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Alberta Court of Appeal Addresses Constitutionality of Personal Information Protection Act

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Cases Considered:

Union Food and Commercial Workers, Local 401 v Alberta, 2012 ABCA 130

This is an appeal of a privacy case that was the subject of an earlier blog: See here. 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 stating: "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. 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 ("OIPC") Adjudicator accepted that it was a long-standing historical practice for Unions and employers to photograph and videotape at picket line sites.

The following purposes for videotaping and photographing by the Union were at issue (ABCA, para 60):

- Placing the images in newsletters and strike leaflets;
- Dissuading people from crossing the picket line;
- Acting as a deterrent to violence from non-picketers;
- Creating material for use as a training tool for union members;
- Providing material to other unions for educational purposes;
- Supporting morale on the picket line with the use of humour;
- Responding to similar activity on the part of the employer;
- Deterring theft of union property; and
- Generally achieving a resolution to the labour dispute favourable to the union.

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 OPIC Adjudicator ordered the Union to cease videotaping, except for the limited purpose of gathering evidence. The Adjudicator ruled that the collection or use of personal information by the Union other than for use in an investigation or legal proceedings, or to provide information to the police was contrary to the *PIPA*. She then ordered that the Union stop collecting information for unauthorized purposes, and destroy any such information it still possessed.

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 two provisions of the *PIPA* relied upon by the Union were too broad, infringed the Union's rights of freedom of expression under *Charter* section 2(b), and were not saved by *Charter* section 1.

Justice Goss concluded that she could interpret the *PIPA* exception for "journalistic purposes" broadly to include an exception for personal information used to inform the public and picketing Union members, but also held that the use of the Vice President's image on a "mock mug shot poster" and the postings on the internet went too far to qualify as journalism. Likewise, deterring violence, deterring theft of Union property and responding to the employer's videotaping of events should be taken as coming within the exception for investigations and legal proceedings. Justice Goss concluded that the words in section 4(3)(c) "and for no other purpose" to be of no force or effect and the definition of "publicly available" in section 7 of the regulation to be invalid to the extent that it interfered with Union picketing activity, but suspended the declaration that these sections were unconstitutional for 12 months. She also provided a constitutional exemption for Union activity during those 12 months.

The OIPC and Attorney General of Alberta appealed this decision to the Alberta Court of Appeal ("ABCA") (heard by Justices Frans Slatter, J.D. Bruce McDonald and Donna Read). Justice Slatter wrote the unanimous judgment for the ABCA. The ABCA noted that a consideration of the constitutionality of the *PIPA* provisions should be reviewed on a standard of correctness. The OIPC argued that Justice Goss had found the *PIPA* to be unconstitutional based on an interpretation of the *PIPA* provisions that was never adopted by the Adjudicator (para 46). The ABCA determined that Justice Goss had assessed the constitutionality of the *PIPA* based on an inaccurate conclusion about what the *PIPA* prohibits, and what the Adjudicator had ordered (para 54). Thus, the constitutionality of the *PIPA* required a "fresh analysis".

While Justice Goss had concluded that the exemption for journalistic purposes would be considered constitutional if the phrase "for no other purpose" were struck from section 4(3) (c) of the *PIPA*, the ABCA concluded that the exemption for journalistic purposes was not so wide as to encompass everything within the phrase "freedom of opinion and expression" under *Charter* section 2(b). The ABCA further said that it was not helpful to force what the Union was trying to do into the "journalism exemption". The Union's activities were really about labour relations, collective bargaining and the economic issues surrounding its strike. Thus, the ABCA held that "not all expression is journalism" (para 57).

The ABCA held that the true issue on freedom of expression should have been: if the *PIPA* prevents the Union from using images for the purposes listed above in the second paragraph of this blog, does this inhibit the Union's freedom of expression, and, if so, is that restriction demonstrably justified in a free and democratic society?

The ABCA held that the Adjudicator's order had a direct impact on the Union's right to freedom of expression and thus the Union had established a breach of its *Charter* section 2 rights.

Next, the ABCA analyzed whether the *Charter* infringement could be justified under *Charter* section 1. The ABCA held that the pressing and substantial problem addressed by the *PIPA* is the potential misuse of personal information and that limiting the ability of organizations to collect, store and use personal information has a rational connection to the objective (para 72). Next, the ABCA held that there were a number of provisions under the *PIPA* that are overly broad and therefore not proportional. It was also not apparent that the salutary effects of the *PIPA* outweigh its deleterious effects. Thus, the OIPC and Attorney General were not able to justify the infringements of freedom of expression arising from the *PIPA* (para 77).

During its discussion on the proportionality of the *PIPA*, the ABCA noted that a number of provisions of the *PIPA* are over-broad (para 73):

> There is, however, a problem relating to proportionality. The constitutional problems with the Act arise because of its breadth. It does not appear to have been drafted in a manner that is adequately sensitive to protected *Charter* rights. There are a number of aspects to the over-breadth of the Act:
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> - It covers all personal information of any kind, and provides no functional definition of that term. (The definition of "personal information" as "information about an identifiable individual" is essentially circular.) The Commissioner has not to date narrowed the definition in his interpretation of the Act in order to make it compliant with *Charter* values.
> - The Act contains no general exception for information that is personal, but not at all private. For example, the comparative statutes in some provinces exempt activity that occurs in some public places.
> - The definition of "publicly available information" is artificially narrow.
> - There is no general exemption for information collected and used for free expression.
> - There is no exemption allowing organizations to reasonably use personal information that is reasonably required in the legitimate operation of their businesses.
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> This appeal clearly demonstrates the impact that the Act can have on protected rights. The legitimate right of the union to express itself and communicate about the strike and its economic objectives have been directly impacted by the Adjudicator's order. The appellant has not demonstrated why this heavy-handed approach to privacy is necessary, given the impact it has on expressive rights.

The ABCA also noted that in Alberta, the Adjudicator does not have the jurisdiction to consider constitutional issues and therefore did not attempt to balance privacy rights with freedom of expression rights. Thus, the Adjudicator's decision cannot be justified.

The Adjucator's interpretation of the *PIPA*, and the order that was granted, interfered with the Union's *Charter* rights. Justice Goss had attempted to remedy the breach by providing wide interpretations of some of the terms used in the *PIPA* and by declaring other portions of the *PIPA* inoperative (para 79). However, the ABCA held that it is not the role of the courts to rewrite legislation. Because all of the provisions of the *PIPA* might have a constitutional application at some time, there is no obvious way to amend the statute so as to make it constitutional.

Thus, the ABCA held that the appropriate remedy was not to strike down any portion of the *PIPA*, but rather to declare that the application of the *PIPA* to the activities of the Union was unconstitutional. The order of Justice Goss was varied to replace her declarations that the two

sections of the *PIPA* were invalid, with a declaration that the application of the *PIPA* to the activities of the Union was unconstitutional.

I find the ABCA case to be quite confusing. The ABCA provides several examples (in para 73) where the *PIPA* is overly broad and thus not adequately sensitive to *Charter* rights. At the same time, the ABCA states that "the courts have neither the institutional nor the legislative ability to rewrite the Act…There is no obvious way to prune this statute so as to make it constitutional" (para 80) and: "It is within the particular mandate of the Legislature to decide what amendments are required to the Act in order to bring it in line with the *Charter*" (para 81). These statements would seem to be inviting individuals to challenge the constitutionality of the entire *PIPA*, and the Legislature to review the *PIPA* as a whole for *Charter* compliance. Yet, all legislation is subject to the *Charter* or should be interpreted in a way that is constitutional, if possible.

Finally, I am confused by the declaration that the application of the Act to the activities of the Union was unconstitutional. The ABCA held that the Adjudicator's order violated the Union's freedom of expression. Yet, it could be argued that any order of the OIPC limiting the use or disclosure of personal information would violate the respondent's freedom of expression. This is exacerbated by the ABCA's discussion of the over-breadth of the *PIPA* as a whole during its *Charter* section 1 analysis on proportionality. Would it not have been more appropriate to analyze the over-breadth of the two exceptions that were at issue rather than the entire *PIPA*?