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ALBERTA COURT DECLARES PIPA SECTIONS TO BE UNCONSTITUTIONAL IN PICKETING MATTER

Justice Goss of the Alberta Court of Queen's Bench recently declared that portions of the *Personal Information Protection Act* ("PIPA") and the *Personal Information Protection Regulation* (the "Regulation") are unconstitutional because they violate the right to freedom of expression in the *Charter of Rights and Freedoms*. This finding was made in a case called *United Food and Commercial Workers, Local 401 v. Alberta (Information and Privacy Commissioner)*.

The case began as a complaint to the Alberta Information and Privacy Commissioner that the Applicant union, the United Food and Commercial Workers ("UFCW"), was taking video recordings and photographs of persons in and around a picket-line set up at the Palace Casino in West Edmonton Mall. In addition to posting personal information to its website, the union also published images taken at the picket-line in its newsletters and leaflets.

UFCW raised various issues before the Adjudicator, including whether PIPA applied to the information in question because it was collected, used and disclosed by UFCW for "journalistic purposes" under section 4(3)(c) of PIPA. The Adjudicator denied that this section of PIPA applied because UFCW did not collect, use or disclose personal information *solely* for journalistic purposes, as the section requires. The UFCW had agreed that it collected, used and disclosed the pictures and videos for a number of reasons, and the Adjudicator held that even if some of those reasons were journalistic purposes, others were not as the Union had as its underlying purpose the favourable resolution of the labour dispute.

UFCW also raised on judicial review the issue of whether the information in question was publicly available as prescribed by the Regulation. As noted by Justice Goss, the relevant section in the Regulation is limited to such things as information in phone books and directories and records held in registries and judicial or quasi-judicial bodies. It does not include references to attendances at public, social or political events.

In making the constitutional arguments in the judicial review, UFCW argued that the overall question was whether the positive effects of protecting personal information outweighed the negative effects on the Union's freedom of expression. In part, UFCW argued that effectively limiting the journalistic purposes exception to only traditional media significantly curtails journalistic expression by the non-traditional media who may have other purposes beyond journalism. In response, the Attorney General argued that PIPA protects an individual's "practical anonymity in public places", and that the journalistic exception in section 4(3)(c) of PIPA is appropriate and does not apply to mainstream media exclusively.

Justice Goss held that the publicly available information provision and the journalistic purposes exemption violated the UFCW's freedom of expression under section 2(b) of the *Charter*. UFCW's freedom to express itself through video and photos taken at a public, political event was limited by the exclusion of such events from the definition of "publicly available" and by the narrow journalistic purposes exception.

The Court held that the violation of the right to freedom of expression could not be saved under section 1 of the *Charter*, which required that the Attorney General show that the objectives in the legislation were pressing and substantial, and that the means chosen was proportional to these objectives. Although the purposes of the provisions were pressing and substantial, they required the balancing of the protection of personal information with organizations' needs to use such information. Justice Goss held that the provisions did not minimally impair the right to freedom of expression because the definition of publicly available information was overly narrow. Further, Justice Goss held that "the requirement that an organization's only purpose be journalistic is an extreme, almost draconian, limitation on freedom of the press." As well, the impairment was not proportionate. The salutary effects of protecting 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.

As a remedy, Justice Goss struck the words "and for no other purpose" from the journalistic purposes exemption. With respect to the publicly available information exception, Justice Goss delayed the declaration that the section in the Regulation was unconstitutional for a period of 12 months in order to permit the re-drafting of the section to comply with constitutional requirements. In the meantime, it was also ordered that an exception would apply in respect of certain delineated union activities in conjunction with strikes or picket lines.

Not only is this decision of interest to unions, employers or other organizations subject to PIPA, similar language to that ruled unconstitutional is also contained in privacy legislation in other jurisdictions. As well, this decision points to the possibility of other challenges to the limitations on freedom of expression posed by other specific provisions contained in privacy legislation.

Given the importance of the issue, it is not surprising that the Alberta Government is appealing the ruling, with a hearing expected to take place in 2012.

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