



SUPREME COURT OF CANADA

CITATION: Alberta (Information and Privacy Commissioner) v.
United Food and Commercial Workers, Local 401, 2013 SCC 62

DATE: 20131115
DOCKET: 34890

BETWEEN:

Information and Privacy Commissioner of Alberta
Appellant
and
United Food and Commercial Workers, Local 401
Respondent

AND BETWEEN:

Attorney General of Alberta
Appellant
and
United Food and Commercial Workers, Local 401
Respondent

- and -

**Attorney General of Canada, Attorney General of Ontario, Privacy
Commissioner of Canada, Canadian Civil Liberties Association, British
Columbia Civil Liberties Association, Information and Privacy Commissioner of
Ontario, Coalition of British Columbia Businesses, Merit Canada, Information
and Privacy Commissioner of British Columbia and Alberta Federation of
Labour**
Interveners

CORAM: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver,
Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 42)

Abella and Cromwell JJ. (McLachlin C.J. and LeBel, Fish,
Rothstein, Moldaver, Karakatsanis and Wagner JJ.
concurring)

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ALBERTA v. U.F.C.W.

Information and Privacy Commissioner of Alberta

Appellant

v.

United Food and Commercial Workers, Local 401

Respondent

- and -

Attorney General of Alberta

Appellant

v.

United Food and Commercial Workers, Local 401

Respondent

and

**Attorney General of Canada, Attorney General of Ontario,
Privacy Commissioner of Canada, Canadian Civil Liberties
Association, British Columbia Civil Liberties Association,
Information and Privacy Commissioner of Ontario,
Coalition of British Columbia Businesses, Merit Canada,
Information and Privacy Commissioner of British Columbia,
and Alberta Federation of Labour**

Interveners

**Indexed as: Alberta (Information and Privacy Commissioner) v. United Food
and Commercial Workers, Local 401**

2013 SCC 62

File No.: 34890.

2013: June 11; 2013: November 15.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Charter of Rights — Freedom of expression — Labour relations — Privacy — Union video-taping and photographing individuals crossing its picket line for use in its labour dispute — Whether legislation restricting the collection, use and disclosure of personal information violates union's expressive right under s. 2(b) of Charter and, if so, whether violation is justified — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Personal Information Protection Act, S.A. 2003, c. P-6.5 — Personal Information Protection Act Regulation, Alta Reg. 366/2003.

During a lawful strike lasting 305 days, both the Union and the employer video-taped and photographed individuals crossing the picketline. The Union posted signs in the area of the picketing stating that images of persons crossing the picketline might be placed on a website. Several individuals who were recorded crossing the

picketline filed complaints with the Alberta Information and Privacy Commissioner. The Commissioner appointed an Adjudicator to decide whether the Union had contravened the *Personal Information Protection Act (PIPA)*. The Adjudicator concluded that the Union's collection, use and disclosure of the information was not authorized by *PIPA*. On judicial review, *PIPA* was found to violate the Union's rights under s. 2(b) of the *Charter*. The Court of Appeal agreed and granted the Union a constitutional exemption from the application of *PIPA*.

Held: The appeal is substantially dismissed.

PIPA establishes a general rule that organizations cannot collect, use or disclose personal information without consent. None of *PIPA*'s exemptions permit the Union to collect, use and disclose personal information for the purpose of advancing its interests in a labour dispute. The central issue is whether *PIPA* achieves a constitutionally acceptable balance between the interests of individuals in controlling the collection, use and disclosure of their personal information and a union's freedom of expression. To the extent that *PIPA* restricts collection for legitimate labour relations purposes, it is in breach of s. 2(b) of the *Charter* and cannot be justified under s. 1.

The purpose of *PIPA* is to enhance an individual's control over his or her personal information by restricting the collection, use and disclosure of personal information without that individual's consent. The objective of providing an

individual with this measure of control is intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values.

But the *Act* 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. This Court has long recognized the fundamental importance of freedom of expression in the context of labour disputes. *PIPA* prohibits the collection, use, or disclosure of personal information for many legitimate, expressive purposes related to labour relations. Picketing represents a particularly crucial form of expression with strong historical roots. *PIPA* imposes restrictions on a union's ability to communicate and persuade the public of its cause, impairing its ability to use one of its most effective bargaining strategies in the course of a lawful strike. This infringement of the right to freedom of expression is disproportionate to the government's objective of providing individuals with control over the personal information that they expose by crossing a picket line. It is therefore not justified under s. 1 of the *Charter*.

Given the comprehensive and integrated structure of the statute, the Government of Alberta and the Information and Privacy Commissioner requested that the Court not select specific amendments, requesting instead that the entire statute be declared invalid so that the legislature can consider the *Act* as a whole. The declaration of invalidity is therefore granted but is suspended for a period of

12 months to give the legislature the opportunity to decide how best to make the legislation constitutionally compliant.

Cases Cited

Referred to: *Order P2010-003; Synergen Housing Co-op Ltd.*, 2010 CanLII 98626; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] 1 S.C.R. 441; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Great Atlantic & Pacific Co. of Canada*, [1994] O.L.R.B. Rep. March 303; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

Statutes and Regulations Cited

Administrative Procedures and Jurisdiction Act, R.S.A. 2000, c. A-3.

Canadian Charter of Rights and Freedoms, ss. 1, 2(b).

Personal Information Protection Act, S.A. 2003, c. P-6.5, ss. 1(1)(i) “organization”, (k) “personal information”, 3, 4(1), (3)(a), (b), (c), 7(1), 14(d), (e), 17(d), (e), 20(f), (j), (m), 56(2), (3).

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Rayner, Wesley B. *Canadian Collective Bargaining Law*, 2nd ed. Markham, Ont.: LexisNexis, 2007.

APPEAL from a judgment of the Alberta Court of Appeal (Slatter and McDonald J.J.A. and Read J. (*ad hoc*)), 2012 ABCA 130, 57 Alta. L.R. (5th) 249, 522 A.R. 197, 544 W.A.C. 197, 349 D.L.R. (4th) 654, 258 C.R.R. (2d) 110, 33 Admin. L.R. (5th) 321, [2012] 6 W.W.R. 211, 2012 CLLC ¶210-025, [2012] A.J. No. 427 (QL), 2012 CarswellAlta 760, allowing in part (only to the extent the remedy was varied) a decision of Goss J., 2011 ABQB 415, 53 Alta. L.R. (5th) 235, 509 A.R. 150, 339 D.L.R. (4th) 279, 32 Admin. L.R. (5th) 107, [2012] 4 W.W.R. 324, 2011 CLLC ¶210-055, [2011] A.J. No. 940 (QL), 2011 CarswellAlta 1486, setting aside a decision of the Information and Privacy Commissioner, Order P2008-008, 2009 CanLII 90942. Appeal substantially dismissed.

Glenn Solomon, Q.C., and Robert W. Armstrong, for the appellant the Information and Privacy Commissioner of Alberta.

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Patricia D. S. Jackson and Sarah Whitmore, for the intervener the Canadian Civil Liberties Association.

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William S. Challis, for the intervener the Information and Privacy Commissioner of Ontario.

Simon Ruel, for the interveners the Coalition of British Columbia Businesses and Merit Canada.

Written submissions only by Nitya Iyer, for the intervener the Information and Privacy Commissioner of British Columbia.

David Williams and Kristan McLeod, for the intervener the Alberta Federation of Labour.

The judgment of the Court was delivered by

ABELLA AND CROMWELL JJ. —

Overview

[1] This appeal requires the Court to determine whether Alberta’s *Personal Information Protection Act* unjustifiably limits a union’s right to freedom of expression in the context of a lawful strike. At issue is whether the *Act* achieves a constitutionally acceptable balance between the interests of individuals in controlling the collection, use and disclosure of their personal information and a union’s freedom of expression.

[2] The dispute in this case arose when the United Food and Commercial Workers, Local 401 recorded and photographed individuals crossing its picketline for use in its labour dispute. Several individuals whose images were captured complained to the Information and Privacy Commissioner of Alberta that the Union’s activities contravened the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 (“*PIPA*”), which restricts the collection, use and disclosure of personal information by a range of organizations. Those individuals were successful, prompting an application for judicial review on the basis that the legislation infringed the Union’s right to freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms* and that this infringement was not justified under s. 1.

[3] In our view, the legislation violates s. 2(b) because its impact on freedom of expression in the labour context is disproportionate and the infringement is not justified under s.1.

Facts

[4] The Union represents employees at the Palace Casino at West Edmonton Mall in Alberta. In 2006, during a lawful strike which lasted 305 days, both the Union and a security company hired by the employer video-taped and photographed the picketline near the main entrance to the Casino. The Union posted signs in the area of the picketing stating that images of persons crossing the picketline might be placed on a website called www.casinoscabs.ca.

[5] Several individuals who were recorded crossing the picketline filed complaints with the Alberta Information and Privacy Commissioner under *PIPA*. The Vice-President of the Casino complained that he was photographed or video-taped and that two pictures of him were used on a poster displayed at the picketline with the text: "This is [x's] Police Mugshot." Images of his head were also used in union newsletters and strike leaflets with captions intended to be humorous. Another complainant, a member of the public, testified that cameras were trained on the entrance to the Casino where he would regularly meet friends. A third complainant testified that she had been photographed and video-taped while working near the Casino entrance. No recordings of the complainants were placed on the website.

[6] The Commissioner appointed an Adjudicator to decide whether the Union, in collecting, using and disclosing personal information about individuals without their consent had contravened *PIPA*. In Alberta, the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3, and accompanying regulations prevent the Commissioner from deciding questions of constitutional law. As a result, the Adjudicator lacked jurisdiction to consider the Union's arguments on the constitutionality of *PIPA* or its application to the Union's activities. The Adjudicator accepted the Union's evidence that it is common practice in Alberta for both employers and unions to video-tape and photograph picketlines and that the Union did so for the following reasons:

- informing the public about the strike, including through pamphlets, newsletters and a website;
- informing picketing Union members about the strike, including through pamphlets, newsletters and a website;
- dissuading people from crossing the picketline;
- acting as a deterrent to violence from non-picketers;
- gathering evidence should it become relevant to an investigation or legal proceeding (both of altercations as well as to show long periods of peaceful picketing);
- creating material for use as a training tool for Union members;
- providing material to other unions for educational purposes;
- supporting morale on the picketline with the use of humour;
- responding to similar activity on the part of the employer; and
- deterring theft of Union property.

(*Order P2008-008; United Food and Commercial Workers, Local 401*, 2009 Can LII 90942 (AB OIPC), at para. 20)

The Adjudicator concluded that “many of these purposes also promoted the underlying purpose of the strike — that of achieving a resolution to the labour dispute [in favour] of the Union”: para. 20. The Adjudicator concluded that the Union’s collection, use and disclosure of private information was for an expressive purpose. As she put it, “one of the primary purposes of the Union’s information collection was to dissuade people from crossing the picket line”: para. 51. She also concluded that she was not aware of, and had not been referred to, any provisions of *PIPA* that would authorize collection, use and disclosure of personal information for that purpose: para. 67. She rejected the Union’s claim that it was covered by the “journalistic purposes” exemption because its activities were also aimed at resolving the labour dispute in its favour. The “journalistic purposes” exemption in the *Act* therefore did not apply to the extent that the information was collected, used or disclosed for other purposes. The Union’s ancillary argument — that the collection, use and disclosure of personal information was authorized under another exemption — a possible investigation or legal proceeding — was accepted, but was not sufficient to exempt the Union’s activity from *PIPA* for any other purpose. The Union was ordered to stop collecting the personal information for any purposes other than a possible investigation or legal proceeding and to destroy any personal information it had in its possession that had been obtained in contravention of the *Act*.

[7] On judicial review, the Union argued that the provisions of *PIPA* that prevent it from collecting, using and disclosing personal information obtained from its lawful picketline infringed s. 2(b) of the *Charter* (2011 ABQB 415, 53 Alta. L.R. (5th) 235). The chambers judge found that the Union's activity had expressive content and that there was no reason to exclude it from the protection of s. 2(b). She found that *PIPA*, as interpreted by the Adjudicator, directly limited the Union's freedom of expression by preventing the Union from collecting, using, and disclosing personal information obtained about individuals while they were in public view. She also concluded that the breach could not be justified under s. 1.

[8] The Court of Appeal was of the view that the real issue in the case was whether it was justifiable to restrain expression in support of labour relations and collective bargaining activities (2012 ABCA 130, 57 Alta. L.R. (5th) 249). It concluded that *PIPA* was overbroad. The privacy interest at stake was minor since the complainants were in a public place, crossing a picketline, and had notice that images were being collected. On the other side of the balance was the right of workers to engage in collective bargaining and of the Union to communicate with the public: para. 74. The Court of Appeal agreed with the chambers judge that there was a breach of s. 2(b) that could not be saved under s. 1 and it therefore granted the Union a constitutional exemption from the application of *PIPA*.

Analysis

[9] The stated constitutional questions in this case are:

1. Do the *Personal Information Protection Act*, S.A. 2003, c. P-6.5, and the *Personal Information Protection Act Regulation*, Alta Reg. 366/2003, violate s. 2(b) of the *Canadian Charter of Rights and Freedoms* insofar as they restrict a union's ability to collect, use or disclose personal information during the course of a lawful strike?

2. If so, is the infringement a reasonable limit prescribed by law, which can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

[10] We turn first to the question of whether *PIPA* limits freedom of expression. This case arises in the specific factual context that was before the Adjudicator, but the challenge is to *PIPA* as a whole. While there was some debate about whether particular aspects of the conduct engaged in by the Union were protected by s. 2(b), there can be no doubt, in our view, that *PIPA* limits expressive activity that is so protected. The reviewing judge and the Court of Appeal both recognized that the collection, use and disclosure of personal information by the Union in the context of picketing during a lawful strike is inherently expressive. We agree.

[11] As the parties conceded, freedom of expression under s. 2(b) is clearly engaged by the Union's activities. The Union collected personal information by recording the picketline. One of the primary purposes for the Union's *collection* of personal information was, as the Adjudicator recognized, to dissuade people from crossing the picketline: para. 51; Goss J., at paras. 31–34; Court of Appeal, at para. 64. Recording conduct related to picketing and, in particular, recording a lawful picketline and any individuals who crossed it, is expressive activity: its purpose was

to persuade individuals to support the Union. So too is recording and potentially using or distributing recordings of persons crossing the picketline for deterring people from crossing the picketline and informing the public about the strike.

[12] To understand how *PIPA* limited the Union's expressive activities, it is helpful to review the legislation in some detail.

[13] Alberta's *PIPA* was inspired by the federal *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA*"). Both pieces of legislation are part of an international movement towards giving individuals better control over their personal information: Éloïse Gratton, *Understanding Personal Information: Managing Privacy Risks* (2013), at pp. 6 ff. *PIPEDA* generally applies to private sector organizations engaged in commercial activities in any province. It does not apply, however, if the Governor General in Council determines that there is comparable protection in place in the province, as is the case with respect to *PIPA* in Alberta: *PIPEDA*, s. 26(2)(b); Michel W. Drapeau and Marc-Aurèle Racicot, *Protection of Privacy in the Canadian Private and Health Sectors 2013* (2012), at p. AB-3.

[14] *PIPA*'s stated purpose is almost identical to that of the *PIPEDA*. *PIPA*'s purpose is explicitly set out in s. 3, which states that it is

. . . to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need

of organizations to collect, use or disclose personal information for purposes that are reasonable.

[15] The scope of *PIPA* is, however, considerably broader than that of *PIPEDA*. Unlike *PIPEDA*, *PIPA*'s limitations on the collection, use and disclosure of personal information are not restricted to those activities undertaken for commercial purposes. Instead, *PIPA* establishes a general rule that organizations cannot collect, use or disclose personal information without consent: s. 7(1). Except as provided for by *PIPA*, it "applies to every organization and in respect of all personal information": s. 4(1). The term "organization" includes a corporation, an unincorporated association, a trade union, a partnership, or an individual acting in a commercial capacity: s. 1(1)(i). The term "personal information" is defined broadly to mean "information about an identifiable individual": s. 1(1)(k). The Commissioner has made it clear that personal information includes information that is not "private", so that "personal information does not lose its character as personal information if the information is widely or publically known": *Order P2010-003; Synergen Housing Co-op Ltd.*, 2010 CanLII 98626 (AB OIPC), at para. 17.

[16] The breadth of *PIPA* is mitigated by a series of exemptions. The most relevant include the following. First, through a restriction on the definition of "organization", *PIPA* excludes from its application individuals acting in a "personal or domestic capacity": s. 1(1)(i) and s. 4(3)(a). Second, s. 56(2) and (3) operate together so that *PIPA* does not apply to a non-profit organization unless that organization collects, uses, or discloses information in connection with a commercial

activity. Third, the application provision indicates that *PIPA* does not apply in certain circumstances, including when information is collected, used, or disclosed for “artistic or literary purposes and for no other purpose” (s. 4(3)(b)) or when it is collected, used or disclosed for “journalistic purposes *and for no other purpose*” (s. 4(3)(c)). Finally, *PIPA* creates an exception to the consent requirement where the collection, use or disclosure of the information is reasonable for the purposes of an investigation or a legal proceeding (ss. 14(d), 17(d), 20(f) and (m)) or the information is “publicly available as prescribed or otherwise determined by the regulations” (s. 14(e), 17(e) and 20(j)). The term “publicly available” is narrowly defined in s. 7 of the *Personal Information Protection Act Regulation*, Alta. Reg 366/2003, to mean information that is available: in a telephone or business directory (or other similar registry); in a record of a quasi-judicial body; or in a magazine, book, or newspaper.

[17] Given the Adjudicator’s finding that none of these exemptions applied to allow the Union to collect, use and disclose personal information for the purpose of advancing its interests in a labour dispute, we conclude without difficulty that it restricts freedom of expression.

[18] This brings us to the s. 1 analysis. At this stage, we must determine whether *PIPA* serves a pressing and substantial objective and, if so, whether its provisions are rationally connected to that objective, whether it impairs the right to freedom of expression no more than is necessary, and whether its effects are proportionate to the government’s objective. While *PIPA* is rationally connected to a

pressing and substantial objective, its broad limitations on freedom of expression are not demonstrably justified because its limitations on expression are disproportionate to the benefits the legislation seeks to promote.

[19] There is no dispute that *PIPA* has a pressing and substantial objective. The purpose of *PIPA* is explicitly set out in s. 3, as previously noted, which states:

The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.

The focus is on providing an individual with some measure of control over his or her personal information: Gratton, at pp. 6 ff. The ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy. As this Court has previously recognized, legislation which aims to protect control over personal information should be characterized as “quasi-constitutional” because of the fundamental role privacy plays in the preservation of a free and democratic society: *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 24; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66; *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] 1 S.C.R. 441, at para. 28.

[20] *PIPA*'s objective is increasingly significant in the modern context, where new technologies give organizations an almost unlimited capacity to collect personal information, analyze it, use it and communicate it to others for their own purposes. There is also no serious question that *PIPA* is rationally connected to this important objective. As the Union acknowledges, *PIPA* directly addresses the objective by imposing broad restrictions on the collection, use and disclosure of personal information. However, in our view, these broad restrictions are not justified because they are disproportionate to the benefits the legislation seeks to promote. In other words, "the *Charter* infringement is too high a price to pay for the benefit of the law": Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 2, at p. 38-43.

[21] The beneficial effects of *PIPA*'s goal are demonstrable. *PIPA* seeks to enhance an individual's control over his or her personal information by restricting who can collect, use and disclose personal information without that individual's consent and the scope of such collection, use and disclosure. *PIPA* and legislation like it reflect an emerging recognition that the list of those who may access and use personal information has expanded dramatically and now includes many private sector actors. *PIPA* seeks to regulate the use of personal information and thereby to protect informational privacy, the foundational principle of which is that "all information about a person is in a fundamental way his own, for him to communicate or retain . . . as he sees fit": Report of a Task Force established jointly by the

Department of Communications/Department of justice, *Privacy and Computers* (1972), at p. 13.

[22] Insofar as *PIPA* seeks to safeguard informational privacy, it is “quasi-constitutional” in nature: *Lavigne*, at para. 24; *Dagg*, at paras. 65-66; *H.J. Heinz*, at para. 28. The importance of the protection of privacy in a vibrant democracy cannot be overstated: see John D. R. Craig, “Invasion of Privacy and *Charter* Values: The Common-Law Tort Awakens” (1997), 42 *McGill L.J.* 355, at p. 360-61. As Chris D. L. Hunt writes in “Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada’s Fledgling Privacy Tort” (2011), 37 *Queen’s L.J.* 167, at p. 217, “[d]emocracy depends on an autonomous, self-actualized citizenry that is free to formulate and express unconventional views. If invasions of privacy inhibit individuality and produce conformity, democracy itself suffers.”

[23] *PIPA* also seeks to avoid the potential harm that flows from the permanent storage or unlimited dissemination of personal information through the Internet or other forms of technology without an individual’s consent.

[24] Finally, as discussed above, the objective of providing an individual with some measure of control over his or her personal information is intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values.

[25] The price *PIPA* exacts, however, is disproportionate to the benefits it promotes. *PIPA* limits the collection, use and disclosure of personal information other than with consent without regard for the nature of the personal information, the purpose for which it is collected, used or disclosed, and the situational context for that information. As the Adjudicator recognized in her decision, *PIPA* does not provide any way to accommodate the expressive purposes of unions engaged in lawful strikes. Indeed, the *Act* 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. As counsel for the Commissioner conceded during oral submissions, *PIPA* contains a general prohibition of the Union's use of personal information (absent consent or deemed consent) to further its collective bargaining objectives. As a result, *PIPA* deems virtually all personal information to be protected regardless of context.

[26] But the extent to which significant values were actually impaired in the context of this case must be kept in context. The personal information was collected by the Union at an open political demonstration where it was readily and publicly observable. Those crossing the picketline would reasonably expect that their image could be caught and disseminated by others such as journalists, for example. Moreover, the personal information collected, used and disclosed by the Union was limited to images of individuals crossing a picketline and did not include intimate biographical details. No intimate details of the lifestyle or personal choices of the individuals were revealed.

[27] It goes without saying that by appearing in public, an individual does not automatically forfeit his or her interest in retaining control over the personal information which is thereby exposed. This is especially true given the developments in technology that make it possible for personal information to be recorded with ease, distributed to an almost infinite audience, and stored indefinitely. Nevertheless, *PIPA*'s restrictions operate in the context of a case like this one to impede the formulation and expression of views on matters of significant public interest and importance.

[28] *PIPA*'s deleterious effects weigh heavily in the balance. What is of the utmost significance in our view is that *PIPA* prohibits the collection, use, or disclosure of personal information for many legitimate, expressive purposes related to labour relations. These purposes include ensuring the safety of union members, attempting to persuade the public not to do business with an employer and bringing debate on the labour conditions with an employer into the public realm. These objectives are at the core of protected expressive activity under s. 2(b).

[29] This Court has long recognized the fundamental importance of freedom of expression in the context of labour disputes: *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West)*, [2002] 1 S.C.R. 156 ("*Pepsi*"), at para. 33. In *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, ("*Kmart*"), [1999] 2 S.C.R. 1083, Cory J., writing for the Court, held that "[f]or employees, freedom of expression becomes not only an important but an *essential* component of labour relations": para. 25 (emphasis added).

[30] Expressive activity in the labour context is directly related to the *Charter* protected right of workers to associate to further common workplace goals under s. 2(d) of the *Charter: Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at para. 38. As the International Labour Organization observed, “[t]he exercise of freedom of association and collective bargaining is dependent on the maintenance of fundamental civil liberties, in particular, . . . freedom of opinion and expression”: *Report of the Director-General: Freedom of association in practice: Lessons learned* (2008), at para. 34.

[31] A person’s employment and the conditions of their workplace can inform their identity, emotional health, and sense of self-worth: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368. As McLachlin C.J. and LeBel J. recognized in *Pepsi*, free expression on these issues therefore “contributes to self-understanding, as well as to the ability to influence one’s working and non-working life”: para. 34.

[32] Free expression in the labour context can also play a significant role in redressing or alleviating the presumptive imbalance between the employer’s economic power and the relative vulnerability of the individual worker: *Pepsi*, at para. 34. It is through their expressive activities that unions are able to articulate and promote their common interests, and, in the event of a labour dispute, to attempt to persuade the employer.

[33] Finally, in the labour context, freedom of expression can enhance broader societal interests. As this Court found in *Pepsi*, the free flow of expression by unions and their members during a labour dispute plays an important role in bringing issues relating to labour conditions into the public arena for discussion and debate: paras. 34-35. As this Court emphasized in *Pepsi*, free expression provides “an avenue for unions to promote collective bargaining issues as public ones to be played out in civic society, rather than being confined to a narrow realm of individualized economic disputes”: Michael MacNeil, “Unions and the *Charter*: The Supreme Court of Canada and Democratic Values” (2003), 10 *C.L.E.L.J.* 3, at p. 24.

[34] Since the Second World War, the Canadian government has recognized that unions have a role to play in the Canadian economy and society more broadly: George W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), vol. 1, at pp. 1-11 to 1-16. This recognition includes a general acceptance that workers have the right to associate and bargain collectively and that when collective bargaining breaks down, unions and employers may, in certain circumstances, legitimately exert economic sanctions in order to facilitate resolution of the dispute in their favour: Wesley B. Rayner, *Canadian Collective Bargaining Law* (2nd ed. 2007), at pp. 2 and 457.

[35] Within the labour context, picketing represents a particularly crucial form of expression with strong historical roots. Strikes and picketlines have been used by Canadian unions to exert economic pressure and bargain with employers for over a century: affidavit of Dr. Jeffery M. Taylor, A.R. vol. IV, at p. 35. The use of

picketlines is an invaluable tool in the economic arsenal of workers in the collective bargaining process: Rayner, at p. 483. As Judith McCormack, then Chair of the Ontario Labour Relations Board, explained in *Great Atlantic & Pacific Co. of Canada*, [1994] O.L.R.B. Rep. March 303:

Picketing is . . . part of a group of economic sanctions which are considered key to the scheme of collective bargaining as a whole. While such sanctions are not frequently resorted to in the overall landscape of collective bargaining, it is axiomatic that the underlying threat of such economic conflict is what drives the vast majority of uneventful negotiations and contract settlements. [para. 35]

[36] The effectiveness of picketlines is dependent on the ability of the union to try to convince the public not to cross the picketline and do business with the employer. Cory J. recognized the significance of the role of public opinion in *KMart*, where he observed that “it is often the weight of public opinion which will determine the outcome of the dispute”: para. 46. In some cases, this goal may be achieved simply by making others aware of the labour dispute. In others, however, a union may achieve its goal by putting pressure on those who intend to cross the picketline. The imposition of public or economic pressure has come to be accepted as a legitimate price to pay to encourage the parties to resolve their dispute. As McLachlin C.J. and LeBel J. observed in *Pepsi*, strikes are not tea parties: para. 90. This Court has acknowledged that such pressure is permissible as long as it does not rise to the level of a tortious or criminal act: *Pepsi*, at paras. 96 and 101-7.

[37] *PIPA* imposes restrictions on a union’s ability to communicate and persuade the public of its cause, impairing its ability to use one of its most effective

bargaining strategies in the course of a lawful strike. In our view, this infringement of the right to freedom of expression is disproportionate to the government's objective of providing individuals with control over personal information that they expose by crossing a picketline.

[38] This conclusion does not require that we condone all of the Union's activities. The breadth of *PIPA*'s restrictions makes it unnecessary to examine the precise expressive activity at issue in this case. It is enough to note that, like privacy, freedom of expression is not an absolute value and both the nature of the privacy interests implicated and the nature of the expression must be considered in striking an appropriate balance. To 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.

[39] Accordingly, we would answer the constitutional questions as follows:

1. Do the *Personal Information Protection Act*, S.A. 2003, c. P-6.5, and the *Personal Information Protection Act Regulation*, Alta Reg. 366/2003, violate s. 2(b) of the *Canadian Charter of Rights and Freedoms* insofar as they restrict a union's ability to collect, use or disclose personal information during the course of a lawful strike?

Yes.

2. If so, is the infringement a reasonable limit prescribed by law, which can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

[40] Both the Information and Privacy Commissioner of Alberta and the Attorney General of Alberta stated in oral argument that if they were unsuccessful, they would prefer that *PIPA* be struck down in its entirety. We agree. Given the comprehensive and integrated structure of the statute, we do not think it is appropriate to pick and choose among the various amendments that would make *PIPA* constitutionally compliant: *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 80; *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 707.

[41] We would therefore declare *PIPA* to be invalid but suspend the declaration of invalidity for a period of 12 months to give the legislature time to decide how best to make the legislation constitutional. Rather than sustain the constitutional exemption ordered by the Court of Appeal, we would simply quash the Adjudicator's order.

[42] The Union is entitled to its costs throughout.

Appeal substantially dismissed with costs throughout.

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