The Supreme Court invalidates Alberta's personal information protection act : What impact will this have elsewhere in Canada?

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On November 15, 2013, the Supreme Court of Canada declared Alberta's *Personal Information Protection Act (PIPA)*[1] constitutionally invalid on the ground that it disproportionately infringed a union's right to freedom of expression, in this case, the United Food and Commercial Workers, Local 401 (the "Union").[2] This case is of particular importance because it raises the issue of Canadian legislatures' ability to establish a constitutionally acceptable balance between the protection of personal information and a union's freedom of expression.

THE BACKGROUND

The events giving rise to the case occurred in 2006, during a lawful strike by the employees of the Palace Casino at the West Edmonton Mall (the "Employer") that lasted 305 days. During the course of this lengthy labour dispute, both the Union and a security company hired by the Employer videotaped and photographed the picket line. Signs placed in the picketing area stated the Union's intention to publish images on the Internet of individuals crossing the picket line. While no images were posted on the Internet, the Union nevertheless used certain photographs to prepare pamphlets, newsletters and posters.

Several individuals who had been videotaped or photographed crossing the picket line filed complaints to the Alberta Information and Privacy Commissioner under *PIPA*. The adjudicator, who was appointed by the Commissioner to decide on the complaints ruled that no provision of *PIPA* authorized the Union to collect, use or disclose personal information for the purpose of advancing its interests. Consequently, she ordered the Union to stop collecting the personal information without the consent of the individuals in question and to destroy any material in its possession that contravened *PIPA*. It should be noted that, under Alberta law, the adjudicator did not have jurisdiction to rule on the constitutionality of *PIPA*.

Following the judicial review of the adjudicator's decision, the judge of the Alberta Court of Queen's

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Bench accepted the Union's arguments and ruled that *PIPA* unreasonably infringed the Union's freedom of expression as guaranteed under s. 2(b) of the *Canadian Charter*.[3] On appeal from this judgment, the Court of Appeal agreed with the Court of Queen's Bench and ruled that the infringement of a union's freedom of expression is not justifiable in a free and democratic society.[4] It therefore granted the Union a constitutional exemption from the application of *PIPA*.

THE DECISION OF THE SUPREME COURT OF CANADA

In a unanimous judgment written by Justices Abella and Cromwell, the Supreme Court agreed with the Court of Appeal. It stated that videotaping and photographing persons crossing a picket line – as well as possibly using or distributing these images – were expressive activities carried out for legitimate purposes, in this case, to deter people from crossing the picket line and to inform the public about the strike.[5] It also noted that those crossing the picket line could reasonably expect to be videotaped or photographed and have their image disseminated. The Supreme Court emphasized that, in the case at bar, the personal information collected, used or disclosed by the Union did not contain any intimate details about the lifestyle or personal choices of the individuals in question.[6]

Canada's final court of appeal then performed a detailed review of *PIPA* in order to understand how it limited the Union's expressive activities. It concluded that *PIPA* has a much broader scope than the federal statute that inspired it. Unlike the federal *Personal Information Protection and Electronic Documents Act ("PIPEDA")*,[7] *PIPA* does not apply solely to activities undertaken for commercial purposes. In fact, except to the extent provided by *PIPA*, it "applies to every organization in respect of personal information".[8]

Despite the numerous exemptions restricting the scope of *PIPA*, none of them applied so as to allow the Union to collect, use and disclose personal information for the purpose of advancing its interests and expressing its views on "matters of significant public interest and importance".[9] Consequently, the Supreme Court concluded that *PIPA* infringed the Union's freedom of expression.

The Court then analysed s. 1 of the *Charter*, pointing out the important role of unions in Canada's economy and emphasizing that a union's freedom of expression is an essential component of labour relations. The Court further stated that picketing represents "a particularly crucial form of expression with strong historical roots".[10] Given the Court's opinion that *PIPA* does not include any mechanisms by which a union's constitutional right to freedom of expression may be balanced with the interests protected by the legislation, and given the breadth of the restrictions imposed on the Union's freedom of expression, the Court ultimately concluded that the adverse effects of *PIPA* were disproportionate to its benefits.

At the request of the Alberta Attorney General and the Privacy Commissioner and "given the comprehensive and integrated structure of the statute",[11] the Supreme Court declared the entire statute invalid, but suspended the effect of the declaration of invalidity for a period of 12 months in order to give the Alberta legislature the opportunity to determine how to bring the legislation in compliance with the *Charter*.

THE FORESEEABLE CONSEQUENCES

We must now consider the following question: What impact will this decision have on *PIPEDA* and on the Quebec and British Columbia statutes governing the protection of personal information in the private sector?

It should be noted that, like Alberta's *PIPA*, the Quebec and British Columbia statutes relating to the protection of personal information in the private sector apply to unions and are not limited to

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commercial activities. As for *PIPEDA*, it is worth noting that it also applies to labour relations involving firms under federal jurisdiction.

Moreover, none of these statutes provides for an exception to the general rule requiring that the collection, use and disclosure of personal information be authorized by the person in question, so as to take into account freedom of expression. In Quebec, section 1 of the *Act respecting the protection of personal information in the private sector*[12] contains a specific rule of interpretation that concerns freedom of the press, but it does not apply to freedom of expression in its broadest sense. Moreover, the narrow interpretation attributed over the years by the Commission d'accès à l'information and the courts to the concept of "personal information", without regard to the notion of privacy[13], does not leave much room to consider freedom of expression.

In this context, we believe there is a very good chance these statutes will be successfully challenged, unless the legislature takes prompt action to make the necessary adjustments.

We will closely monitor any legislative amendments and jurisprudential developments likely to result from this recent Supreme Court decision.

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1 S.A. 2003, c. P-6.5.

3 Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, 2013 SCC 62 (hereinafter "Alberta v. UFCW").

3 United Food and Commercial Workers, Local 401 v. Alberta (Information and Privacy Commissioner), 2011 ABQB 415.

4 United Food and Commercial Workers, Local 401 v. Alberta (Attorney General), 2012 ABCA 130.

5 Alberta v. UFCW, supra, note 2, at par. 11.

6 Id., at par. 26.

7 S.C. 2000, c. 5.

8 Alberta v. UFCW, supra, note 2, at par. 15, citing s. 4(1) PIPA.

9 Id., at par. 27.

10 Id., at par. 35.

11 Id., at par. 40.

12 CQLR, c. P-39.1.

13 On this point, see Raymond Doray and François Charette, Accès à l'information: loi annotée, jurisprudence, analyse et commentaires, Cowansville, Éditions Yvon Blais, loose-leaf edition, updated to September 1, 2013, vol 1, p. III/54-5 and III/54-6.

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