Privacy Law Bulletin

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Supreme Court of Canada Strikes Down Privacy Law

By Paige Backman And Meghan Cowan

On November 15, 2013, the Supreme Court of Canada ("**SCC**") declared Alberta's privacy law, the *Personal Information Protection Act*, S.A. 2003 c.P-6.5 ("**Alberta's Privacy Act**"), to be invalid. The court found that Alberta's Privacy Act unjustly restricted the collection, use and disclosure of personal information which violated a union's expressive rights under section 2(b) of the *Canadian Charter of Rights and Freedoms* (the "**Charter**"). It is a precedent setting case, one that will have legislators, privacy commissioners and privacy advocates across Canada taking notice.

Background

During a lawful strike, a union representing employees at the Palace Casino at the West Edmonton Mall (the United Food and Commercial Workers, Local 401, the "**Union**") video-taped and photographed individuals crossing the picket line. The Union used images of the Vice-President of the casino in poster displays, union newsletters and strike leaflets with humorous captions. A number of individuals, including the Vice-President of the casino, brought complaints to the Alberta Information and Privacy Commissioner, alleging that the Union's activities contravened Alberta's Privacy Act.

A Balancing Act

Alberta's Privacy Act provides that organizations cannot collect, use or disclose personal information without an individual's consent. It was substantially inspired by the federal *Personal Information Protection and Electronic Documents Act,* S.C. 2000, c. 5 ("**PIPEDA**"), as both Alberta's Privacy Act and PIPEDA aim to give individuals better control over their personal information.

The SCC affirmed that privacy legislation is critically important in Canada and can be characterized as "quasi-constitutional" because of the fundamental role that it plays in the preservation of a free and democratic society. In so doing, it highlighted the intimate connection between an individual's ability to control their personal information and their autonomy and dignity.

Section 2(b) of the Charter, on the other hand, provides for freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. The SCC noted that Canadian jurisprudence has explicitly recognized the importance of freedom of expression in the context of labour disputes, including a union's ability to express its views through picketing as a legitimate and necessary means for the union to articulate its goals and persuade the public and the employer of its position.

These two competing interests – the protection of an individual's privacy interests versus a union's freedom of expression rights – came to a head in Alberta *(Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401.*

The Decision and the Road Travelled Thereto

After receiving the initial privacy complaints about the Union's activities, Alberta's Privacy Commissioner appointed an adjudicator to examine whether the Union had infringed certain individual's rights under Alberta's Privacy Act. The Adjudicator concluded that while the Union's activities were for an expressive purpose, they were not saved by any of the exemptions contained in Alberta's Privacy Act, and therefore the Union was in contravention of Alberta's privacy legislation.

As the Privacy Commissioner cannot decide questions of constitutional law, an application for judicial review was taken to determine the constitutionality of the law. On judicial review of the Adjudicator's decision, the chambers judge held that Alberta's Privacy Act had limited the Union's freedom of expression rights in the context of a labour dispute.

On appeal from judicial review, Alberta's Court of Appeal found that the Union's activities had expressive content and should be protected by the *Charter.* The Court of Appeal held that the Union should be afforded constitutional protection from the application of Alberta's Privacy Act. An appeal of this decision was made to the SCC.

In examining and balancing the Union's rights with the rights of the individual complainants, the SCC noted that Alberta's privacy legislation did not include any mechanism to balance a union's constitutional right to freedom of expression with the privacy interests protected by Alberta's Privacy Act. In this way, Alberta's Privacy Act imposed a restriction on the Union's right to communicate and persuade the public of its position. The SCC held that to the extent that Alberta's Privacy Act restricted the Union's ability to collect, use and disclose personal information for legitimate labour relations purposes, including a union's ability to communicate and persuade the public during a lawful strike, Alberta's Privacy Act violated section 2(b) of the *Charter*. The SCC further held that the infringement by Alberta's Privacy Act on the right to freedom of expression is disproportionate to the government's objectives of providing individuals with control over the personal information they expose by crossing a picket line. As a result, this violation of the constitutionally protected freedom of expression could not be justified under section 1 of the Charter.

The SCC held Alberta's Privacy Act to be invalid, but granted a suspension to the declaration of invalidity for a period of 12 months so that Alberta's legislature could decide how to amend Alberta's Privacy Act to bring it into constitutional conformity.

Going Forward

This landmark decision is significant not only on limiting the scope of privacy rights in a labour setting and for the delineation of a union's rights of expression opposite individual's privacy rights, but for privacy legislation in other Canadian jurisdictions. Both British Columbia and Quebec have privacy legislation impacting the private sector that are in many ways similar to Alberta's Privacy Act. It will be interesting to watch how this recent decision impacts the interpretation of privacy legislation across Canada.

For more information on privacy-related issues, please contact any member of the Aird & Berlis LLP Privacy Team, as listed below:

Lawyers:

Paige Backman	416.865.7700	pbackman@airdberlis.com
Meghan A. Cowan	416.865.4722	mcowan@airdberlis.com
Donald B. Johnston	416.865.3072	djohnston@airdberlis.com
Corrine Kennedy	416.865.7709	ckennedy@airdberlis.com

AIRD & BERLIS LLP

Barristers and Solicitors

Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario, Canada
M5J 2T9
T 416.863.1500 **F** 416.863.1515
www.airdberlis.com