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## Freedom of Expression, the Right to Privacy, and Grasping for a Middle Ground

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# FREEDOM OF EXPRESSION, THE RIGHT TO PRIVACY, AND GRASPING FOR A MIDDLE GROUND

*John J. Kappel\**

ON November 11, 2013, the Supreme Court of Canada issued its opinion in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*.<sup>1</sup> The decision marked the conclusion of a seven-year dispute with the striking down of an Alberta privacy statute by a unanimous court.<sup>2</sup> The case originated from a casino union's efforts to publicize a strike and resulted in a significant increase in freedom of expression for unions, corporations, and other organizations in Alberta.<sup>3</sup> The first section outlines the challenged statute and its practical effects, and the second section addresses the Supreme Court's decision and its implications.

## I. THE PERSONAL INFORMATION PROTECTION ACT

The Legislative Assembly of Alberta enacted the Personal Information Protection Act (PIPA) in 2003.<sup>4</sup> The official purpose of the 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."<sup>5</sup> The statute was modeled after a similar Canadian federal statute passed in 2000 called the Personal Information Protection and Electronic Documents Act (PIPEDA).<sup>6</sup>

### A. PROTECTING PRIVACY, PUBLICLY

Part 1 of PIPEDA creates a series of restrictions on private entities

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1. *Alberta (Info. & Privacy Comm'r) v. United Food & Commercial Workers, Local 401*, 2013 SCC 62 (Can.).

2. *Id.* paras. 4–5.

3. *See id.* paras. 4, 10.

4. Personal Information Protection Act, S.A. 2003, c. P-6.5, (Can. Alta.).

5. *Id.* § 3.

6. Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 (Can.).

using personal information for commercial purposes.<sup>7</sup> PIPEDA defines “personal information” as “information about an identifiable individual, but . . . not . . . the name, title[,] or business address[,] or telephone number of an employee of an organization.”<sup>8</sup> This definition is notably quite broad and includes a sizable amount of information that is not actually private and may, in fact, be readily available to the public.<sup>9</sup> The limiting factor of the statute’s scope is therefore that the statute does not apply to the use of personal information for noncommercial purposes rather than a strict limitation on the type of information collected and used.<sup>10</sup>

#### B. IF YOU DON’T LIKE OURS YOU CAN ALWAYS MAKE YOUR OWN

PIPEDA was enacted by the Canadian Federal Government with the intention of regulating the use of personal information in all of Canada’s ten provinces and three territories.<sup>11</sup> But PIPEDA was enacted to allow the provincial governments to displace Part 1 of PIPEDA with provincial legislation that performs essentially the same function as Part 1 of PIPEDA.<sup>12</sup> The provision of PIPEDA that allows provincial legislation to displace Part 1 of PIPEDA requires the relevant provincial legislation to be “substantially similar” to Part 1 of PIPEDA.<sup>13</sup> The Legislative Assembly of Alberta took advantage of this provision and enacted PIPA three years after PIPEDA was enacted.<sup>14</sup> Consequently, while Part 1 of PIPEDA technically applies to all of Canada, it had no practical effect in Alberta while PIPA was still valid law.<sup>15</sup>

#### C. PRIVACY, PROVINCIAL STYLE

While PIPA is sufficiently similar to Part 1 of PIPEDA that none of the courts in *United Foods & Commercial Workers* raised any question about PIPA’s satisfaction of the substantial similarity requirement,<sup>16</sup> PIPEDA and PIPA actually have several significant differences. First, the definition of “personal information” is even broader under PIPA,<sup>17</sup> including all “information about an identifiable individual.”<sup>18</sup> Second, PIPA does not limit its regulation to private organizations involved in commercial activity;<sup>19</sup> instead, PIPA establishes a blanket general rule banning orga-

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7. *See id.* pt. 1.

8. *Id.* § 2(1).

9. *See id.*

10. *See id.* § 4.

11. *Id.* § 26(2).

12. *Id.* § 26(2)(b).

13. *Id.*

14. Personal Information Protection Act, S.A. 2003, c. P-6.5 (Can. Alta.).

15. *See id.*

16. Personal Information Protection and Electronic Documents Act § 26(2)(b); *Alta. (Info. & Privacy Comm’r) v. United Food & Commercial Workers, Local 401*, 2013 SCC 62, para. 13 (Can.).

17. *Compare* Personal Information Protection and Electronic Documents Act § 2(1), *with* Personal Information Protection Act § 1(1)(k).

18. Personal Information Protection Act § 1(1)(k).

19. *See* Personal Information Protection and Electronic Documents Act § 4.

nizations from collecting, using, or disclosing an individual's personal information without the individual's consent.<sup>20</sup> The term "organization" is also defined very broadly in PIPA and includes: corporations,<sup>21</sup> unincorporated associations and entities,<sup>22</sup> trade unions,<sup>23</sup> partnerships,<sup>24</sup> and individuals who are functioning in a strictly commercial capacity.<sup>25</sup>

### 1. Exemptions . . . in Excess?

To alleviate the extremity of this far-reaching rule, the statute contains a list of exemptions.<sup>26</sup> The Supreme Court highlighted several of the exemptions as the most relevant.<sup>27</sup> The first exemption provides the only substantial limitation on the scope of the definition of "organization" by excluding an individual's actions in a "personal or domestic capacity."<sup>28</sup> Second, PIPA does not apply to personal information collected, used, or disclosed exclusively for artistic,<sup>29</sup> literary,<sup>30</sup> or journalistic purposes.<sup>31</sup> PIPA also has exemptions for an individual's business contact information when used only for business purposes,<sup>32</sup> personal information of individuals who are candidates for or occupants of public office,<sup>33</sup> and for personal information obtained as part of a legal investigation or proceeding.<sup>34</sup> There are also exemptions for old<sup>35</sup> and archived records,<sup>36</sup> and for records of individuals deceased for at least twenty years.<sup>37</sup> Finally, PIPA does not apply to non-profit organizations so long as the collection, use, and disclosure of personal information by non-profits is not done for commercial purposes.<sup>38</sup>

In spite of the long list of exemptions present in PIPA, there are notably no exemptions for the collection, use, or disclosure of personal information for purposes of: (1) creating awareness of some issue among the public or some subset of the public if the promoter is neither a non-profit nor a journalistic entity, (2) encouraging or discouraging any particular behavior among the public or some subset of the public if the promoter is neither a non-profit nor a journalistic entity, and (3) providing informa-

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20. See Personal Information Protection Act § 4(1).

21. *Id.* § 1(1)(i)(i).

22. *Id.* § 1(1)(i)(ii).

23. *Id.* § 1(1)(i)(iii).

24. *Id.* § 1(1)(i)(iv).

25. *Id.* § 1(1)(i)(v).

26. *Id.* § 4(3).

27. Alberta (Info. & Privacy Comm'r) v. United Food & Commercial Workers, Local 401, 2013 SCC 62, para. 16 (Can.).

28. See Personal Information Protection Act §§ 1(1)(i)(v), 4(3)(a).

29. *Id.* § 4(3)(b).

30. *Id.*

31. *Id.* § 4(3)(c).

32. *Id.* § 4(3)(d).

33. *Id.* § 4(3)(m)-(o).

34. *Id.* § 4(3)(k).

35. *Id.* § 4(3)(i).

36. *Id.* § 4(3)(j).

37. *Id.* § 4(3)(h).

38. *Id.* § 56(2)-(3).

tion or education if the educator is neither a non-profit nor a journalistic entity.<sup>39</sup> The lack of exemptions for these three categories directly gave rise to *United Food & Commercial Workers* and the striking down of PIPA.<sup>40</sup>

## II. UNITED FOOD & COMMERCIAL WORKERS

### A. FACTUAL BACKGROUND

United Food & Commercial Workers (UFCW) is a union that represents workers at the Palace Casino at West Edmonton Mall in Alberta.<sup>41</sup> UFCW conducted a 305 day-long strike in 2006, during which both UFCW and the casino filmed and photographed UFCW's picket line near the main entrance to the casino.<sup>42</sup> UFCW posted signs near their picket line indicating that images of people crossing the picket line would be uploaded to a website.<sup>43</sup>

Unsurprisingly, a number of individuals were not particularly happy about UFCW's recording and publication of them and complained to the Alberta Information and Privacy Commissioner that UFCW's actions had violated PIPA.<sup>44</sup> Individuals claiming that UFCW recorded them included casino employees, casino customers, and members of the public who just happened to be near the casino during the strike.<sup>45</sup>

### B. APPLYING, BUT NOT QUESTIONING PIPA

Alberta Information and Privacy Commissioner appointed an Adjudicator to determine if UFCW had violated any of PIPA's provisions by "collecting, using and disclosing personal information about individuals without their consent."<sup>46</sup> During the Adjudicator's review of UFCW's conduct, UFCW claimed that it had filmed the picket line to: (1) create awareness of the strike among union members, (2) create public awareness of the strike, (3) discourage people from crossing the picket line, (4) deter potential acts of violence from non-picketers, (5) deter theft of union property, (6) document the occurrence and peaceful nature of the picketing, (7) support morale of the picketers, and (8) create material for union training and education.<sup>47</sup>

UFCW argued that its conduct should be found to fall within either the journalistic or legal proceeding exemptions to PIPA.<sup>48</sup> The Adjudicator

39. See *Alberta (Info. & Privacy Comm'r) v. United Food & Commercial Workers, Local 401*, 2013 SCC 62, para. 6 (Can.).

40. See *id.* paras. 6, 41.

41. *Id.* para. 4.

42. *Id.*

43. *Id.* Amusingly, the website UFCW used to publish images of people crossing their picket line was titled "www.casinoscabs.ca." *Id.*

44. *Id.* para. 5.

45. *Id.*

46. *Id.* para. 6.

47. *Id.*

48. *Id.*

rejected these contentions on the grounds that UFCW's actions were primarily rooted in financial gain and the commercial success of its members.<sup>49</sup> This aspect of commerciality precluded UFCW's use of the legal proceeding and journalistic exemptions.<sup>50</sup> The Adjudicator ultimately found that none of PIPA's exemptions were applicable to UFCW's actions and that UFCW had therefore violated PIPA.<sup>51</sup>

### C. JUDICIAL REVIEW

Unhappy with the Adjudicator's decision, UFCW sought judicial review.<sup>52</sup> Rather than attempting to argue that the Adjudicator misinterpreted or misapplied PIPA, UFCW chose instead to argue that PIPA violated section 2 of The Charter of Rights and Freedoms (the Charter).<sup>53</sup> UFCW was unable to make this argument before the Adjudicator due to the limits of the Adjudicator's jurisdiction.<sup>54</sup> section 2 of the Charter provides, among other things, a right of freedom of expression guaranteed to everyone, including non-natural legal persons such as unions.<sup>55</sup>

The Court of the Queen's Bench of Alberta determined that PIPA undoubtedly restricted UFCW's freedom of expression.<sup>56</sup> The court further determined that said restriction was not justified as a reasonable limitation under section 1 of the Charter<sup>57</sup> and that PIPA was therefore in violation of the Charter.<sup>58</sup> The Alberta Information and Privacy Commissioner appealed the lower court's ruling to the Alberta Court of Appeal, which reached the same decision.<sup>59</sup> The Alberta Information and Privacy Commissioner chose to appeal the Alberta Court of Appeal's decision to the Supreme Court of Canada.<sup>60</sup> Unfortunately for the Commissioner, the third time turned out not to be the charm and the Supreme Court affirmed the decision of the two lower courts.<sup>61</sup>

### D. A DISPROPORTIONATE INFRINGEMENT OF EXPRESSION

The Supreme Court readily agreed with the two lower courts, without much in the way of analysis, that at least some of UFCW's conduct prohibited by PIPA constituted expression under section 2 of the Charter.<sup>62</sup> The court conducted a much more involved analysis with respect to

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49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* para. 7.

53. *Id.*

54. *Id.* para. 6.

55. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11, § 2(b) (U.K.).

56. *United Food & Commercial Workers*, 2013 SCC 62, para. 7.

57. *Id.*; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11, § 1 (U.K.).

58. *United Food & Commercial Workers*, 2013 SCC 62, para. 7.

59. *Id.* para. 8.

60. *See id.*

61. *Id.* para. 3.

62. *Id.* para. 10.

whether the restrictions placed on UFCW's freedom of expression by PIPA were reasonable.<sup>63</sup> The Supreme Court ultimately came to the conclusion that while PIPA created numerous demonstrable benefits, the price of those benefits was far too high.<sup>64</sup> The disproportionate relationship between the benefits to privacy rights and the cost to freedom of expression caused the court to find that PIPA violated section 2 of the Charter.<sup>65</sup>

As a result of this analysis the Supreme Court struck down PIPA in its entirety.<sup>66</sup> A partial striking of the statute could have sufficed under these circumstances, but Alberta Information actually requested that the court strike the whole law rather than take a piecemeal approach.<sup>67</sup>

#### E. ALBERTA AFTER UNITED FOOD AND COMMERCIAL WORKERS

The full range of effects of the Supreme Court's decision is not immediately clear. PIPA will remain valid law until November 13, 2014,<sup>68</sup> and will cease to be valid after that point.<sup>69</sup> If the Alberta legislature does not enact a new privacy law, then PIPEDA will once again become active law in Alberta. Because the Alberta legislature chose to enact PIPA to displace PIPEDA in the first place, it would seem unlikely that they would now be satisfied with PIPEDA. The only alternative is for the Alberta legislature to enact a new privacy law to replace PIPA. Doing so may prove to be a challenging task because the legislature will be seeking to strike a delicate balance. PIPEDA prevents Alberta from enacting any privacy laws less restrictive than PIPEDA and too restrictive of a privacy law runs the risk of violating section 2 of the Charter. Exemptions for unions are a must for PIPA's possible replacement, but it remains unclear whether the *United Food and Commercial Workers* decision requires exemptions for other groups.

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63. *Id.* paras. 18–25.

64. *Id.* para. 25.

65. *Id.*

66. *Id.* para. 40.

67. *Id.*

68. *Id.* para. 41.

69. *Id.*