FTR Now

Supreme Court of Canada Declares Privacy Legislation Invalid for Infringing Union's Expressive Rights

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Today, the Supreme Court of Canada rendered a significant decision in Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401. The unanimous Court held that the Alberta *Personal Information Protection Act* ("PIPA") infringes a union's right of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

In this *FTR Now*, we discuss the decision and its implications.

BACKGROUND

In 2006, during a prolonged strike at the Palace Casino in Edmonton, the United Food and Commercial Workers, Local 401 ("Union") videotaped the picket line, as did the employer. The parties acknowledged that such videotaping is a common practice during a strike. The Union published images of a member of management in mocking fashion in a poster that was displayed at its picket line, in newsletters and in leaflets. This individual and two others complained under PIPA.

The Alberta Office of the Information and Privacy Commissioner ("OIPC") held that in the absence of consent, there was no provision in PIPA that authorized the Union's collection, use and disclosure of personal information and that the Union's activity did not fit within any statutory exemption. It affirmed the complaints.

In May 2012, the Alberta Court of Appeal issued a very broadly-framed finding that PIPA infringed the Union's freedom of expression without a constitutionally-permissible justification.

THE SUPREME COURT OF CANADA DECISION

The Court recognized that privacy protection is a "pressing and substantial objective" of increasing significance and held that restricting the collection, use and disclosure of personal information is a rational means of achieving privacy protection. It also held, however, that PIPA was disproportionate and therefore unlawful because it went too far in limiting expressive activity.

On a strict reading, the decision is narrow, and only about the significant weight to be accorded to

expression in a labour dispute. The Court relied on leading jurisprudence about the importance of such expression, quoting the famous “strikes are not tea parties” line from its 2002 *Pepsi* decision. It then held, “[t]o the extent that PIPA restricted the Union’s collection, use and disclosure of personal information for legitimate labour relations purposes, the Act violates s. 2(b) of the *Charter* and cannot be justified under s. 1.”

There are also, however, two broader aspects to the judgment.

First, the Court expresses significant discomfort with the breadth of PIPA in general. It suggests that imposing a consent requirement for the collection, use and disclosure of all “personal information” (a term that has been broadly defined by the Court itself) is bound to run afoul of individuals’ reasonable expectations and unjustifiably encroach upon individual expression. It shows its preference for the more flexible common law “reasonable expectation of privacy” rule, which defines what (information) is and is not amenable to privacy protection based on what ought to be expected in a democratic society and in the full factual context.

Second, the Court makes statements drawn from older cases that elevate the value of employee expression in general – i.e. expression unrelated to the labour disputes. These comments are relevant given the expressive content common to employee social media posts that employers have generally been successful in restricting.

At the request of Alberta’s Attorney General and the Alberta OIPC, the Court declared PIPA invalid but suspended that declaration for 12 months to allow the government time to review the legislation.

DISCUSSION

The Alberta government must, within the next 12 months, decide how to amend PIPA to comply with the Court’s decision. British Columbia and Manitoba have privacy statutes that also regulate union activity. British Columbia and Manitoba may proactively amend their statues to minimize the likelihood of constitutional challenge.

Other than the general suggestion that Canadian privacy legislation must permit collection, use and disclosure of personal information in a manner consistent with “reasonable expectations” to be constitutionally permissible, today’s judgment raises difficult questions about the permissible scope of privacy legislation under the *Charter*. It remains to be seen whether Alberta or any other Canadian government will accept the Court’s invitation to add greater flexibility into privacy legislation by moving forward with aggressive amendments. Those who do not will be open to future *Charter* challenges.

Should you have any questions about this decision, please contact a member of Hicks Morley’s Information and Privacy Group.