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Supreme Court of Canada Upholds Union's Right to Freedom of Expression



By **Albert Nolette**

As noted in our latest Privacy Press update, recently the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, determined that Alberta's *Personal Information Protection Act* (the "PIPA") unjustifiably limits a union's right to freedom of expression in the context of a lawful strike.

The Supreme Court struck down the *PIPA* legislation in its entirety, albeit with a year reprieve to allow Alberta to adapt the legislation. In addition to the privacy issues and impacts identified in Field Law's previous update, it is important to also be aware of the importance of the decision and its reasoning relating to the rights of unions and employers. The Supreme Court sent a clear message to lawmakers across the country that a union's right to freedom of expression in the context of a lawful strike, although not absolute, must be preserved when enacting laws seeking to provide individuals control over their personal information.

The case arose in 2006 when the United Food and Commercial Workers, Local 401 (the "Union") representing employees at a Casino in Edmonton began recording and photographing individuals crossing the picket line in the midst of a 305 day labour dispute. Signs posted by the Union where the picketing occurred stated that photographed and video images of individuals crossing the picket line might be posted on the internet. Although no images were published online, several individuals whose images were recorded or photographed by the Union filed complaints with the Alberta Information and Privacy Commissioner under *PIPA*. The employer's Vice President also filed a complaint after images of him were used on a poster at the picket line and in Union leaflets and newsletters, accompanied with captions intended to be humorous.

An adjudicator appointed by the Commissioner decided that by collecting, using and disclosing personal information about individuals without their consent, the Union had contravened *PIPA*. In deciding this, the adjudicator rejected the Union's argument that the information collected and used by the Union was covered by the "journalistic purposes" exemption in *PIPA*. The Union applied to the Court of Queen's Bench for judicial review of the adjudicator's decision arguing that by preventing the Union from collecting, using and disclosing personal information obtained from its lawful picketline, *PIPA* violated its *Charter* protected freedom of expression and that such a violation could not be justified. The Court of Queen's Bench found (and the Court of Appeal of Alberta agreed) that there was a violation of the Union's *Charter* protected freedom of expression that could not be justified.

In a unanimous decision, the Supreme Court of Canada also concluded that *PIPA* violated the Union's *Charter* protected freedom of expression by restricting the Union's ability to collect, use or disclose personal information during the course of a lawful strike, and that such an infringement could not be justified in a free and democratic society. In its reasons, the Court began by concluding without difficulty that *PIPA* restricted the Union's freedom of expression. The Court then moved on to determine if the violation could be justified. Although the Court found that *PIPA* served a pressing and substantial objective in providing individuals some measure of control over their personal information, the Court concluded that the limits imposed by *PIPA* were disproportionate to the benefits it promoted.

In its analysis, the Court stressed the importance of freedom of expression in labour disputes. Notably, the Court explained that:

- expressive activity in the labour context is directly related to the *Charter* protected right of workers to associate to further common workplace goals under s. 2(d) of the *Charter*;
- a person's employment and the conditions of their workplace can inform their identity, emotional health, and sense of self-worth;
- it is through their expressive activities that unions are able to articulate and promote their common interests, and, in the event of a labour dispute, to attempt to persuade the employer;

- in the labour context, freedom of expression can enhance broader societal interests;
- the free flow of expression by unions and their members during a labour dispute plays an important role in bringing issues relating to labour conditions into the public arena for discussion and debate; and
- picketing is a form of expression that has strong historical roots, as strikes and picketlines have been used by Canadian unions to exert economic pressure and bargain with employers for over a century.

Accordingly, the Court concluded that by imposing restrictions on the Union's ability to communicate and persuade the public of its cause, *PIPA* impaired the Union of its ability to use one of its most effective bargaining strategies in the course of a lawful strike. This infringement of the Union's right to freedom of expression was found to be disproportionate to the government's objective of providing individuals with control over personal information that they expose by crossing a picketline. To the extent that *PIPA* restricted the Union's collection, use and disclosure of personal information for legitimate labour relations purposes, the legislation violated the Union's freedom of expression, and could not be justified. The Court noted, however, that its conclusion would not condone all of a union's activities. Just like privacy, freedom of expression is not an absolute value and the nature of the interests concerned must be considered in striking an appropriate balance.

For these reasons and given the comprehensive and integrated structure of the statute, the Supreme Court of Canada ordered that *PIPA* should be struck down in its entirety. However, it is worth noting that the Court suspended the declaration of invalidity for a period of one year to give the Alberta legislature time to render *PIPA* constitutional or to adopt a new law.

This is a very important decision for unions and employers for obvious reasons. It is also significant for any party dealing with a *PIPA* complaint, and advice should be sought as to whether and how this decision affects you. Field Law's Labour and Employment and Privacy Practice Groups are here to assist you and your organization with all strategic and practical matters arising from these issues.

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