for 12 months to allow the legislature time to decide how best to amend the *PIPA*. This remedy alleviates the concerns I expressed after the Alberta Court of Appeal granted the union a constitutional exemption (see here). Now, privacy and freedom of expression advocates have the opportunity to provide "guidance" to the Alberta Legislature about suggested changes to the entire *PIPA*.