From: AFL temp
To: EconomicFuture Committee
Cc: Gil McGowan; Siobhan Vipond; Gwen Feeny; Maureen Werlin
Subject: AFL PIPA Review Submission
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Hello,

Please find attached the Alberta Federation of Labour's submission to the review of the Personal Information Protection Act by the Standing Committee on Alberta's Economic Future. The AFL thanks the Committee for their work and would be pleased to participate in any future proceedings as the review progresses.

Sincerely,

Mary Elizabeth Archer (for)

Gil McGowan, President
Alberta Federation of Labour

Alberta Federation of Labour

PIPA Review Submission 2016

February 26, 2016

The Alberta Federation of Labour thanks the Standing Committee on Alberta's Economic Future for the opportunity to provide our input into the legislative review of the *Personal Information Protection Act* ("PIPA" or the "Act"). As the organization representing more than 170,000 unionized employees in the province and advocating for all Alberta workers, we understand the importance of privacy and personal information protections within a suite of statutory employment and labour rights.

Alberta was one of the first jurisdictions to introduce private sector privacy legislation in 2004. Pursuant to the Act, it must be reviewed by a special committee of the Legislature on a regular basis. As such, PIPA has been reviewed and amended in 2005 and 2009. It was amended again in December 2014 as a result of the Supreme Court of Canada's decision in *Alberta (Information and Privacy Commissioner of Alberta) v. United Food and Commercial Workers, Local 401*[1], which will be discussed below. The current review is therefore an opportunity to make further improvements to the law, but also to address some of those previous amendments in a more fulsome manner.

Alberta's PIPA has been declared substantially similar to that of several other provinces and works in conjunction with the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA"). With the exception of the disappointing response by the former government to the Supreme Court's findings in *Alberta v. UFCW*, Alberta has been a leader in the protection of personal information.

We have confined our comments in this submission to those relating most closely to the protection of workers and unions and their rights as the area in which we have the greatest level of expertise and experience. However, we thank the Committee for the comprehensive and expansive discussion guide and we note the importance of a well-integrated and designed statutory scheme that balances relevant rights and protects privacy rights.

Alberta v. UFCW Decision and Bill 3 Amendments (Questions 1 and 2)

On November 15, 2013, the Supreme Court of Canada ("SCC") struck down the entire Act and suspended the declaration of invalidity for a 12 month period to allow the legislature to respond. Having delayed and neglected this deadline, the former PC government brought in a hasty amendment bill, Bill 3, the *Personal Information Protection Amendment Act, 2014*, in November 2014. The bill's amendments were narrowly constructed, fell far short of addressing the SCC's concerns and arguably leave PIPA unconstitutionally broad to this day.

[1] *2013 SCC 62 (Alberta v. UFCW).*

The case arose from a UFCW picket line in conjunction with a legal strike at the Palace Casino at West Edmonton Mall. After posting a warning notice, union organizers recorded photo and video images of customers and workers crossing the picket line and used some of them in website and other campaign materials over the course of the strike. Some of the recorded individuals launched complaints with the Information and Privacy Commissioner who found that, though the union's activities were expressive in purpose, the union was in breach of PIPA prohibitions on the collection, use and disclosure of personal information as then drafted. As she did not have jurisdiction to consider the constitutional question that arose around this prohibition and the Charter right to freedom of expression, an order was made against the union.

At the Court of Queen's Bench, Court of Appeal and SCC, the courts had little trouble finding that, notwithstanding the valid and important right to privacy, PIPA was overly broad and restrictive with regard to freedom of expression. As the SCC explains, while recognizing the quasi-constitutional status of privacy legislation and its important role in democratic societies, "… the *Act* does not include any mechanisms by which a union's constitutional freedom of expression may be balanced with the interests protected by the legislation."[2] When a union's expressive rights are curtailed, other fundamental constitutional rights are also impinged upon, including rights to collective bargaining and freedom of association.

The SCC again reinforced that pickets and other union activities are expressive in nature and serve fundamental purposes in a democratic society as well as in the context of labour relations. The SCC confirmed that, within our labour relations regime, the ability of unions to use, collect and disclose information relating to safety in the workplace, to exert economic pressure on the employer by dissuading the public and to discuss labour conditions are all at the core of protected expressive activity. The Court particularly highlighted the importance that such expressive activity has in enhancing "broader societal interests" beyond labour disputes themselves. Furthermore, as with much of our labour relations regime, protecting freedom of expression assists in redressing the power imbalance between employer and employee.

In response, the former PC government introduced narrow amendments that allow the collection, use and disclosure of personal information by a trade union only in the context of a legal strike in which that particular union is involved and only if that collection, use or disclosure is reasonably necessary in relation to "a matter of significant public interest or importance relating to a labour relations dispute".

These Bill 3 amendments did little address the underlying problem of overly broad restrictions that fail to balance the other constitutionally-protected rights of unions, like freedom of association and freedom of association, not to mention those of other associations and organizations serving important advocacy roles in society.

Unions often support each other in the course of pickets and strikes, as do a range of other organizations including the Alberta Federation of Labour. As amended by Bill 3, PIPA still restricts the freedom of expression of these other associations to participate in picketing in support of legal strikes. Furthermore, not all pickets occur in the context of legal strikes. Though we hope that Alberta's unconstitutional prohibition on the right to strike will soon be remedied for public sector workers who cannot legally strike, unions and other advocacy groups frequently engage in informational events, demonstrations and pickets that also serve the expressive purposes of educating and communicating with the public as described by the SCC as constitutionally protected. By grounding the exemption to the prohibition on collection, use and disclosure of personal information in the narrow context of a legal strike, the Bill 3 amendments

[2] *Alberta v. UFCW para 25.*

overly restrict the rights of Albertans to engage in expressive activity and communications in a range of legitimate public actions.

PIPA as currently drafted and as amended by Bill 3 perpetuates the imbalance of power between employers and employees. Employers have a statutory exemption to requirement of obtaining consent for the collection, use and disclosure of their employee's information, which was argued as necessary to ease the administration and operation of employers' workplaces and human resources. However, organizations representing workers, and the workers themselves, have no countervailing ability to collect, use or disclose information relating to their workplaces. This imbalance further impedes the ability of workers and unions to engage in expressive activity with a goal to improving workplace conditions, public safety, or advancing other legitimate labour relations purposes.

Not only do the Bill 3 amendments fail to rectify PIPA's unconstitutional overbreadth, they also introduce new conflicts and problems into the privacy regime and its interaction with the labour relations regime. The AFL is alarmed and concerned that, by virtue of drafting the standard for the trade union exemption to "a matter of significant public interest", Bill 3 essentially delegated the power to make determinations on matters of labour relations to the Information and Privacy Commissioner. It is now within that office's powers to adjudicate when a labour dispute and the actions of the union meet the standard of PIPA compliance.

The Alberta Labour Relations Board (ALRB) is responsible for the application and interpretation of Alberta's labour laws, but these amendments mean that the Information and Privacy Commissioner will become involved in determining labour relations matters, regarding the collection and disclosure of personal information during a labour dispute.

Labour relations, like privacy and information law, is a complex and highly technical field where decision makers require extensive expertise and many years' of direct experience to be able to make well-founded judgments. It is just as inappropriate to allow a labour board member to adjudicate on a privacy matter as it is for a privacy expert to adjudicate on a labour relations matter and this basic principle is reflected in myriad arbitration and court decisions. We recommend that this section be amended to restore to each body the adjudicative and decision-making powers appropriate to their own expertise.

It is also worth noting that PIPA is considerably more restrictive than PIPEDA in this respect as PIPEDA applies only to personal information collected, used or disclosed for a commercial purpose. In other words, the ability of unions or other public interest groups to communicate with the public, advocate for social justice issues or bring awareness to problems of health, safety or working conditions is overly restricted by PIPA in its current form.

The AFL therefore recommends re-visiting the overly narrow amendments made in December 2014 and replacing them with language that upholds the spirit of the SCC decision in *Alberta v. UFCW* and the rights of all Albertans to communicate about important social and political issues in meaningful but respectful ways. In order to create true balance between rights to freedom of expression and rights to privacy, PIPA's exceptions to consent requirements for collection, use and disclosure of information in the context of communication about important societal matters must be expanded to allow other parties besides a specific trade union engaged in a dispute to advocate and communicate with the public, broaden the context beyond the narrow limit of a legal strike, and restore adjudicative powers to their appropriate bodies.

Employee Information (Questions 13 and 14)

With regard to PIPA's current provisions relating to personal information in the employment context, we note with approval that the current definition of "employee" for the purposes of the Act is sufficiently broad to cover a range of employment relationships, including contract, apprenticeship and volunteer work as well as more traditional employer-employee relationships. Given the changing nature of workplaces, safeguarding, and potentially enhancing as necessary, this expansive definition is important.

We also note and emphasize the importance of current provisions allowing workers to access their own personal employee information and correct it as necessary. Because one's employment-related information is vital to current and future career prospects, financial security and mental wellbeing, it is important that employees retain these rights to ensure some control over this information.

However, the AFL is concerned with the breadth of section 21(2), which allows a former or current employer to disclosure personal employee information to another potential or current employer (in other words, provide a reference check without the employee's consent). While recognizing that employers have an important interest in conducting reference checks and gathering enough information to ascertain if a prospective employee is suitable for their workplace, the current provision is not sufficiently circumscribed provision to protect potentially sensitive or unnecessary information about a candidate.

Because section 21(2) relies on the same definition of "personal employee information" as the rest of the statute, an employer could disclose any information collected for the purposes of "establishing, managing, or terminating the employment or volunteer-work relationship." Allowing employers to disclose all information related to "managing" the employment relationship leaves workers, particularly those in already precarious employment, vulnerable to management or co-worker mistreatment.

Furthermore, we note that other Canadian jurisdictions with substantially similar legislation to Alberta's (notably British Columbia and Quebec) do not create a specific exemption to the prohibition on non-consensual disclosure for the purpose of reference checks. As such, the AFL recommends eliminating, or at least narrowing, the exception to consent requirements for employment reference checks.

Information Destruction (Question 15)

During British Columbia's 2008 legislative review of their substantially similar personal information statute, the National Association for Information Destruction (Canada) ("NAID") recommended that a definition of information destruction be included in order to clarify and strengthen existing destruction requirements.[3] A similar requirement was made during the federal review of PIPEDA in 2007.[4]

Like BC, Alberta's legislation already requires that personal information only be retained for as long as it is reasonably required and thereafter be destroyed or anonymized. However, neither province currently defines acceptable procedures for the destruction or anonymization of personal information. By leaving standards for appropriate destruction up to the interpretation of each organization, the Act raises the risk that information might be disposed of improperly, the retention and destruction might be applied inconsistently and that privacy breaches might occur at this stage of process, rendering all the other excellent provisions of the Act ineffective.

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[3] https://www.oipc.bc.ca/special-reports/1276

[4] http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2891060&File=66

NAID has suggested that "destruction" should be defined as "the physical obliteration of records in order to render them useless or ineffective and to ensure reconstruction of the information (or parts thereof) is not practical." The BC Office of the Privacy Commissioner found this language too narrow to allow for technological advancements that might alter how documents and information are presented. However, a broad definition that clarifies that records must be destroyed to the extent that they are useless or ineffective and incapable of reconstruction would strengthen this protection in the legislation while remaining sufficiently flexible to apply to a range of records, documents and destruction methods. In fact, changing data distribution and storage technology actually reinforces the need for better standards and guidance to protect against inadvertent violation of these destruction provisions or information breaches.

In order to strengthen protections on the personal information of employees retained by former employers, the AFL recommends adopting a flexible definition of destruction or anonymization of personal information to guide the legislative interpretation of those requirements. Alternatively, the Act should require that organizations develop information destruction policies that follow best practices and are reviewable by the Information and Privacy Commissioner.

Offences (Question 19)

Statutory Remedies

In a 2013 legislative review of PIPEDA, the federal Privacy Commissioner recommended instituting statutory penalty provisions for the contravention of some or all of the provisions of the statute.[5] Such a recommendation has not been implemented in any jurisdiction in Canada to date, but Alberta could again be a leader in the protection of personal information and privacy in the private sector by amending PIPA to include basic fines.

As described by the Privacy Commissioner:

> Pursuant to this model, damages would be awarded for contraventions of certain PIPEDA provisions, without the requirement for a claimant to prove an actual loss stemming from the contravention. A range of damage awards could be prescribed, setting out minimum and maximum amounts for contraventions of specific provisions. Within that range, courts may assess damages based on a number of explicit factors to be taken into consideration.

While the Act currently allows for the Commissioner to refer contraventions to the Crown for prosecution, not all breaches of the Act are sufficiently serious to merit criminal charges or may not meet other legal requirements for criminal prosecution. Currently, only a provincial court judge can issue a penalty or levy after a successful conviction.

It is in these very cases, where encouraging compliance and discouraging intentional or unintentional breaches is important for the overall functioning of the statutory regime but the legal requirements to mount full civil or criminal proceedings can rarely be met, that legislated penalties and fines are appropriate. The AFL recommends providing guidelines to fines by creating a schedule to the Act and providing the Commissioner with the powers to levy administrative penalties in cases of breaches that will not be referred to the Crown for prosecution.

[5] https://www.priv.gc.ca/parl/2013/pipeda_r_201305_e.asp

Conclusion

Alberta has strong personal information and privacy legislation, but the current legislative review presents an opportunity to further improve the law and to achieve a better balance between important rights to privacy and rights protected under the *Canadian Charter of Rights and Freedoms*. PIPA must be amended to reflect the findings of the Supreme Court of Canada in *Alberta v. UFCW* in order to give full effect to the rights of Albertans to engage in expressive activity and to do so within organizations and collective associations. Worker's rights to privacy and control of their own information could be improved by limiting PIPA's provisions on disclosure of information in line with provisions in other jurisdictions. And the safety of an employee's information could be better safeguarded by introducing required standards for information destruction. Finally, Alberta could be a leader in Canada by creating a statutory penalty regime to assist workers and individuals whose privacy rights have been breached in obtaining simpler remedies and to discourage the intentional or unintentional contravention of the Act. We thank the Committee for their time and their work on reviewing PIPA and we look forward to working together to enhance and protect the rights of all Albertans.