Case In Point

Supreme Court of Canada Grants Leave in Cyber-Picketing Case

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The Supreme Court of Canada has granted leave to appeal in United Food and Commercial Workers, Local 401 v Alberta (Attorney General), a decision from the Alberta Court of Appeal which raised extremely broad questions about the constitutionality of Alberta's commercial sector privacy statute in disposing of a dispute about the right of a union to take images of people who cross a picket line.

A decision from the Supreme Court of Canada will speak to the permissible scope of privacy legislation under the *Canadian Charter of Rights and Freedoms*. The Court may also weigh in on the legitimacy of this increasingly common union tactic in labour disputes.

In this case, a union had suggested that it might post videotaped recordings it had made of people crossing a picket line on the Internet. The issue before the Court of Appeal was whether the union had a constitutionally protected right to collect images of persons crossing the picket line, and therefore whether an order by the respondent Information and Privacy Commissioner preventing it from doing so should be set aside.

In September 2011 the Alberta Court of Queen's Bench held that the Alberta *Personal Information Protection Ac*t violated the right of expression guaranteed by section 2(b) of the *Charter* because it was disproportionate in restricting unions from engaging in "union journalism" relating to labour disputes and picket lines. The Court's focus was relatively narrow and its *Charter*-based order focused on the breadth of a scope provision meant to protect journalistic activity and an exclusion for publicly available information.

The Court of Appeal first re-framed the expressive interest at stake as related to labour relations and not journalism. It then held that the statute interfered with this interest in a manner that could not be justified in a free and democratic society.

The Court's proportionality analysis was broad. It weighed the purpose of Alberta PIPA – protecting reasonable expectations of privacy, protecting expectations that one can control one's own image and personal information and limiting the misuse of personal information – against the right of free expression in general. The Court said:

[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:

- 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 *Charte*r 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.

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.

Regarding remedy, the Court issued a declaration that the restrictive order at issue was unconstitutional and invited the Alberta legislature to "decide what amendments are required to the Act in order to bring it in line with the *Charter*."