Alberta v UFCW 401 (2013): Highest Court Upholds Union's Constitutional Freedom of Expression at Picket Line

Introduction

When union members are on strike they engage in all sorts of activities at a picket line, including taking pictures and recordings of all those present. Can unions take pictures of people crossing a picket line without their permission? As decided by the Supreme Court of Canada (SCC) in its November 15, 2013 ruling *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401 (UFCW 401)*,[1] they can because unions are guaranteed freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*.[2]

In its first case dealing with the *Charter* right to freedom of expression in 1989, the SCC interpreted freedom of expression broadly; an activity was covered so long as it was non-violent and "attempts to convey meaning."[3] In *UFCW 401* the SCC found capturing images to be a meaningful activity since it was a vital tool for the union to express its position during the strike. Therefore, the law forbidding the collection and use of such images without permission, the Alberta *Personal Information Protection Act* (*PIPA*),[4] is unconstitutional because it is an unreasonable limit to the Union's freedom of expression. But to give the government time to amend the law and not leave Albertans without a personal information protection law, the Court allowed the law to remain in force for up to one year.

Facts

Employees of Edmonton's Palace Casino, members of the United Food and Commercial Workers local 401 (UFCW 401), picketed on site during a 305-day lawful strike. The Union took film footage and photographs of patrons, managers and replacement workers crossing the picket line, as well as any individuals in the camera's line of sight. To pressure those who crossed or were about to cross to respect the picket line, a nearby sign informed those individuals that their images may be placed on a website (www.casinoscabs.ca). One manager's image was used, in a way intended to be humorous, on a poster and in internal union communication to keep up the strikers' morale.

A few of the individuals who were photographed were unhappy and complained to the Alberta Information and Privacy Commissioner (AIPC), claiming that the Union violated *PIPA* by collecting their personal information without their consent.

Procedural History

The case went first to an adjudicator appointed by the AIPC. Because there was no exemption in *PIPA* that allowed a union to collect, use or disclose personal information without consent, the adjudicator ordered UFCW 401 to stop collecting images and to destroy the ones it already had. The adjudicator agreed that the Union collected the images for an expressive purpose which fell under the protection of section 2(b) of the Charter (freedom of expression), but she was prevented from deciding questions of constitutional law by the *Administrative Procedures and Jurisdiction Act*.[5]

UFCW 401 then challenged the law at Alberta's Court of Queen's Bench. There, the Court ruled that the Union's activity was for an expressive purpose, and that *PIPA's* efforts to limit this activity violated the Union's right to freedom of expression.[6] The Court also determined that this limitation was not reasonable.

The Alberta government appealed this decision to the Alberta Court of Appeal; that Court ruled likewise. It found that *PIPA's* limitations violated UFCW 401's right to expression in order to support its labour relations and collective bargaining.[7] The government then appealed to the SCC.

Issues

The issues examined by the SCC were as follows:

(1) Is the Union's use of film and photography during the lawful strike considered an expressive activity that deserves protection under section 2(b)?;

(2) If so, does *PIPA* violate section 2(b) by restricting the Union's ability to collect, use or disclose personal information without consent during that strike?; and

(3) If there is a violation under *PIPA*, is it a reasonable limit to the Union's right that can "be demonstrably justified in a free and democratic society" as stated in section 1 of the Charter?

Decision

In a unanimous decision, the SCC concluded that *PIPA's* total ban on UFCW's freedom of expression in recording picket line images is unconstitutional. Since the Act's restriction of this activity is disproportionate to the benefits it seeks to promote in protecting personal information, it also could not be saved by section 1 of the *Charter*. Therefore, the Court declared the legislation invalid, but allowed a period of one year for the legislature to change it.

Analysis

Expressive Activity

The Court affirmed that filming and photographing at a picket line during a lawful strike is

part of a union's freedom of expression. To record people crossing a picket line has meaning. It is done to try to persuade people to support the strike, or at least discourage people from doing business with the employer. Film and photographic images can also be used to inform the public about the strike, bring the labour dispute into the public realm, ensure the safety of union members, and boost morale and solidarity.

PIPA's Restrictions

The Court found that *PIPA's* purpose was to give people greater control over their personal information. "Personal information" is information about an identifiable person, even if it is widely known and not private.[8] While exemptions in the legislation exist for artistic or journalistic purposes, as a general rule organizations (including unions) cannot collect, use or disclose personal information without consent.[9] Since no exemptions applied for UCFW 401 to advance its interests in a labour dispute by capturing picket line images, the legislation violates its 2(b) freedom.

Section 1

If the government could show that section 7(1) of *PIPA* is a 'reasonable limit' to UCFW 401's 2(b) freedoms under section 1 of the *Charter*, the legislation could stand. Under the Oakes Test, the SCC found that *PIPA* had a pressing and substantial objective to allow individuals control over who had their personal information and how widely it could be used. The SCC also found that *PIPA's* procedures were rationally connected to its objective of protecting personal information connected to individual autonomy and dignity.

However, the Court determined that the beneficial effect of the legislation comes at the cost of the Union's constitutional right to freedom of expression. It noted that, "*PIPA* deems virtually all personal information to be protected regardless of context."[10] While not all union activity that is expressive would prevail over such legislation, the SCC emphasized that in the *context of labour relations* the freedom of expression is of fundamental importance.

Freedom of expression in a labour dispute is directly related to workers' associational freedoms to promote common interests and influence their working conditions. In legitimate labour relations contexts, the protections given by both 2(b) and the freedom of association in 2(d) contribute to an individual worker's self-identity, worth, and ability to withstand an employer's economic power in relation to their vulnerability.[11] In addition, the SCC recognized that unions and their rights to associate and bargain collectively have a role to play in the Canadian economy and society.

Therefore, the SCC decided that the law was unconstitutional because it disproportionately "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."[12]

Significance of the Ruling

Alberta's government must now draft new constitutionally compliant legislation. It must weigh the interests of individuals who want to protect their personal information with a union's freedom of expression in a labour relations context.

The SCC's ruling was a victory for both the UFCW 401 and the labour movement. It recognizes the historical and contemporary importance of unions for individual workers in labour relations, and it accordingly protects unions' freedom of expression from legislation that seeks to limit it.

The decision impacts groups other than unions that have the right to associate. The Union's lawyer noted "it is a very important decision for not just trade unions, but any kind of public organization or people's organization."[13] When a group's freedom of expression is limited by similar legislation, the courts will look at the context of the communication in weighing the benefit of it against the disadvantages of it for the group. She hopes that the new legislation will not restrict any group's ability to freely communicate its views about public events or politics.

[1] *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62 .

[2] *Canadian Charter of Rights and Freedoms*. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canadian Act 1982* (UK), 1982, c 11, s 33.

[3] *Irwin Toy v Quebec*, 1 SCR 927.

[4] *Personal Information Protection Act*, SA 2003, c P-6.5 [PIPA]

[5] *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3. Section 11 of the *Act* specifies that unless a regulation has been made, an administrative body does not have jurisdiction to rule on constitutional matters. The province of Alberta had not delegated jurisdiction to the AIPC to determine questions of constitutional law.

[6] *United Food and Commercial Workers, Local 401 v Alberta (Information and Privacy Commissioner)*, 2011 ABQB 414. https://www.canlii.org/en/ab/abqb/doc/2011/2011abqb415/2011abqb415.html

[7] *United Food and Commercial Workers, Local 401 v Alberta (Attorney General)*, 2012 ABCA 130.

[8] *PIPA*, *supra* note 4 s 1(1)k.

[9] *Ibid*, s 7(1).

[10] *UFCW 401*, *supra* note 1 at para 25.

[11] *Ibid* at para 32.

[12] *Ibid* at para 37.

[13] Alberta's Personal Information Protection Act Struck Down by Supreme Court of Canada" *Canadian Press* (15 November 2013) online: *Huffington Post*