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Canada Safeway's Charter Right to Freedom of Expression Not Violated by Privacy Legislation When it Reported Co-op Employee's Unique Shopping Methods

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Cases Considered:

Canada Safeway Limited v. Shineton, 2007 ABQB 773

In a judicial review of a decision of Alberta's Privacy Commissioner, Canada Safeway put forward a very interesting (yet ultimately unsuccessful) argument as a defence to a complaint that it breached a person's privacy; Safeway argued that s. 7 (1)(d) of the Personal Information Protection Act ("PIPA"), S.A. 2003, c. P-6.5 violated its right to freedom of expression under the Canadian Charter of Rights and Freedoms ("Charter") s. 2(b).

Ms. Shineton, while wearing a Co-op uniform, allegedly shoplifted a few items from a Canada Safeway store. The Calgary Police Service were called to the incident, but, for reasons unknown, declined to charge Shineton with any criminal offence. Safeway later contacted Co-op and advised them of the alleged theft by Shineton, and Co-op then fired her. Shineton complained to the Office of the Privacy Commissioner, arguing that Safeway had violated her rights under s. 7(1)(d) of the PIPA. Subsection 7(1)(d) provides that an organization shall not disclose personal information about an individual unless that individual consents to the disclosure of the information. All parties agreed that Shineton had not consented to the disclosure by Safeway.

The Information and Privacy Commissioner ("Commissioner") held that Safeway had violated Shineton's rights under the PIPA. Further, the Commissioner found that Safeway's rights under Charter s. 2(b) were not violated by PIPA s. 7(1)(d), because freedom of expression must be placed in context and balanced with the right to privacy. In addition, the Commissioner dismissed Safeway's arguments that the disclosure was reasonable for the purposes of an investigation (s. 20(m)) or that disclosure was permitted or required under a Canadian or Albertan statute (s. 20(b)).

When the matter was before the Commissioner, no one addressed the issue of whether the disclosed information fit the definition of "personal information" – "information about an identifiable individual" under the PIPA.

Safeway applied to the Alberta Court of Queen's Bench for judicial review of the Commissioner's decision. Justice Dennis G. Hart first dealt with whether on an application for judicial review, he could address the new issue of whether the disclosure amounted to the sharing of "personal information" under the PIPA. Since Safeway had not raised the issue before the Commission, and Justice Hart had actually raised it before the ABQB, he declined to address the

issue, noting that an administrative tribunal should not be placed in the position of making a party's case for it.

On the Charter s. 2(b) issue, Alberta's Attorney General also appeared to make arguments on the constitutionality of PIPA s. 7(1)(d). All parties agreed that the issue of whether Charter s. 2(b) is violated may be analyzed using a two part test as set out by the Supreme Court of Canada in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927:

> (a) Is the activity an expression that falls within the meaning of s. 2(b)?
> (b) Does the government action, in purpose or effect, restrict freedom of expression?

In applying this test, the court first looked at whether the activity fell within the meaning of Charter s. 2(b). Safeway argued that the disclosure in question was a protected activity and that any activity conveying meaning is expression and on the face of it falls within Charter s. 2(b). In addition, Safeway argued that disclosure fell within one of the 'fundamental principles underlying freedom of expression' – namely seeking and attaining the truth. Shineton, the Commissioner and the Attorney General argued that the disclosure was not protected expression. Both Shineton and the Commissioner characterized the expression as something that had no purpose of any value and which led to harm when Shineton was dismissed from her employment. The Attorney General was more temperate, saying that Safeway's disclosure was "at the low range of expressive activity."

Next, the court looked at whether the legislation restricted freedom of expression. Safeway argued that the prohibition under s. 7(1)(b) directly restricted Safeway's expression and also had the effect of restricting such expression. Shineton argued that PIPA did not restrict the content of the expression by singling out particular meanings that were not to be conveyed, but rather, prohibited the disclosure of personal information subject to various exceptions, regardless of the content of the personal information.

Justice Hart held that he was not satisfied that the disclosure that Safeway made to Co-op was the kind of expression that s. 2(b) of the Charter is meant to protect.

In the event that he was incorrect in determining s. 2(b) was not infringed, Justice Hart then looked at whether the provision would nevertheless be saved by Charter s. 1. In applying the test in *R. v. Oakes*, [1986] 1 S.C.R. 103, Justice Hart concluded that the protection of personal information is an important legislative objective. Further, the objective is logically furthered by PIPA's restriction and that PIPA represents a reasonable balancing of competing rights and interests and that, while PIPA does impose "some limits on expression, those limits are not so severe as to require me to second-guess the balancing the Legislature has chosen to adopt" (para. 45).

Finally, Justice Hart agreed with the Commissioner that Safeway could not rely on the defences that the personal information was required to be released by law or that it was necessary for investigative purposes.

Although I agree with the result of the decision, I am struggling with the finding that PIPA s. 7(1)(d) does not violate Charter s. 2(b). Justice Hart may have been on more solid footing had he found that Safeway's freedom of expression under Charter s. 2(b) was violated by PIPA s. 7(1)(d), but that it was saved by Charter s. 1, once the purpose of the PIPA and the important privacy considerations were taken into account. Even the Attorney General asserted that the

disclosure was expressive (at the low range). The general approach taken by the Supreme Court of Canada has been to find that any activity conveying meaning is expression and thus falls within the scope of s. 2(b). In preventing the disclosure of personal information, the PIPA restricts the expression. However, because there are privacy considerations and because there are a number of exceptions to the prohibition, the PIPA would then be saved by Charter s. 1.