ALBERTA (INFORMATION AND PRIVACY COMMISSIONER) V. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 401

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I. INTRODUCTION

In a unanimous ruling, the Supreme Court of Canada recently decided the first case involving a *Charter* challenge to private-sector privacy legislation. The dispute in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401* arose when a trade union (the Union) took photographs and video of individuals crossing a picket line and warned them that the images may be posted on the Internet.[1] Several of these individuals filed complaints to the Information and Privacy Commissioner of Alberta (the Commissioner) claiming that the Union's actions violated their privacy rights under Alberta's *Personal Information Protection Act*.[2] In response, the Union challenged *PIPA* on the basis that the legislation infringed its freedom of expression, as guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*.[3] The Supreme Court upheld the Union's *Charter* challenge, finding that *PIPA* violated the Union's freedom of expression, and that the absence of any mechanism in *PIPA* for accommodating expressive freedoms meant that the legislation could not be justified under section 1 of the *Charter*.

The Supreme Court correctly recognized the critical importance of both privacy rights and expressive freedoms, and that neither one could be cast in absolute terms. The decision provided legislatures with useful, albeit abstract, guidelines to consider in striking the appropriate balance between freedom of expression and privacy rights. In response, Alberta's Commissioner has proposed short-term amendments to the Ministers responsible for *PIPA*, but these amendments are inadequate in a number of respects. Alberta's legislature is not the only one who must now grapple with the difficult task of amending its privacy legislation. Privacy legislation in a number of other jurisdictions is analogous to *PIPA* and is unlikely to withstand constitutional scrutiny. These jurisdictions include British Columbia, Manitoba, and to perhaps a lesser extent, the federal scheme.

II. BACKGROUND

A. *PERSONAL INFORMATION PROTECTION ACT*

In order to understand the case, it is useful to comprehend some basics about *PIPA*. The *Act* is intended to give individuals some degree of control over information about them.[4] Under *PIPA*, organizations generally cannot collect, use, or disclose personal information unless certain requirements are met. The individual to whom the "personal information"

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1 2013 SCC 62, [2013] 3 SCR 733 [*AIPC v UFCW*].

2 SA 2003, c P-6.5 [*PIPA*].

3 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

4 *AIPC v UFCW*, *supra* note 1 at para 13; Éloïse Gratton, *Understanding Personal Information: Managing Privacy Risks* (Markham: LexisNexis, 2013) at 6.

relates must generally consent to the organization's collection, use, or disclosure of the information,[5] and at the time the information is collected the organization must disclose its purposes for collection.[6] The phrase "personal information" is defined extremely broadly to mean "information about an identifiable individual."[7]

There are specific exemptions, but they tend to be defined narrowly. For example, *PIPA* states that an organization may collect, use, and disclose personal information about an individual without consent if the information is "publicly available,"[8] which is narrowly defined to include, for instance, personal information in a telephone directory, professional or business directory, or generally circulating magazine, book, or newspaper.[9] Moreover, Alberta's Commissioner has ruled that personal information includes information that is not "private," so personal information does not cease to be personal information simply because the information is widely or publicly known.[10] Additionally, *PIPA* states that consent is not needed where the collection, use, or disclosure "of the information is reasonable for the purposes of an investigation or a legal proceeding."[11] Lastly, *PIPA* expressly states that it does not apply to personal information collected, used, or disclosed solely for "artistic or literary purposes" or solely for "journalistic purposes."[12]

B. FACTS[13]

In 2006, UFCW, Local 401, was engaged in a bitter labour dispute with the Palace Casino located in a mall in Edmonton, leading to a strike that lasted for 305 days. As part of this strike, the workers picketed the main entrance to the casino. Both the Union and a security firm hired by the casino videotaped and photographed the picket line; this was found to be customary in labour disputes. The Union posted a number of signs in the vicinity of the picket line, advising that images of those who crossed the picket line may be posted on a Union-maintained website called "www.CasinoScabs.ca."

Despite this warning, the Union did not post any images of picket line crossers on the website. However, the Union in two ways used images of the vice-president of the casino, taken as he crossed the picket line. First, a mock mug shot was created of him, and used on picket posters. Second, images of his head were used in Union newsletters and strike leaflets with captions intended to be humorous. The vice-president objected to this use of his image as a violation of his privacy rights under *PIPA*, and filed a complaint with the Commissioner. Additionally, two other individuals filed complaints with the Commissioner regarding the fact that the Union took pictures and video footage of them. One complainant was a management employee with the casino, and the other was a member of the public. There was no evidence that the Union actually posted the images of these other two complainants on the website, or published them in some other way. The Commissioner appointed an

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5 *PIPA*, *supra* note 2, s 7.
6 *Ibid*, s 13.
7 *Ibid*, s 1(1)(k).
8 *Ibid*, ss 14(e), 17(e), 20(j).
9 *Personal Information Protection Act Regulation*, Alta Reg 366/2003, s 7.
10 *Synergen Housing Co-op Ltd* (15 September 2010), P2010-003 at para 17, online: Office of the Information and Privacy Commissioner of Alberta <http://www.oipc.ab.ca>.
11 *PIPA*, *supra* note 2, ss 14(d), 17(d), 20(m).
12 *Ibid*, ss 4(3)(b)-(c).
13 The relevant facts are summarized in *AIPC v UFCW*, *supra* note 1 at paras 4-6.

Adjudicator to determine whether the Union had violated *PIPA* by collecting, using, or disclosing personal information about the complainants without their consent.

III. DISPOSITION BEFORE THE TRIBUNAL AND LOWER COURTS

A. ADJUDICATOR, ALBERTA INFORMATION AND PRIVACY COMMISSIONER

As part of its case before the Adjudicator, the Union challenged *PIPA* as being an infringement of its freedom of expression under section 2(b) of the *Charter*.[14] The Adjudicator declined to apply the *Charter* on the grounds that she was not empowered to make a decision about the constitutional validity of *PIPA*.[15] The adjudicator concluded that one of the primary purposes for the Union's collection, use, and disclosure of personal information was to dissuade people from crossing the picket line.[16] Ultimately, she ruled that no provision of *PIPA* would authorize the non-consensual collection, use, and disclosure of personal information for that primary purpose.[17] In the course of her reasoning, she considered the Union's argument that its actions were covered by the "journalistic purposes" exemption, which stated that *PIPA* does not apply "if the collection, use or disclosure, as the case may be, *is for journalistic purposes and for no other purpose*."[18] She held that the exemption did not apply here because, in addition to journalistic purposes, the Union's activities were also aimed at resolving the labour dispute in its favour. The Union also argued that the provisions dealing with a potential investigation or legal proceeding[19] removed the need for consent in its case. The Adjudicator accepted this argument, but decided it was not sufficient to exempt the Union's collection, use, and disclosure for other purposes. 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 *PIPA*.

B. COURT OF QUEEN'S BENCH

The Union applied to the Alberta Court of Queen's Bench for judicial review of the adjudicator's decision. Justice Goss granted the application and quashed the adjudicator's decision.[20] She found that the Union's activity had expressive content, which was protected by section 2(b) of the *Charter*. She ruled that *PIPA* directly curtailed the Union's freedom of expression by preventing the Union from collecting, using, and disclosing images taken of individuals in a public setting, and that this curtailment could not be saved by section 1 of the *Charter*.

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14 *United Food and Commercial Workers, Local 401* (30 March 2009), P2008-008, online: Office of the Information and Privacy Commissioner of Alberta <http://www.oipc.ab.ca>.
15 *Ibid* at para 16.
16 *Ibid* at para 51.
17 *Ibid* at para 67.
18 *PIPA*, *supra* note 2, s 4(3)(c) [emphasis added].
19 *Ibid*, ss 14(d), 17(d), 20(m).
20 *United Food and Commercial Workers, Local 401 v Information and Privacy Commissioner (Alta)*, 2011 ABQB 415, 509 AR 150.

C. ALBERTA COURT OF APPEAL

The Attorney General of Alberta appealed Justice Goss' decision to the Alberta Court of Appeal.[21] According to the Court, the real issue in the case was whether it was justifiable to restrain expression in support of labour relations and collective bargaining activities.[22] It decided that *PIPA* was overbroad. The complainants' privacy interests were minor since their activities occurred in a public place and they made the decision to cross the picket line knowing their images would be collected. These minor privacy interests had to be balanced with the right of workers to engage in collective bargaining and of the Union to communicate with the public. As Justice Goss did, the Court of Appeal ruled that there was a breach of section 2(b) of the *Charter* that could not be saved under section 1.

IV. THE SUPREME COURT OF CANADA

As did the judges of the lower courts, Justices Abella and Cromwell focused on two constitutional questions in this case. First, did *PIPA* and its regulations violate section 2(b) of the *Charter* by limiting a union's ability to collect, use, or disclose personal information during the course of a lawful strike? Second, if *PIPA* did violate section 2(b) of the *Charter*, was the infringement a reasonable limit under section 1 of the *Charter*?

In regards to the first question, the Court had little difficulty in finding that *PIPA* limited freedom of expression. A union's acts of videotaping a lawful picket line, videotaping any individuals who crossed it, and distributing these recordings all constituted "expressive activity" that was protected by section 2(b) of the *Charter*. The Court found that the purposes of this expressive activity were to persuade individuals to support the Union, deter people from crossing the picket line, and inform the public about the strike.[23]

In reaching its conclusion regarding the first constitutional question, the Court considered the broad applicability of *PIPA* and the narrowness of its exemptions. It noted that *PIPA* defines the term "personal information" extremely broadly, and limits the collection, use, and disclosure of personal information without regard to the specific types of activities involved. The Court compared *PIPA* to the federal *Personal Information Protection and Electronic Documents Act*, which applies primarily to personal information that "the organization collects, uses or discloses *in the course of commercial activities*."[24] The Court noted that the privacy restrictions in the federal legislation would not typically apply to the activities of trade unions, which are of a non-commercial nature. The Court then went on to discuss the exemptions under *PIPA*, including the journalistic purposes exemption and the investigation and legal proceeding exemption. Given that none of the exemptions allowed the Union to collect, use, and disclose personal information for the purpose of advancing its interests in a labour dispute, the Court concluded that *PIPA* restricts freedom of expression.

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21 *United Food and Commercial Workers, Local 401 v Privacy Commissioner (Alta*), 2012 ABCA 130, 522 AR 197.

22 *Ibid* at para 58.

23 *AIPC v UFCW*, *supra* note 1 at para 11.

24 SC 2000, c 5, s 4(1)(a) [*PIPEDA*] [emphasis added]. "Commercial activity" is defined in s 2(1) as "any particular transaction, act or conduct or any regular course of conduct that is of a commercial character."

Having decided that *PIPA* violated the Union's section 2(b) *Charter* rights, Justices Abella and Cromwell next considered the second constitutional issue: whether the infringement could be justified under section 1. In applying the *Oakes* test,[25] the Court determined that *PIPA* has a pressing and substantial objective: "The focus [of *PIPA*] is on providing an individual with some measure of control over his or her personal information," an issue that is "intimately connected to their individual autonomy, dignity and privacy."[26] The Court went on to explain that the fundamental role of privacy in a free and democratic society elevated privacy legislation to a "quasi-constitutional" status.[27] The Court had similar ease in finding that the "rational connection" branch of the *Oakes* test was met, as "*PIPA* directly addresses the objective by imposing broad restrictions on the collection, use and disclosure of personal information."[28]

Nevertheless, the Supreme Court ruled that *PIPA* failed the last part of the *Oakes* test,[29] finding that the statute's broad restrictions were not justified because they outweighed the benefits provided by the legislation. The Court pointed out a number of factors that mitigated the privacy concerns in the case at bar. The picket line was an "open political demonstration," readily observable by the public.[30] Those crossing the picket line could reasonably expect their image to be taken and disseminated by journalists. Moreover, the images collected, used, and disclosed by the Union were limited to those of individuals crossing a picket line and did not include "intimate biographical details" related to "lifestyle or personal choices."[31] Although the privacy interests *PIPA* was protecting in the case at bar were judged to be relatively minor, the Union was prevented from exercising a freedom that was of critical importance to it. The Court held that *PIPA* thwarted many Union objectives that are "at the core of protected expressive activity under s. 2(b)" including "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."[32]

The Court emphasized that neither privacy nor free speech is an absolute right, and that free speech would not always supersede privacy rights. The Court criticized *PIPA* for failing to include "any mechanisms by which a union's constitutional right to freedom of expression may be balanced with the interests protected by the legislation."[33] The Court suggested some factors to consider in striking the appropriate balance between freedom of expression and the right to privacy: "the nature of the expression"; "the nature of the privacy interests"; and "the

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[25] This test was originally set out in *R v Oakes*, [1986] 1 SCR 103 [*Oakes*]. It can be summarized as follows:
1. Is the objective sought to be achieved by the impugned legislation related to concerns which are "pressing and substantial" in a free and democratic society?
2. Are the means chosen by the government proportional to its objective?
   a. the limiting measures must be carefully designed, or rationally connected, to the objective;
   b. they must impair the right as little as possible; and
   c. their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights.

[26] *AIPC v UFCW*, *supra* note 1 at para 19.

[27] *Ibid*.

[28] *Ibid* at para 20.

[29] The Court did not provide any analysis regarding the "minimal impairment" branch of the *Oakes* test.

[30] *AIPC v UFCW*, *supra* note 1 at para 26.

[31] *Ibid*.

[32] *Ibid* at para 28.

[33] *Ibid* at para 25.

nature of the personal information, the purpose for which it is collected, used or disclosed, and the situational context for that information."[34]

Having found that *PIPA* violates section 2(b) of the *Charter* and cannot be justified under section 1, the Court then considered the remedy. The Court said that the structure of the statute is "comprehensive and integrated," and that is was not appropriate to order specific amendments to make *PIPA* constitutionally compliant.[35] Instead, the Court declared *PIPA* invalid in its entirety, but suspended the declaration for a period of 12 months to afford the Alberta legislature time to decide how to amend it.[36]

V. ANALYSIS OF THE SUPREME COURT OF CANADA DECISION

A. FREEDOM OF EXPRESSION

The *AIPC v. UFCW* decision is consistent with a long line of Supreme Court jurisprudence which has interpreted the *Charter* protection of freedom of expression very broadly. In *Libman v. Quebec (Attorney General)*, the Court ruled that, generally, "any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of s. 2(b) of the Canadian *Charter*."[37] Even communications that wilfully promote hatred against an identifiable group are covered by section 2(b).[38] Only if the expression is communicated in a violent manner will it lose the protection of that provision.

The Supreme Court has decided many freedom of expression cases in the labour context, and has continued its tradition of broadly interpreting section 2(b). Two are particularly relevant to the analysis of *AIPC v. UFCW*. In *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, the union was involved in a bitter labour dispute with two KMart stores in British Columbia that eventually resulted in a lockout.[39] During the lockout, members of the union distributed leaflets to customers in the parking lots of other KMart stores (ones not involved in the labour dispute). The leaflets provided information about the labour dispute, and asked patrons to consider refraining from shopping at KMart during the lockout. British Columbia's labour relations legislation prohibited picketing, and the definition of picketing was broad enough to apply to the kind of leafleting done by the union. The issue was whether the legislation violated the union's freedom of expression, and if so, whether the violation could be justified by section 1.

In *KMart*, Justice Cory stated for the Court, that freedom of expression is "the foundation of any democratic society," and essential to the functioning of democratic institutions.[40] He went on to discuss the importance of freedom of association in the labour relations context:

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34 *Ibid* at paras 25, 38.
35 Both the Commissioner and the Attorney General requested this remedy, in the event they lost the appeal: *ibid* at para 40.
36 *Ibid* at para 41.
37 [1997] 3 SCR 569 at para 31.
38 *R v Keegstra*, [1990] 3 SCR 697 at 732.
39 [1999] 2 SCR 1083 [*KMart*].
40 *Ibid* at para 21.

> [W]orkers, particularly those who are vulnerable, must be able to speak freely on matters that relate to their working conditions. For employees, freedom of expression becomes not only an important but an essential component of labour relations. It is through free expression that vulnerable workers are able to enlist the support of the public in their quest for better conditions of work. Thus their expression can often function as a means of achieving their goals.[41]

The Supreme Court ruled that the British Columbia legislation had the effect of restricting leafleting and therefore infringed freedom of expression. The Court then proceeded to determine whether the limitations were demonstrably justifiable. Justice Cory explained that picketing has two elements. It has an element whereby the union is communicating with the public. But, it also has a coercive element (which he called "signalling"),[42] which may justify regulation and restriction in some circumstances. The Court ruled that the legislation was overbroad, as the leafleting was virtually all expressive and did not have the "signal effect" of the picket.[43]

The *KMart* decision is important for two reasons: (1) it describes the crucial role that freedom of expression plays in the labour context, particularly in enabling vulnerable workers to bring their plight to public attention and thereby increase their bargaining power; and (2) the Court was clear that a union's right to expression is not absolute. Picketing and related activities may be justifiably limited in circumstances were they become too coercive.

The other Supreme Court of Canada case of significance is *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd*.[44] This case involved secondary picketing by the Retail, Wholesale and Department Store Union. The phrase "primary picketing" typically refers to picketing at the premises of the employer; "secondary picketing" involves picketing at other premises, such as those of suppliers or customers of the employer.[45] Pepsi-Cola locked out its employees, and the union picketed a number of sites that were not owned by the company. Union members picketed certain retail outlets, thus impeding the delivery of Pepsi-Cola's products and dissuading store staff from accepting delivery. Union members also carried placards in front of a hotel where substitute workers were lodging and attended outside the homes of some of Pepsi-Cola's management personnel, proceeding to cause disruptions. A judge granted Pepsi-Cola an injunction on the grounds that secondary

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41 *Ibid* at para 25.

42 The Supreme Court explained the term "signalling" (*ibid* at para 40):

> There can be no doubt that picketing is an exercise of freedom of expression. Yet its trademark is the picket line, which has been described as a "signal" not to cross. Whatever may be its message, the picket line acts as a barrier. It impedes public access to goods or services, employees' access to their workplace, and suppliers' access to the site of deliveries. As Dickson C.J. pointed out in *B.C.G.E.U.*, "[p]icketing sends a strong and automatic signal: do not cross the line lest you undermine our struggle; this time we ask you to help us by not doing business with our employer; next time, when you are on strike, we will respect your picket line and refuse to conduct business with your employer."

The Court went on to make the following observations about the "signalling" effect of picket lines: "Picket lines constitute a formidable barrier. There is a reluctance in Canadian society to cross a picket line" (*ibid* at para 41); "The decision for people, whether employees, suppliers or consumers, not to cross the picket line may be based on its coercive effect rather than the persuasive force of the picketers" (*ibid* at para 42).

43 Therefore, the legislation could not be saved by the minimal impairment branch of the *Oakes* test (*ibid* at paras 43, 77).

44 2002 SCC 8, [2002] 1 SCR 156 [*Pepsi-Cola*].

45 *Ibid* at para 29.

picketing was prohibited at common law. The union challenged the injunction as infringing freedom of expression.

The Supreme Court was asked to determine the extent to which a union's right to freedom of expression was limited when economic harm was imposed on third parties who were not directly involved in the labour dispute. Chief Justice McLachlin and Justice LeBel, for the Court, upheld the union's appeal. They explained that picketing, however defined, always involves expressive action, and that both primary and secondary picketing are forms of expression.[46] They repeated the observation in *KMart* that freedom of expression is particularly critical in the labour context, and expressly reaffirmed the statements of Justice Cory in that decision.[47] They explained that freedom of expression in the labour context benefits society as a whole because it brings the debate over labour conditions into the public realm.[48] They stated that freedom of expression is not absolute, and that when harm exceeds benefit, the expression may be legitimately curtailed.[49] However, they explained that some economic harm to third parties imposed by the labour relations system is justified as a necessary cost of resolving industrial conflict.[50] In other words, total protection from harm is not the goal. Chief Justice McLachlin and Justice LeBel articulated a "wrongful action model" which permits the activities of primary and secondary picketing so long as they are not tortious or criminal in nature.[51] They ultimately concluded that protection from economic harm is an important value capable of justifying some legislative limitations on freedom of expression, but it is an error to accord this value absolute or preeminent importance over all other important values, among them freedom of expression.

The principles in *Pepsi-Cola* are applicable to *AIPC v. UFCW*. In *Pepsi-Cola*, the Supreme Court balanced competing rights: the union's freedom of expression versus a third party's freedom from economic harm. Similarly, in *AIPC v. UFCW*, the Court was asked to balance competing rights: the union's freedom of expression versus a third party's right to protect his or her personal information. In both cases, the Supreme Court ruled that neither the freedom of expression nor the competing third party right is absolute. As a corollary, the Court suggested in both cases that a certain amount of harm to third parties is permissible in the process of a union exercising its freedom of expression. In the case of *Pepsi-Cola*, some economic harm to third parties was acceptable as a result of secondary picketing. In *AIPC v. UFCW*, some collection, use, and disclosure of personal information of picket line crossers was acceptable in the course of a union's primary picketing.

B. STATUS OF PRIVACY LEGISLATION

The constitutional status of privacy legislation is germane to the issue of the extent to which rights established and protected by that legislation must yield to freedom of association. In *AIPC v. UFCW*, the Supreme Court stressed the importance of privacy legislation, calling it quasi-constitutional. This is consistent with past Supreme Court

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46 *Ibid* at para 32.
47 *Ibid* at para 33.
48 *Ibid* at para 34-35.
49 *Ibid* at para 36.
50 *Ibid* at para 45.
51 *Ibid* at para 66.

jurisprudence. In *Dagg v. Canada (Minister of Finance)*,[52] Justice LaForest explained that "[t]he protection of privacy is a fundamental value in modern, democratic states."[53] He went on to state that as "[a]n expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions."[54] He held that privacy derived its quasi-constitutional status in part from its close relationship with section 7 of the *Charter*, which guarantees the right to "life, liberty, and security of the person," and section 8 of the *Charter*, which protects the "right to be secure against unreasonable search or seizure."[55] In *Dagg*, Justice LaForest expressly recognized the "privileged, foundational position of privacy interests in our social and legal culture."[56]

The Supreme Court also discussed the constitutional status of privacy legislation in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*.[57] In *Lavigne*, Justice Gonthier for the Court stated that "the protection of privacy is necessary to the preservation of a free and democratic society," and reiterated privacy legislation's quasi-constitutional status.[58] In other words, courts must interpret privacy legislation generously, to give effect to its special status. In another more recent case, the Supreme Court again stressed the "quasi-constitutional" status of privacy legislation because of the important "role privacy plays in the preservation of a free and democratic society."[59] To summarize, although the Supreme Court had consistently upheld the importance of privacy legislation, it had not, until *AIPC v. UFCW*, been asked to deal with a conflict between privacy legislation and *Charter* rights.

C. BALANCE BETWEEN FREEDOM OF EXPRESSION AND PRIVACY

In *AIPC v. UFCW*, the Supreme Court provided some general guidance for striking an appropriate balance between a union's freedom of expression and an individual's right to privacy. The Supreme Court said that both the "nature of the expression" and the "nature of the privacy interests" must be considered.[60] While the Court did not expand upon what it meant by the phrase "nature of the expression," it did provide a list of factors that could be used to assess the "nature of the privacy interests": "the nature of the personal information, the purpose for which it is collected, used or disclosed, and the situational context for that information."[61]

This guidance, while useful, was only of a general nature. The Supreme Court was not required to apply it to the case at bar. At this stage, the best that can be attempted is an informed guess as to how this guidance will be applied in future cases. For assessing the

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52 [1997] 2 SCR 403 [*Dagg*].
53 *Ibid* at para 65. Justice LaForest wrote the dissenting opinion, but the majority concurred with him on this point.
54 *Ibid*.
55 *Ibid* at para 66; *Charter*, *supra* note 3.
56 *Dagg*, *supra* note 52 at para 69.
57 2002 SCC 53, [2002] 2 SCR 773 [*Lavigne*].
58 *Ibid* at para 25.
59 *HJ Heinz Co of Canada Ltd v Canada (Attorney General)*, 2006 SCC 13, [2006] 1 SCR 441 at para 28.
60 *AIPC v UFCW*, *supra* note 1 at para 38.
61 *Ibid* at para 25.

"nature of expression" in a particular case, the degree to which the expression is coercive, rather than informative or persuasive, will likely be relevant. For example, if a union collected and distributed information about the children of those who crossed the picket line, this is likely to be taken as an implied threat to the safety of family members. Another relevant factor under "nature of expression" is the degree to which violence or harm is being incited. For instance, if the Union had collected and disclosed the names and addresses of picket line crossers with a caption that read, "It would be terrible if a UFCW member went and vandalized these people's houses," the individuals' privacy rights ought to trump the Union's freedom of expression. Also, the "nature of expression" should account for the degree to which the union's expression is vindictive or malicious. For example, a union should be prevented from collecting and then posting health or medical information of a picket line crosser.

In striking the balance, courts and legislators will also have to consider the Supreme Court's suggested factors related to the "nature of the privacy interests." For the "nature of the personal information," the most significant factor is likely to be the extent to which the subject matter is sensitive. To return to a previous example, a union should be prevented from posting sensitive personal details about picket line crossers, such as medical conditions and sexual preferences. For another one of the Supreme Court's factors — the "purpose for which the personal information is collected, used or disclosed" — many of the same considerations will be applicable here as were previously discussed as being relevant under the "nature of expression." If the union is collecting, using, or disclosing the personal information for coercive or vindictive purposes, or with the intent to incite violence or harm, it is more likely that the privacy interests should prevail.

Lastly, the "situational context" must be considered. A good example here would be the degree to which the information is in the public realm. If images of someone crossing a picket line were captured in a very public place and have already been widely circulated, there should be less concern from a privacy standpoint with a union republishing the images. However, it is important to take into account the whole "situational context," and this factor might interact with other factors, such as the "nature of the personal information." For instance, imagine that striking health professionals were picketing outside the entrance to an abortion clinic, and were capturing video footage of individuals crossing the picket line. If the Union decided to post its footage on a website, some very sensitive details might be revealed about young female picket line crossers.[62] The privacy rights of these picket line crossers should likely trump the Union's freedom of expression, even though the footage was captured in a public place. As the Supreme Court pointed out in *AIPC v. UFCW*, the mere fact that a picket line is crossed in a public place does not automatically mean that an individual forfeits "his or her interest in retaining control over the personal information which is thereby exposed."[63]

There are plenty of other ways in which the "situational context" might impact the analysis. For example, the degree to which the picket line crosser has a choice about whether

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62 The idea for this example was obtained from the Canadian Civil Liberties Association's Factum: *AIPC v UFCW*, *ibid* (Factum of the Intervener Canadian Civil Liberties Association) at para 23 [CCLA Factum].

63 *AIPC v UFCW*, *ibid* at para 27.

to cross the picket line might influence the analysis. If the individual has little choice but to cross the picket line to obtain a good or service (say, where there are no substitutes, the good or service is essential, or it is provided on a time-sensitive basis), there is more justification that the privacy interests should prevail over the union's expression.

While the Court's guidance regarding balancing is useful, it is submitted by this author that another layer of complexity is necessary, one that the Court did not address. Each of the collection, use, and disclosure stages ought to be assessed separately, as different considerations may occur at each stage, and applicable factors may be weighed differently.[64] Often, the collection of personal information will carry fewer privacy risks than the use of that information, and use of it will be less problematic than disclosure. An example used above helps to illustrate this. If a young woman is filmed by a union crossing a picket line to enter an abortion clinic, this act of filming, in and of itself, does not really represent an invasion to her privacy. All the union members on the picket line would have still witnessed her enter the abortion clinic. The real risk comes if the footage is "disclosed" on the website, as a much broader group of people will have access to it. She has a stronger argument that her privacy interests should supersede the union's freedom of expression at the disclosure phase than she does at the collection phase.

The guidance that the Supreme Court has provided, although quite general in nature, will be useful to two groups. It provides judges with factors to consider in the context of the section 1 *Charter* analysis that will be required in future litigation regarding privacy legislation. It also provides guidance to the Alberta legislature as how to amend *PIPA* so that it is *Charter* compliant. In fact, the Alberta government is already considering such amendments.

D. PRIVACY LEGISLATION AMENDMENTS

In response to the Supreme Court's decision in *AIPC v. UFCW*, the Privacy and Information Commissioner of Alberta has provided a letter to the Ministers of Justice and Service Alberta, advising how *PIPA* should be amended.[65] She proposes adding "authorizing provisions allowing the collection, use or disclosure of personal information by unions for expressive purposes without consent, in the context of picketing during a lawful strike."[66] These proposed amendments are unlikely to achieve the appropriate balance between freedom of expression and privacy interests envisioned by the Supreme Court, because they are too broad in some respects, and too narrow in others. The amendments would be too broad within the specific sphere of union picketing, because they would permit all forms of union expression, even coercive expression that infringes legitimate privacy interests. The proposed amendments are also too narrow, because they apply only to union picketing. Unions have a need for freedom of expression outside of the picketing context that may also conflict with privacy rights, for instance during an organizing drive. Moreover, unions are

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64 CCLA Factum, *supra* note 62 at paras 4, 25-29.

65 Letter from Jill Clayton, Information and Privacy Commissioner of Alberta to the Honourable Jonathan Denis and the Honourable Doug Griffiths (20 December 2013), online: Office of the Information and Privacy Commissioner of Alberta <http://www.oipc.ab.ca/Content_Files/Files/News/Denis_Griffiths_2013_PIPA_Website.pdf>.

66 *Ibid* at 3 [emphasis omitted].

not the only groups who engage in political forms of protest like picketing. Many other groups, such as environmental and human rights organizations, also have a legitimate interest in freedom of expression in protesting, and the amendments fail to protect them. However, in fairness to the Commissioner, she is clear in her letter that the proposed amendments are motivated by the 12-month time frame given by the Supreme Court. She does leave open the possibility of more significant changes to *PIPA* as part of a previously scheduled review of the *Act* by a special committee of Alberta's Legislative Assembly, to begin by July 2015.

The *AIPC v. UFCW* case has implications for privacy legislation in other jurisdictions. All private-sector privacy legislation in Canada uses a very broad definition of "personal information" that covers any information about an identifiable individual, not just his or her "intimate biographical details."[67] As a result, the foundation of all private sector privacy legislation in Canada has been called into question by this Supreme Court decision. The key issue is whether these laws have some kind of mechanism to balance privacy rights with freedom of expression. The provincial statutes that are most similar to *PIPA* are the *Personal Information Protect Act* of British Columbia[68] and *The Personal Information Protection and Identity Theft Prevention Act* of Manitoba.[69] They too apply to the collection, use, and disclosure of broadly defined "personal information" by most organizations.[70] The British Columbia and Manitoba statutes have only a few narrowly specified exclusions, and these are similar to those found in *PIPA*: most notably for personal information collected, used, or disclosed solely for artistic, literary, journalistic, or litigation purposes, and for personal information that is "publicly available" (with a very limited range of circumstances qualifying).[71] Therefore, statutes in some other provinces appear also to be vulnerable to claims that they lack balancing mechanisms, and likely require amendments.

Additionally, the Supreme Court's decision may impact *PIPEDA*, the federal privacy statute. As previously discussed, *PIPEDA* differs from the privacy statutes of Alberta, British Columbia, and Manitoba in that its application is restricted to "commercial activities."[72] For those commercial activities, *PIPEDA* is structured very much the same way as the legislation of these three provinces, and it too lacks a balancing mechanism. However, this restriction to "commercial activities" might be sufficient to make *PIPEDA* defensible. In the past, the Supreme Court has stated that commercial expression is protected under section 2(b) of the *Charter*, but has suggested that limitations to such expression might be easier to justify under section 1.[73]

VI. CONCLUSION

AIPC v. UFCW involved a conflict between privacy rights and freedom of expression. While the Union was the central protagonist in the case, its implications go far beyond the organized labour context. In Canada, private-sector privacy legislation has cast the right to

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67 *AIPC v. UFCW*, *supra* note 1 at para 26.
68 SBC 2003, c 63 [*PIPA*, BC].
69 SM 2013, c 17 (not yet in force) [*PIPITPA*].
70 *PIPA*, BC, *supra* note 68, s 1; *PIPITPA*, *ibid*, s 1.
71 *PIPA*, BC, *ibid*, ss 3(2), 12(e), 15(e), 18(e); *PIPITPA*, *ibid*, ss 4(3), 14(e), 17(e), 20(j).
72 *Supra* note 24.
73 See e.g. *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927; *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232.

privacy in absolute terms, and this case was the first *Charter* challenge to such a conceptualization considered by the Supreme Court. The Court's decision to strike down *PIPA* was correct both at law and public policy. Legislatures are now faced with the difficult task of determining how to amend privacy legislation to ensure that constitutional rights are respected. Privacy legislation is still in its infancy in Canada, and there will likely be a great deal more dialogue between the courts and legislatures before the correct balance between privacy and constitutional rights is struck.