ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2008-008

March 30, 2009

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 401

Case File Number P0564

Office URL: www.oipc.ab.ca

Summary: A number of persons complained that their personal information had been collected, used and/or disclosed, contrary to the *Personal Information Protection Act,* by members of a Union who were engaged in picketing the premises of the employer (Palace Casino or "the Casino") pursuant to a strike. The Union members had video recorded and taken still photos of the complainants and others in the area of a picketing site, in some cases when they were crossing the picket line to enter or exit the employer's premises. Signs placed by the Union in the area of the picketing suggested that the images of persons crossing the picket line would be placed on the www.CasinoScabs.ca website. The Union had also used and disclosed some of the personal information by placing it in posters and newsletters visible or available to other Union members and to the public.

The Adjudicator found that the Union's collection, use and disclosure for the purposes of a possible investigation or legal proceeding was authorized by section 14(d), 17(d) and 20 (f) and (m) of the Act, that this was a reasonable purpose, and that collection restricted to this purpose was reasonable for the purpose. However, the Union had contravened the Act by failing to provide notice of its authorized purpose in accordance with section 13.

However, the Union had many other purposes for its collection, use and disclosure of the personal information of the Complainant and others. The Adjudicator found that the Act did not authorize the collection, use and disclosure for any of these other purposes. She also found that the Complainants had not consented to the Union's collection use or disclosure, either expressly or in accordance with the provision in the Act under which consent could be deemed or implied, and that she could not find that any other persons whose information had been collected had so consented. She ordered the Union to cease collecting, using and disclosing such personal information for any purpose other than that

for which the Act provided authorization, and to destroy any information still in its possession that it had collected in contravention of the Act.

Statutes Cited: AB: *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3; *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 1(f), 1(g), 1(k), 1(i)(iii), 4(3)(c), 7, 7(1), 7(1)(d), 8, 8(2), 8(2)(a), 8(2)(b), 8(3), 8(3)(a)(i), 8(3)(a)(ii), 8(3)(b), 8(3)(c), 11(1), 11(2), 13, 13(1), 13(1)(b), 13(4), 14, 14(b), 14(d), 16(1), 16(2), 17, 17(b), 17(d), 19(1), 19(2), 20, 20(b), 20(f), 20(m), 34, 36(2), 49(2), 50(4), 52, 52(4), 59, 60; **CANADA:** *Canadian Charter of Rights and Freedoms*, ss. 1, 2(b), 2(d).

Orders Cited: P2005-004, P2005-006; P2006-005, P2006-008, P2007-010, P2007-014, P2008-002.

Court Cases Cited: *R.v. Zundel*, [1992] 2 S.C.R. 731; *Canada Safeway Ltd. v. Shineton*, [2007] A.J. No. 1477; *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown and Root (Canada) Company*, 2007 ABCA 426; *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)*, 2008 ABCA 384.

I. BACKGROUND

[para 1] On various dates during mid-to-late October, and November, 2006, this Office received complaints from a number of persons that their personal information had been collected, used and/or disclosed by the respondent Union (or "the Organization") contrary to the *Personal Information Protection Act* ("PIPA" or "the Act"). At the time these incidents were said to have taken place, the Union was engaged in a lawful strike action against the Palace Casino at West Edmonton Mall, and was picketing the entrance to the Casino.

[para 2] The complainants stated in these complaints that the Union was taking photographs and video recordings of persons walking into the Casino and in the adjacent area, including photos or recordings of them. Some of them said they were informed by the picketers that these images would be posted on the Union's website. One of the complainants also complained about a still photo that a Union member had taken of her. As well, one of the complainants, the then-Vice President of the Casino (Complainant C), said that his photo image was placed on a poster (which he described as "defamatory") which was displayed at the picketing site. In testimony given at the inquiry, this complainant also stated that his photo with accompanying images and text was placed in the Union's newsletter and in pamphlets about the strike that were distributed at the site.

[para 3] In view of the currency of the situation at the time the complaints were made, the Commissioner decided not to appoint a mediator, and the matter proceeded directly to inquiry. This Office issued Notices of Inquiry on December 1, 2006.

[para 4] Some of the complainants were willing to participate and to be named in the Notice of Inquiry. Others chose not to participate, or could not be located for the purpose

of providing materials about the Inquiry to them. Palace Casino was named as an Intervenor, and participated in the early stages of the inquiry, but withdrew from participation after the labour dispute was resolved.

[para 5] On January 9, 2007, the Union asked me to defer the matter to the Alberta Labour Relations Board (LRB), primarily on the basis that it was essentially a labour dispute and also that it involved constitutional questions which, unlike the LRB, I am not empowered to decide. I received submissions from the parties on this question, and decided that I would proceed to hear the complaints. The decision letter on this question, dated April 25, 2007, is attached as Appendix A to this Order. An oral hearing was accordingly scheduled, which proceeded on May 30, 2007.

[para 6] The hearing did not conclude, and recommenced on November 30, 2007. On that date, the Union raised an objection to my jurisdiction in this matter on the basis that I had failed to meet the timelines set out in section 50(5) of the Act. This provision states that an inquiry must be completed within 90 days from receipt by the Commissioner of the request for review, unless the Commissioner provides a notification to the parties that he is extending that period and provides an anticipated date for completion of the review.

[para 7] I reserved my decision on the jurisdictional question, and proceeded to hear the conclusion of the oral part of the hearing. After receiving further written submissions from the parties on the jurisdictional question, I decided that I had not lost jurisdiction. This decision was issued as Order P2007-010, dated March 31, 2008.

[para 8] I requested the parties to provide concluding written submissions. Final rebuttal submissions from the parties were received by June 12, 2008.

II. ISSUES

[para 9] The issues as stated in the Notice of Inquiry were:

Issue A: Is the Organization collecting, using or disclosing "personal information" as that term is defined in PIPA?

Issue B: If the Organization is collecting, using or disclosing "personal information" as defined in PIPA, is it doing so in contravention of, or in compliance with, section 7(1) of PIPA? In particular,

i. If the Organization is collecting, using or disclosing "personal information" as defined in PIPA, does it have authority to do so without consent, as permitted by sections 14, 17 and 20 of PIPA?

ii. If the Organization does not have the authority to collect, use or disclose "personal information" without consent, is the organization obtaining consent in accordance with section 8 of the

Act before collecting, using or disclosing the personal information?

Issue C: If the Organization is collecting "personal information" as defined in PIPA, is it doing so in contravention of, or in compliance with, section 13 of PIPA? In particular, is it

i. required to provide, and
ii providing,

notification, before or at the time of collecting personal information, in accordance with section 13 of PIPA?

Issue D: If the Organization is collecting, using or disclosing "personal information" as defined in PIPA, is the collection, use or disclosure contrary to, or in compliance with, sections 11(1), 16(1) and 19(1) of PIPA (collection, use and disclosure for purposes that are reasonable)?

Issue E: If the Organization is collecting, using or disclosing "personal information" as defined in PIPA, is the collection, use or disclosure contrary to, or in compliance with, sections 11(2), 16(2) and 19(2) of PIPA (collection, use and disclosure to the extent reasonable for meeting the purposes)?

[para 10] As at the time the Notice of Inquiry was prepared, the activities giving rise to this inquiry were still in progress, the issues were stated in the present tense. As the activities have now ceased, the issues will be considered as worded in the past tense.

[para 11] As the respondent Organization has raised an additional issue, of a preliminary nature, I will also address it. This issue is:

Preliminary Issue: Is the collection use and disclosure of the personal information at issue in this inquiry excluded from the operation of the Act by section 4(3)(c), which provides that the Act does not apply to the collection, use and disclosure of personal information "for journalistic purposes and for no other purpose"?

[para 12] In the context of this question, both the Organization and one of the Complainants has raised the question of the application to the matters before me of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). I will also consider whether and to what extent I may apply the *Charter*, and to the extent that I may do so, how it applies in this case.

[para 13] Finally, the Organization asked that I reconsider my decision to defer this matter to the Labour Relations Board. I will also address this request.

III. DISCUSSION OF THE ISSUES

[para 14] I will begin with the preliminary issue of whether section 4(3)(c) applies to the present circumstances, because if I decide it applies, I cannot proceed to decide the remaining issues.

Preliminary Issue: Is the collection use and disclosure of the personal information at issue in this inquiry excluded from the operation of the Act by section 4(3)(c), which provides that the Act does not apply to the collection, use and disclosure of personal information "for journalistic purposes and for no other purpose"?

[para 15] The Union's argument on this question is that its dealings with the personal information in this case were for "journalistic purposes", hence, by the operation of section 4(3)(c), the Act does not apply to its collection, use and disclosure of personal information in this case. It adds that "journalistic purposes" as set out in section 4(3)(c) of PIPA must be read in a manner consistent with the *Canadian Charter of Rights and Freedoms,* s. 2(b) – freedom of thought, belief, opinion and expression – because if the Act is not read in this manner, it is overly-broad and unconstitutional.

[para 16] The Union' position involves the contention that PIPA is constitutionally overbroad and violates section 2(b) of the *Charter.* It recognizes that by virtue of the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3, I am not empowered to make a decision about the constitutional validity of the Act, and it states that by participating in this inquiry it is not waiving its right to bring this constitutional challenge before a forum that can decide it. However, it argues that I may and ought to interpret PIPA, and section 4(3)(c) in particular, in accordance with the presumption of compliance with constitutional norms.

[para 17] I accept the Union's argument that I am to interpret the provisions of PIPA in accordance with constitutional norms, and that, in the words of McLachlin, J. in *R.v. Zundel*, [1992] 2 S.C.R. 731, at 771:

> … where a legislative provision, on a reasonable interpretation of its history and on the plain reading of its text, is subject to two equally persuasive interpretations, the Court [and in this case this tribunal] should adopt that interpretation which accords with the *Charter* and the values to which it gives expression.

This conclusion is in accordance with comments made by the Commissioner in Order P2005-004 at paras 11 to 14, where he concluded that any interpretation of the Act must follow *Charter* principles.

[para 18] I also note the Union's position that one of the purposes for which it collected, used and/or disclosed personal information was for a "journalistic purpose". The Union made lengthy submissions in this regard, and also as to the scope of the phrase "journalistic purpose". I am prepared to accept for the purpose of the present discussion

that the dissemination to the public of information about the strike (which might include some personal information of individuals), even though it was done by a union rather than by the media, and whether or not it was not neutral in content or was intended to be persuasive, could conceivably be embraced by the term "journalistic purpose".

[para 19] However, the Union's argument seems to overlook an important aspect of section 4(3)(c). This provision reads as follows:

> *4(3) This Act does not apply to the following:*
>
> *(c) the collection, use or disclosure of personal information, ..., if the collection, use or disclosure, as the case may be, is for journalistic purposes* ***and for no other purpose****; ...* . [emphasis added]

[para 20] As will be seen below, the Union makes this argument despite having presented a host of reasons, beyond purely journalistic ones, for the way in which it was dealing with the personal information at issue in this case. It is acceptable for a party to make alternative legal arguments. However, I cannot make one factual finding for the purpose of one legal argument, and different ones for others. I conclude, on the basis of the Union's submissions and evidence, that it had a variety of purposes for collecting, using and/or disclosing the personal information at issue (which included both the video recording and taking of photographs, as well as placing the personal information of Complainant C in the Union's informational material, and disclosing some of it to police). In addition to its possible use of this information for informing the public, or, with reference to the aforementioned single Complainant, for informing the picketing Union members, the Union stated in its submissions, and through testimony of its witness (a full-time Union representative who was the only person who gave evidence on the Union's behalf), that its purposes included all of the following: dissuading people from crossing the picket line; 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 picket line with the use of humour; responding to similar activity on the part of the employer, and deterring theft of Union property. At a more basic level, many of these purposes also promoted the underlying purpose of the strike - that of achieving a resolution to the labour dispute favourable to the Union.

[para 21] Therefore I do not see how, if I am to read the provision consistently with *Charter* values, I can conclude that the provision applies to the facts in this case. The only way I could do so would be to read it as though the words "and for no other purpose" were not there. That is not a possible reading on the plain words of the text – rather, it would require a "reading down", which is a constitutional remedy that I have no power to grant. If the existence of the phrase "and for no other purpose" makes PIPA constitutionally overbroad, that is a matter to be decided and remedied by another forum, preferably, as I have said earlier (in Appendix A), by a court.

[para 22] Before leaving this discussion I wish to address a suggestion made in the submission of the Union under this heading, which relates to the decision of the Adjudicator in Order P2007-014. In that case, the Adjudicator was asked by the respondent organization (Alberta Teachers' Association) to interpret section 4(3)(c) as though the words "and for no other purpose" were restricted to a purpose such as "an intent to defraud or mislead, defame or commit criminal libel" in other words, to a purpose inconsistent with any journalistic purpose. The Adjudicator declined to adopt this restrictive interpretation, among other reasons, because that would be contrary to the plain ordinary meaning of the phrase. As well, she did not agree that the interpretation proposed by the organization was necessary to achieve consistency between PIPA and the freedom of expression guaranteed by the *Charter*. On the basis of her conclusion that the phrase "and for no other purpose" could not be read in the narrow manner suggested by the organization in that case, the Adjudicator concluded that the Act applied when there was some other purpose for publishing information in addition to a purely journalistic one. Thus she went on to consider whether the disclosure of information at issue was for purely journalistic purposes or whether it was also for other purposes. She concluded that the latter was the case, partly on the basis that the organization could do only what it was empowered to do by the statute by which it was created, and that statute set out its powers and objectives in such a manner that purely journalistic purposes were not contemplated.

[para 23] The Union asks me to reject the reasoning in that case. This argument was based partly on the idea that the Adjudicator did not properly consider the constitutional implications of the issue, including the speech and associational protections that have been recognized in relation to normal union activities.

[para 24] In my view, the Adjudicator was right in her conclusion that the plain meaning of section 4(3)(c) did not permit her to read the provision in the narrow way suggested by the Union. This was so even if such a reading would be required to prevent the Act from offending the *Charter*. By virtue of the *Administrative Procedures and Jurisdiction Act*, the Commissioner or his delegate is able to take the *Charter* into account only to the extent that, in interpreting provisions that are on their face equally susceptible of different meanings, they are to choose the interpretation that best accords with constitutional norms. Because in her view the words "or any other purpose" were not capable of being read in the narrow way put forward by the organization, the Adjudicator would not have been empowered to adopt the ATA's suggested interpretation even had she thought this would be required to make the provision accord with the *Charter.* It was thus not strictly necessary for her to comment on whether a broader reading of the phrase, in accordance with which PIPA would apply to publication where it was for any purpose other than a purely journalistic one, would conflict with the freedom of expression.[1]

[1] I note that her comment that it would not do so finds support in Order P2005-006 and the review of that decision by the Alberta Court of Queen's Bench (*Canada Safeway Ltd. v. Shineton*, [2007] A.J. No. 1477). The Court upheld the Commissioner's conclusion that the freedom of expression of the organization in that case under s. 2(b) of the *Charter* was not infringed by the provision in PIPA that requires consent to disclosure of personal information where disclosure is not otherwise authorized by the Act (section 7(1)(d)). The court found that the disclosure in the case was not the kind of expression that the Charter intended to protect. However, it went on to state the following: "In any event, even if I had found that

[para 25] I turn to the point made by the Union with respect to Order P2007-014 that relates to the Adjudicator's finding that its publication of the personal information at issue in that case was not for purely journalistic purposes but was at the same time for the purpose of meeting its statutory objectives. The Union argues that the finding that the ATA lacks the legal capacity to publish articles for solely journalistic purposes "suggests that Government can restrict the speech rights of statutorily incorporated employee associations, a proposition that is certainly shocking in a democracy, and one that would, most likely, not withstand constitutional challenge under s. 2(b) or (d) of the *Charter*". [2]

[para 26] I agree that a conclusion that an organization is subject to PIPA means that its disclosure of information must not conflict with the restrictions in the Act, and thus might restrict the organization's speech rights insofar as exercise of these rights involves use or disclosure of personal information of third parties. If the Union is arguing that the *Charter* requires the 'reading in' of a clause in the ATA's constituting statute allowing the Association to publish information for purely journalistic purposes unconnected with the stated purposes of the Association (which would have the effect of removing such activity by the ATA from the scope of PIPA), that is something the Adjudicator had no power to do by reference to the *Administrative Procedures and Jurisdiction Act*. If the point was, rather, that the ATA's constituting legislation should be *interpreted* as permitting the ATA to engage in expression for purely journalistic purposes unconnected with the stated purposes of the Association, the Union did not tell me, and I cannot see, which of the provisions of the ATA's constituting statute are capable of being interpreted this way. (Further, even if either of these things were possible, that would not decide the question of what purpose the ATA's publication of the personal information in its newsletter had as a matter of fact.)

[para 27] In any event, I do not see how this aspect of the decision relates to any of the issues in the present case. In this case, there is no question as to whether the Organization was acting for purposes other than purely journalistic ones in its dealings with the personal information at issue – its own evidence establishes that it was. For example, its witness clearly stated that the information it recorded was for the purpose of dissuading people from entering the Casino. Arguably even pure journalism can have persuasion as well as information-provision as a goal, but in this case a positive resolution to the labour dispute was an underlying purpose for all of the Union's activities. With respect to the collection, use and disclosure of the photos of one of the Complainants (the employer Vice-President) that was contained in a poster and included in other informational material, that purpose was also not purely journalistic, but was also intended, according to the Union's testimony, to support morale on the picket line by "bringing some levity".

Safeway's disclosure constituted protected expression, I conclude that the restriction in s. 7(1)(d) of P.I.P.A. is a reasonable and justified limit as contemplated by s. 1 of the *Charter*. In my view, there can be no question that the protection of personal information is an important legislative objective. I am satisfied that, to use Wilson J.'s words from *Lavigne*, that objective is "logically furthered" by PIPA's restriction. I am also satisfied that P.I.P.A. represents a reasonable balancing of competing rights and interests and that, while it does impose some limits on expression, those limits are not so severe as to require me to second-guess the balancing the Legislature has chosen to adopt.".

[2] Section 2(d) of the C*harter* provides for the freedom of association.

This was to promote the conduct, and hence also the purposes, of the strike. While to the extent this activity may have constituted something akin to political satire such as is commonly found in journalistic publications, its purpose may have had a journalistic aspect. However, as the Union had a stake in the outcome of the strike activity it was thereby promoting, its purpose in disseminating the information cannot be said to have been *purely* journalistic.

[para 28] As well, as described above at para 20, the Union also specified many other purposes for its dealings with all of the information at issue in this case. Thus I cannot accept its argument that section 4(3)(c) applies so as to exclude the operation of the Act relative to any of the personal information it collected, used or disclosed in this case. I will accordingly proceed to decide Issues A to E.

Issue A: Is the Organization collecting, using or disclosing "personal information" as that term is defined in PIPA?

[para 29] The Union, which is an "organization" under section 1(i)(iii) of the Act, acknowledged through its own witness that it video-taped the picket line activities as well as took still photographs, and indicated that it kept the video tapes "for a period of time" (such as would allow it to provide documentary evidence, in the event this was called for, for the purpose of a legal proceeding).

[para 30] The Union also concedes in its submissions that video and photographic images of individuals constitute "personal information" within the terms of section 1(k) of the Act in that they constitute information about an identifiable individual. This conclusion has been reached by earlier decisions of this Office, for example, Order P2006-008.

[para 31] As well, the individual Complainants who participated in this case provided evidence that video tapes or photographs of them were taken by the Union's cameras.

[para 32] Complainant A, a member of the public, testified that he crossed the picket line on more than one occasion to enter the Casino, and that the Union camera was trained on the entrance (within 10 or 12 feet) so as to record the image of everyone who entered the premises (and thus crossed the line). In response to a question as to whether he knew if his own image was recorded he stated that the red light on the camera was on. (I have no way of knowing if that meant the camera was recording, but I accept that he believed this to be the case.) He also stated that there was a poster in the area indicating that these pictures would appear on the Union's website www.CasinoScabs.ca. This Complainant did not give evidence that he actually saw a recording of himself entering the Casino. He did say that he checked to see if his image had been posted on the Union's website, and found that it had not been. The Union's evidence indicated that the camera at the entrance to the Casino was continuously recording. There was no suggestion made by the Union that this Complainant's image was not actually recorded, and I find on a

balance of probabilities that it was. Thus I find that the Union collected this Complainant's personal information by way of video recording.

[para 33] Complainant B, an employee of the Casino who was acting in a supervisory capacity at the relevant time, testified that a particular Union representative took a still photograph of her despite her objection, when she was standing at a small concession outlet next door to the Casino. She said the photo was taken from 30 feet away. When asked whether she knew if the photo was of her, she replied that the camera was "aimed right at" her and that "he didn't deny it". This Complainant also said that she was often recorded by the stationary video camera because she had taken it upon herself to greet customers at the door. I find on the basis of this evidence, together with the Union's own evidence about where it was video recording, that the Union collected the personal information of this Complainant by way of video recording as well as a still photograph.

[para 34] The last Complainant who participated in the Inquiry (Complainant C) was the Vice-President of the Casino. His evidence in terms of what information had been collected, used and disclosed about him was that two images, of his face and profile, taken from still photos or video (that had been taken without his consent) had been placed on a poster with the caption "This is [the Complainant's] Police Mugshot", and that this poster had been placed for a period of about two hours at the front door entrance to the Casino. In a later written submission he said that the poster was later put up again with modifications. The Union's witness confirmed the source of the information was as described by the Complainant. As well, exhibits were entered showing that images of this Complainant's face were included (which he stated was without his consent) in issues of the Union's newsletter or strike leaflets, in one case superimposed over the head of a person driving a miniature train, associated with text which began "There goes [the Complainant] with his train full of scabs", and in another case, superimposed onto a turkey. In a third image, in which Complainant C is seen leaning over a railing gazing down at the floor below, the associated text begins: "What is [the Complainant] thinking? Is it jumping? …" and continues with other comments related to the strike and the Complainant's possible thoughts. In addition to pictures, the newsletters/leaflets also contain some other information commenting on the Complainant. The Complainant was not sure to whom the newsletters were distributed (whether only to picketers or also to the public), but said they were distributed around the front and back entrances to the Casino, that they were found in garbage cans or on the floor when the picketers left. He also said that he knew that the public had seen them because some members of the public had "identified" some of the newsletters to Casino staff members.

[para 35] I note as well that in providing its own evidence and in making its arguments, the Union indicated that it had recorded such information of Complainants A, B and C, as well as of other persons who entered or exited the Casino, and also that it had placed still images of Complainant C on a poster and in the newsletters, as described in the preceding paragraph. The Union's witness confirmed that the newsletters were distributed to picketers. As well, the Union indicated that it provided some of the information it had recorded about Complainant C to the police.

[para 36] The evidence with respect to the suggestion that images of persons crossing the picket line would be posted on the Union's website was that this happened only in relation to a single individual who, according to the Union, had provided his consent, and who did not file a complaint in this case. It did not happen with the photos of any of the Complainants or of anyone else.

[para 37] On the basis of the foregoing evidence I find that the Union collected the personal information of Complainants A and B by video recording their images, of Complainant B by taking her photograph, and of Complainant C either by taking his photograph or by video recording or both. I also conclude that the Union used and disclosed the personal information of Complainant C when it placed an image of him (either from a photograph or a still from a video recording) on a poster visible to the picketers and to the public, and when it included images of him and text commenting about him in the newsletters that were distributed to Union members and which were seen by members of the public. As well, it used and disclosed personal information of Complainant C by providing a tape of an incident involving him to police.

[para 38] I also find that the Union collected the personal information of other unknown people who entered or exited the picketing area, by way of video recording.

[para 39] I have no evidence of any use or disclosure of the personal information of Complainants A and B.

[para 40] The Union has argued in its submission that I should not consider the complaints in this case of complainants who did not participate by attending at the inquiry and giving evidence.

[para 41] To decide whether the Union was collecting personal information of the Complainants in this case, I have decided not to consider the written complaints of the remaining complainants, as they do not add any substantive information such as could help me reach conclusions about the facts.

[para 42] However, I note that I am not limited under the Act to making decisions relative only to such complainants as participate throughout the course of an inquiry. I have made this point in a recent Order, P2008-002 (in the Appendix attached to that Order). Neither does the Act limit me to considering collection, use and disclosure only of a Complainant's own information if the complaint was or was also made about an organization's general practice, as long as the respondent has adequate notice of the nature of the complaint. In *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)*, 2008 ABCA 384, the Alberta Court of Appeal quoted its own earlier decision in a case arising in the human rights context, *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown and Root (Canada) Company*, 2007 ABCA 426, to make the point that if a complaint before the Commissioner is to be about a practice, the respondent must be given notice of the fact that that is the nature of the complaint. The quoted passage is as follows:

> In advance of any hearing, the party complained against must know who it has to defend its actions against. Thus, if a complaint is meant to represent a broad class of individuals, that must be made reasonably clear in the complaint. In this case, KBR could only reasonably conclude that it was defending its actions as they related to Chiasson and not to drug-dependent persons generally. Had it been otherwise, KBR would have structured its defences accordingly.

In the present case, some of the complaints, including that of one of the participating Complainants, were about the Casino's general practice, and the wording of the issues in the Notice of Inquiry is sufficiently broad to capture a complaint about the general practice.

[para 43] I also reject the Union's contention that because a decision of the Commissioner can, by reference to section 60 of the Act, "result in both penal and civil penalties", the Union has a right to hear the evidence of , and cross-examine, any complainant. First, the Commissioner cannot make decisions that have the effect described – it is the court and not the Commissioner that adjudicates on any actions contemplated by section 60, which in any event relates only to civil actions (though the cause of action may be based on a finding, again by a court, that an offence has been committed). Second, section 50(4) of the Act provides that the Commissioner may decide whether a person is entitled to be present during or to have access to or comment on representations made to the Commissioner by another person. While in some cases fairness may dictate that parties be given the opportunity to hear and cross-examine on the evidence, that is a judgment the Commissioner is to make on a case-by-case basis – parties have no automatic entitlement.

[para 44] However, in this case, a consideration of the Union's information practices as presented by the participating Complainants and the Union itself will suffice to address all of the issues in the inquiry and permit me to make a decision that gives the parties the direction they require about how personal information in this context should be treated. I will not address the matter of posting the photo on the internet of a single individual, as the Union has stated that that individual consented to this posting, and there is no evidence to the contrary.

Issue B: If the Organization is collecting, using or disclosing "personal information" as defined in PIPA, is it doing so in contravention of, or in compliance with, section 7(1) of PIPA? In particular,

i. If the Organization is collecting, using or disclosing "personal information" as defined in PIPA, does it have authority to do so without consent, as permitted by sections 14, 17 and 20 of PIPA?

iii. If the Organization does not have the authority to collect, use or disclose "personal information" without consent, is the organization obtaining consent in accordance with section 8 of

the Act before collecting, using or disclosing the personal information?

[para 45] The relevant parts of section 7 of the Act provide:

> *7(1) Except where this Act provides otherwise, an organization shall not, with respect to personal information about an individual,*
>
> > *(a) collect that information unless the individual consents to the collection of that information,…*
> >
> > *(c) use that information unless the individual consents to the use of that information, or*
> >
> > *(d) disclose that information unless the individual consents to the disclosure of that information.*

[para 46] I will deal with the question of consent below. I will begin by asking whether any part of the Act provides authority for the collection, use or disclosure of the information at issue in the absence of consent.

[para 47] A primary argument of the Union is that it had authority under the Act to collect, use and disclose the personal information because it was reasonable for the purpose of an investigation or legal proceeding, as is authorized under sections 14(d), 17(d), and 20(f) and (m) of the Act. These provisions are as follow:

> *14 An organization may collect personal information about an individual without the consent of that individual but only if one or more of the following are applicable:*
>
> > *(d) the collection of the information is reasonable for the purposes of an investigation or a legal proceeding;*
>
> *17 An organization may use personal information about an individual without the consent of the individual but only if one or more of the following are applicable:*
>
> > *(d) the use of the information is reasonable for the purposes of an investigation or a legal proceeding;*
>
> *20 An organization may disclose personal information about an individual without the consent of the individual but only if one or more of the following are applicable:*
>
> > *(f) the disclosure of information is to a public body or a law enforcement agency in Canada to assist in an investigation*
> >
> > > *(i) undertaken with a view to a law enforcement proceeding, or*

(ii) from which a law enforcement proceeding is likely to result;

(m) the disclosure of the information is reasonable for the purposes of an investigation or a legal proceeding;

[para 48] The Union states in its submission that it is a long-standing practice of unions engaged in picketing, as well as of employers, to take video recordings of areas in which picketing is taking place in order to create evidence should a picketing incident arise that becomes the subject of legal proceedings.

[para 49] This assertion is supported by the existence of many reported labour law cases that note the existence of video recordings of picket lines and use such information as evidence. I note as well the evidence of Complainants B and C as well as of the Union that video taping of the picket line was also done by a security company on behalf of the Casino. Complainant C confirmed that such recording of the picket line was done by a security company on the Casino's behalf. He said this was required, in addition to the surveillance that was regularly done by cameras for security purposes in and around the Casino, because better audio was required in case evidence was needed for the Alberta Labour Relations Board should there be "picket line misconduct". This latter evidence supports the Union's contention that its own recording was done for a similar purpose.

[para 50] The justification for the information collection under consideration here – which I will call the "evidence-gathering" purpose - was not widely communicated at the time. As noted above, the only purpose of which most of the people whose information was collected were made aware, as indicated by informational posters set up in the area of the picketing, was that recorded images of persons crossing the picket line to enter the Casino would be posted on the Union's "CasinoScabs.ca" website. As well, the Union's witness stated that one of the two main purposes "for the cameras" was to dissuade both employees and potential patrons from going into the Casino. In addition, a clip of a television newscast that was submitted in evidence indicates that the Union's business agent commented in the television interview that the recorded images would be used for this 'persuasion' purpose. There was no written notification of the "evidence-gathering purpose", and no indication in the testimony of the witnesses that the people being recorded were told about this purpose.

[para 51] It appears from the foregoing, and I conclude, that one of the primary purposes of the Union's information collection was to dissuade people from crossing the picket line. I make this finding regardless of whether the statement on the poster that the video recordings would be posted on the website was a true statement of the Union's intentions, or whether the poster was intended to make readers of the material believe this would be done whether or not there was actually an intention to do it.

[para 52] However, this does not preclude the existence of other purposes – including the one of recording for the purpose of documenting evidence in the event it should be called for in an investigation or legal proceeding. The Union's witness provided sworn testimony to the effect this was the other of the Union's two primary purposes in making

the recordings. As well, this witness stated that the Union provided some of the recorded evidence to the police, specifically, of an incident involving Complainant C. Complainant C acknowledged that this may have happened, and he also indicated that the Casino's recorded evidence of the incident had also been provided to the police.[3] (In this incident, the Complainant had removed a Union poster, and a charge of theft in relation to this incident had been laid but later withdrawn. The Union and Complainant B both provided evidence that the Union had called the police in relation to the incident involving Complainant C.)

[para 53] On the basis of the foregoing evidence, I accept that one of the Union's purposes for collecting information by way of video recordings was to gather evidence that could be produced, should the need for such evidence arise relative to an investigation such as a police investigation, or relative to a Labour Relations Board or court proceeding relating to conduct of the picketing or incidents on the picket line. I also accept that in order to achieve this purpose it may be necessary to run video cameras continuously during the course of picketing (rather than only when an incident arises) in order to capture events that arise suddenly, and possibly also to record the fact that there were long periods of peaceful picketing. As well, in some circumstances it may be appropriate for this purpose to also take still photos when an incident arises, if this is necessary to improve the level of detail of the evidence that is recorded.

[para 54] I turn to consider whether sections 14(d), 17(d), and 20(f) and (m) provide the Union with authority for its collection, use and disclosure of the personal information of the Complainants for the "evidence-gathering" purpose.

[para 55] I begin by asking whether the provision is to be read restrictively such that it is triggered only when an actual investigation is underway, or when steps have already been taken to initiate a legal proceeding, and the collection of information begins thereafter. Two broader interpretations are possible: one is that the provision may also apply where a particular investigation or legal proceeding relative to certain facts is contemplated or likely, but has not yet begun; the final and broadest interpretation is that the provision may apply where there is merely a possibility that there will be an investigation or legal proceeding, depending on whether or not facts that would give rise to either of these occur in future.

[para 56] I reject the first, restrictive, interpretation as too narrow. The provision uses the phrase "reasonable for the purposes". It seems reasonable that if an investigation or legal proceeding is reasonably expected because certain facts have happened or may have happened, evidence may be collected, used or disclosed for its purposes even though the investigation or legal proceeding has not technically begun.[4] Thus, in my view, as long as

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[3] As well, there is a suggestion in the evidence of Complainant C that some of the Casino's recording of the picketing was provided to the Labour Relations Board relative to an incident on the picket line, but it is unclear from this evidence what the nature of the information was.

[4] With regard to an as-yet-uninitiated investigation, I refer here to a contemplated investigation by, for example, a formally-appointed investigator or the police, so that the initial collection, use or disclosure by someone who is not formally an investigator is preliminary to the investigation stage.

it is reasonable to do so, collection of information may be done for the purposes of an investigation or legal proceeding that relates to particular, existing facts (known or otherwise), though the investigation or legal proceeding has not yet commenced. This conclusion is in accord with the decision of Hart, J. in *Canada Safeway Ltd. v. Shineton*, [2007] A.J. No. 1477, at paras 60 and 61 (a decision reviewing Order P2005-004), in which the court held that section 20(m) covers the provision of information to an investigator for the purposes of initiating an investigation. Thus I accept that the provision may apply in the circumstances described under the first of the broader interpretations.

[para 57] The situation is different where the investigation or proceeding will take place only if certain facts happen which have not yet happened and may not happen. I note that the provision itself has no temporal restriction, but arguably "an investigation or legal proceeding" refers to an existing or pending proceeding rather than one that is conditional on particular facts happening that may never come to pass.

[para 58] In this regard, I find some assistance in the definition of the term "investigation" that is found in section 1(f). This section provides:

> *1 In this Act,…*
>
> *(f) "investigation" means an investigation related to*
>
> *(i) a breach of agreement,*
>
> *(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or*
>
> *(iii) circumstances or conduct that may result in a remedy or relief being available at law,*
>
> *if the breach, contravention, circumstances or conduct in question has or may have occurred* ***or is likely to occur*** *and it is reasonable to conduct an investigation;…* . [emphasis added]

Under this definition, an investigation may relate to circumstances or conduct that "is likely to occur". Thus section 14(d) permits information to be collected where it is reasonable to do so for the purposes of an investigation that is into circumstances or conduct that have not occurred but are likely to occur. On the theory that a parallel degree of uncertainty is permissible for the "legal proceeding" condition, information can also be collected before the fact where that information will be relevant to a legal proceeding, should it occur, that is likely to occur because the facts or circumstances grounding such a proceeding are likely to happen.

[para 59] I accept the broadest of the possible interpretations of the provision. In my view the inclusion of the phrase "reasonable for the purpose" takes the place of any temporal restriction, allowing information to be collected in the appropriate circumstances even though an investigation or legal proceeding may never take place in

fact. It strikes me as prudent and therefore reasonable to collect information which could avoid contests, in the context of an investigation or legal proceeding that is reasonably likely to arise over contentious facts which would be hard to establish through witness testimony. As there was a reasonable likelihood of incidents on the picket line that could lead to a police investigation and law enforcement proceedings, and as a Labour Relations Board or court proceeding relative to the conduct of the picketing was reasonably forseeable, an investigation or legal proceeding was reasonably likely to arise in the circumstances of the present case.[5]

[para 60] An equally important restriction on the operation of the provision, in my view, is the way that information that is needed for this purpose must be handled. Recording such as that undertaken here necessarily collects much information, of many individuals, in the interests of collecting some small proportion of information that may become useful. Most and possibly all of the personal information of individuals that is collected in circumstances such as the present will not be used for the contemplated purpose, and much of it will be of persons who are not directly involved in the labour dispute, and in some cases are not involved at all (in the sense that the some of the recorded individuals may be merely passers-by rather than persons crossing the picket line). Therefore, it is critical, in my view, that any information that is collected be kept secure, that it be viewed only by such people as need to see it in order to locate information actually needed for an investigation or legal proceeding, and that any information not so required be deleted on a regular basis, as soon as practicable after it is recorded and it is known that it will not be required for the purpose. If information collected for the purpose here under discussion is not treated in accordance with these restrictions, the risk is run that its use or disclosure will lose its authorized status as "reasonable for the purpose of an investigation or legal proceeding".

[para 61] The requirement to make reasonable security arrangements for personal information is in any case a requirement under section 34 of the Act. The Union's witness provided evidence that the video recordings were kept in "locked local headquarters", to which the Union representatives and one shop steward "who did payroll out of the office" had the key. The Union's witness also said that while initially the tapes were all retained, eventually they were "taped over" if there had been no incidents. As well, this witness stated that Union staff and sometimes picketers, if the Union regarded this as "relevant", would have access to the video-recorded images, but that the tapes would never be provided to "third parties" (it is unclear what this meant as she also gave evidence that the videos could be used for the purpose of training in other contexts). She also said, when asked, that people with access to the information do not sign any confidentiality statement or agreement, but that staff would be aware of an obligation not to share the

[5] Such proceedings would be "legal proceedings" within the terms of section 1(g) of the Act, which defines "legal proceeding" as follows: "legal proceeding" means a civil, criminal or administrative proceeding that is related to: (i) a breach of an agreement; (ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or; (iii) a remedy available at law. As well, section 20(f) permits disclosure to a law enforcement agency to assist in an investigation relative to law enforcement proceedings, which are also legal proceedings.

information, particularly given their routine handling of confidential documents. The Union's witness also indicated that all images recorded on disks have now been removed, and that the disposable cameras that were used for still photographs are "gone". It is not clear what became of any photos taken from non-disposable cameras.

[para 62] As the question of proper security arrangements and appropriate limitations on access to the information was not directly an issue in this case, and the parties did not have an opportunity to make submissions on these questions, I do not make a finding in this case about them. However, it is not clear to me that the arrangements described above would meet the test for keeping the information secure and access to it appropriately limited.

[para 63] Before leaving this section, I will comment on the fact that the Union stated a variety of purposes for its collection, use and disclosure of personal information, but it offered only one provision in the Act as authority for its actions, which requires the particular purpose that it be reasonable for an investigation or legal proceeding - the "evidence-gathering" purpose.

[para 64] I note that in making the argument that its actions were authorized by sections 14(d), 17(d) and 20(f) and (m) of the Act, the Union does not distinguish between information it the form of video recordings from that in particular still images (of Complainant B, and of Complainant C that it included in its informational materials). With respect to the still images of Complainants B and C, I cannot see how the "evidence-gathering" purpose could justify creating, using or disclosing still images of situations in which nothing eventful or out of the ordinary is happening. Thus I do not accept that the collection of the still photograph of Complainant B can be said to fall within the purposes contemplated by section 14(d). Similarly, I do not accept that using and disclosing still images of Complainant C by putting them in posters and newsletters and displaying or distributing this material can be said to fall within the purposes contemplated by sections 17(d) and 20 (f) and (m). (Had the taking of Complainant B's still photo, or the inclusion of Complainant C's images in the informational material, become the cause of a picket-line incident, the images might have been relevant to shed light on the incident, but it still could not be said that the collection, use and disclosure of the images at the time in question was done for the purpose of recording evidence.) The Union did not suggest any other provision in the Act (other than that dealing with consent, which is discussed below) which might constitute authority for what was done, and I am unaware of any such provision. Thus I find that the Union's collection of Complainant B's personal information in a still photograph, and its use and disclosure of the images of Complainant C, were not authorized by the provisions in the Act that provide authority in the absence of consent.

[para 65] In contrast, I find that the Union's provision of some of the information it had collected about Complainant C to the police in relation to the incident described at para 52 above was authorized by under section 17(d) and 20(f) and (m) of the Act. (I note that Complainant C did not specifically take issue with this action on the part of the Union, but I comment on it because it was also a use and disclosure of his personal information.)

[para 66] My conclusion that the Act authorizes the collection of such information as is reasonably required to provide evidence for the purposes of an investigation or legal proceeding, might have the result that some of the recordings or photos, depending on the angle and proximity to the subjects, were excessive or inappropriate, while some were reasonable to meet the "evidence-gathering" objective. The same observations would apply to how much information was used or disclosed for the purposes of an investigation. This point is discussed further below under Issue E, which deals with the limitation that collection, use and disclosure may be done only to the extent reasonable for meeting the purposes.

[para 67] As already noted, the Union put forward a variety of purposes for collecting the information at issue in this case in addition to the "evidence-gathering" purpose. I am unaware of any other provisions in the Act that would authorize collection, use and disclosure for any of these other purposes in the absence of consent, and none were suggested to me. (In its reply submission, the Union asserted that its collection, use and disclosure for the purpose of persuading people not to enter the employer's place of business is reasonable as the *Labour Relations Code* allows picketers to engage in picketing for this purpose. The Union did not mention sections 14(b), 17(b) or 20(b), which permit collection, use or disclosure pursuant to a statute of Alberta that authorizes or requires it. If the Union's assertion amounts to an argument that its collection use and disclosure was authorized under these provisions, I do not accept this argument. I cannot see that authorizing picketing authorizes all activities on the part of picketers that would meet their purpose. As well, I believe that for these provisions to apply, the authorizing statute must specifically authorize the collection, use and disclosure of personal information. Therefore, in my view, authorization of picketing by the *Labour Relations Code* does not amount to authorization within the terms of PIPA for the Union's collection, use and disclosure of the personal information of the Complainants.)

[para 68] I must therefore address what decision and order to make where information is being or has been collected, used and disclosed at the same time for a purpose that falls within one of the provisions of the Act under which collection is authorized in the absence of consent, as well as for one or more purposes that do not.

[para 69] I note first that the purpose that the Union stated on the posters and otherwise communicated at the time, or any of its other stated purposes, may have been more significant from its standpoint than the "evidence gathering purpose". Even if that is so, I accept that the latter purpose, though not broadly communicated, was a significant one in terms of the Union's intentions. (I will deal below with the Union's failure to provide the requisite notification of this purpose.)

[para 70] I note second that the Act does not prohibit collection, use or disclosure for specified unauthorized purposes. It does not say: if information is being collected, used or disclosed for an unauthorized purpose, that collection, use of disclosure must cease. Rather, it prohibits collection unless there is either consent, or the collection falls within

one of the provisions of the Act under which collection is authorized in the absence of consent.

[para 71] In this case, the collection, or a considerable part of it of it, falls within sections 14(d). Thus, if the collection were continuing, I would not order it to cease despite the fact that it was also being done for a purpose relative to which there is no authorization under the Act for collection without consent. Rather, I would impose the condition on continued collection that the information not be collected for the purpose relative to which the Act provides no authorization, that the nature and extent of the collection be limited accordingly, and that the information collected for the "evidence-gathering" purpose not be used or disclosed for any of the Union's stated purposes or any other purposes.

[para 72] Similarly, with regard to past collection, I may, and do in this case, conclude that the collection, use or disclosure of personal information of the Complainants for the authorized "evidence-gathering" purpose was in compliance with the Act (with the caveat, as discussed below under Issue C, that proper notification was not given), and that the collection, use and disclosure for any of the other purposes was (in the absence of consent) in contravention of the Act,

[para 73] I note finally that the result would be the same even if the Union's primary purpose was one relative to which the Act gives no authority, and the authorized purpose was relatively a very minor one, as long as the latter was genuine. If I thought the Union was fabricating the authorized purpose to try to validate its collection of information, and that its only true purpose or purposes was other than the authorized one asserted in its submission, I would declare that the collection was in contravention of the Act (or order cessation if collection were continuing) even though the Act authorized collection of the same kind of information for a purpose that the Union did not genuinely have. In this case I believe that the gathering of evidence for the purpose of a possible investigation or legal proceeding was one of the reasons the Union was collecting information through video recordings and photos. Thus it is sufficient to declare that the video recording and photographing was in contravention of the Act (in the absence of consent) only insofar as it was for any of the other purposes. (As well, as discussed below, the collection for the authorized purpose was in contravention of section 13 of the Act insofar as notification of the authorized purpose was lacking.)

Issue B: If the Organization is collecting, using or disclosing "personal information" as defined in PIPA, is it doing so in contravention of, or in compliance with, section 7(1) of PIPA? In particular,

iv. If the Organization does not have the authority to collect, use or disclose "personal information" without consent, is the organization obtaining consent in accordance with section 8 of the Act before collecting, using or disclosing the personal information?

[para 74] I have found that the Union had authority to collect, use and disclose without consent some, but not all, of the information in question in this case. I must therefore ask whether, with regard to the information that was collected, used or disclosed respecting which there was no such authority, the persons whose information it was gave their consent to the collection, use and/or disclosure in accordance with section 8 of the Act.

[para 75] Complainant A indicated in his testimony that he did not consent to having his image video recorded or disclosed, and that he "argued with the picketers". (He did not describe the contents of the arguments.)

[para 76] Complainant B stated that she objected verbally to having her still image photographed. With respect to the video recording, she stated she did not give verbal consent, but that since the cameras were running, by standing in their range it was a given that her image would be recorded.

[para 77] Complainant C stated he did not consent to the video recording or photographing of his image or to the use or disclosure thereof, and that he asked to have the poster that contained his image taken down, but that despite this request it "stayed up for a couple of hours" (and was later put up again with modifications). He also stated that he did not consent to the use and disclosure of his image in any of the Union's newsletters.

[para 78] Section 7(1) has been reproduced earlier (at para 45). The relevant parts of section 8 provide:

> *8(1) An individual may give his or her consent in writing or orally to the collection, use or disclosure of personal information about the individual.*
>
> *(2) An individual is deemed to consent to the collection, use or disclosure of personal information about the individual by an organization for a particular purpose if*
>
> *(a) the individual, without actually giving a consent referred to in subsection (1), voluntarily provides the information to the organization for that purpose, and*
>
> *(b) it is reasonable that a person would voluntarily provide that information.*
>
> *(3) Notwithstanding section 7(1), an organization may collect, use or disclose personal information about an individual for particular purposes if*
>
> *(a) the organization*
>
> *(i) provides the individual with a notice, in a form that the individual can reasonably be expected to understand, that the organization intends to collect, use or disclose personal information about the individual for those purposes, and*

(ii) with respect to that notice, gives the individual a reasonable opportunity to decline or object to having his or her personal information collected, used or disclosed for those purposes,

(b) the individual does not, within a reasonable time, give to the organization a response to that notice declining or objecting to the proposed collection, use or disclosure, and

(c) having regard to the level of the sensitivity, if any, of the information in the circumstances, it is reasonable to collect, use or disclose the information as permitted under clauses (a) and (b).

(4) Subsections (2) and (3) are not to be construed so as to authorize an organization to collect, use or disclose personal information for any purpose other than the particular purposes for which the information was collected.

[para 79] The Union argues that consent was obtained from the individuals whose information was collected in two ways. First, it says that the video cameras were openly displayed and visible to anyone approaching or crossing the picket line, and thus people would know that if they walked into the cameras' range, their image would be captured. Second, the Union states that it gave additional written notice "through its posters of its journalistic purpose". I presume the latter argument is referring to the signs posted in the area of the picketing contained the message: "by crossing the picket line you are providing your consent for your image to be posted at www.CasinoScabs.ca" and "Cross this picket line and see yourself on www.CasinoScabs.ca". From this I take the Union's point to be that the individuals whose information was recorded in this way were, by entering the area and crossing the picket line, giving their consent to having their images so collected for the purpose that they be posted on the named website.

[para 80] With regard to these arguments, I note that section 8 of the Act contemplates deemed or implied consent. However, according to the relevant provisions, a number of conditions must be met in addition to the awareness of the individual that their information is being or will be collected, used and/or disclosed.

[para 81] Dealing first with section 8(2), this section provides that consent may be deemed to be given to collection use and disclosure for a particular purpose if an individual voluntarily provides information for that purpose, and it is reasonable that the person would voluntarily provide that information. When the Complainants came into the range of the cameras and crossed the picket line in this case, they did not thereby "voluntarily provide the information to the organization for … the purpose" that it be posted on the "CasinoScabs" website. These individuals were present in the area for their own purposes, and in my view, their knowledge of the Union's expressed purpose for recording their images did not make their going about their business there despite the signs a voluntary provision of information for the posted purpose as contemplated by section 8(2)(a).

[para 82] Even if the provision had been voluntary, I do not believe that section 8(2)(b) would be met: it would not be reasonable for a person to voluntarily provide information for the purpose that it be posted on a website which by its nature is making a derogatory statement about the persons whose names or images appear there. I also note the concern expressed by Complainant A that posting a person's name or image on the Union's website could make people mistakenly believe that the person is a habitual gambler.

[para 83] I reach similar conclusions with regard to the possible application of section 8(3). In this case, section 8(3)(a)(i) is met in that notice of the particular purpose was clearly given. However, section 8(3)(a)(ii) is not met. This requires that an individual be given a reasonable opportunity to decline or object to having his or her information collected, used or disclosed. Here there was no apparent means by which persons who saw the signs could decline or object – indeed the sign indicated that the collection, use and disclosure would necessarily follow from the very fact the line was crossed – it stated that crossing was an indicator of consent. In other words, the implication from the signs was that the only way to avoid the result was to not cross the line. While there may be persons of a temperament such that they would be willing, if they objected, to make this point to the picketers, many other persons would be unwilling to do so. Thus in my view the situation was not one in which there was a "reasonable opportunity to decline or object".

[para 84] Further in this regard, I note the reply submission of Complainant A, where he pointed out that the Casino vice-president had posted a sign advising persons that they could object about the collection of their information to this office. He expressed his view that the Union should also have advised people of their ability to object, but did not do so. As well, he stated in his testimony that while he argued with the picketers, it did not occur to him to tell them to turn the cameras off. As he took the step of complaining to this office, I may infer that the circumstances were such that he did not see that another route was available to him by which he could have prevented the collection, use and disclosure of his personal information if he entered the Casino.

[para 85] I note further that section 8(3)(a)(i) speaks of the organization *intending to* collect use, or disclose, and section 8(3)(b) speaks of "*proposed* collection, use or disclosure". These words suggest that the opportunity to decline or object must be given before the collection is done. Again, this was not the case, as the cameras were continuously recording rather than starting to record only after the opportunity to decline or object was not taken up "within a reasonable time", within the terms of section 8(3)(b).

[para 86] Finally, a person's name or image posted on a website which makes a derogatory statement about a person whose name appears there is sensitive information. Its sensitivity is such that it is not, in my view, reasonable to use or disclose such information under clauses (a) and (b), and thus the collection is also impermissible by reference to section 8(3)(c).

[para 87] In view of the foregoing, I find that none of the Complainants consented to the collection, use and disclosure of their personal information, either expressly, or as

deemed or implied under section 8 of the Act. Therefore, the Union was not entitled by the Act to collect, use or disclose their personal information, by virtue of any consent, under section 7. With respect to other persons entering the area whose personal information was recorded, I have no evidence that any of them consented (other than the single person mentioned at paras 36 and 44), and therefore I cannot find that any of them did.

[para 88] I make no comment in this discussion as to whether had the Union provided notice of the purpose which I have found to be authorized above, individuals could be deemed to consent to collection, use or diclosure of their information under section 8, as there is no evidence before me that the Union conveyed this purpose to anyone before it collected, used or disclosed the information.

Issue C: If the Organization is collecting "personal information" as defined in PIPA, is it doing so in contravention of, or in compliance with, section 13 of PIPA? In particular, is it

i. required to provide, and

ii providing,

notification, before or at the time of collecting personal information, in accordance with section 13 of PIPA?

[para 89] Section 13 of the Act makes the following provision with respect to notifying individuals when their information is collected directly from them:

> ***Notification required for collection***
>
> *13(1) Before or at the time of collecting personal information about an individual from the individual, an organization must notify that individual in writing or orally*
>
> *(a) as to the purposes for which the information is collected, and*
>
> *(b) of the name of a person who is able to answer on behalf of the organization the individual's questions about the collection.*
>
> *...*
>
> *(4) Subsection (1) does not apply to the collection of personal information that is carried out pursuant to section 8(2).*

[para 90] Section 13 distinguishes between collection from the individual and collection from some other source. The source of the information collected in a video recording or photograph is the individual. In saying this I acknowledge that persons whose information is recorded in this way may not be actively engaged in providing the information, and were not in this case. However, as they were the source of the information, in my view, the requirements of section 13(1) apply.

[para 91] I acknowledge that this conclusion might present a problem in other situations in which the circumstances are such that surreptitious surveillance is required in order not to compromise the purpose of an authorized collection. However, this problem might be resolved by the principle that legislation should not be read so as to produce an absurd result. It would be absurd to require notification to, for example, a suspected thief. Arguably, the words "from the individual" can be interpreted as applying only to collection of which a person is aware, hence the obligation to notify applies only in the circumstance in which the authorized collection is overt, and not in circumstances in which covert collection is justified. This would preserve the requirement in the Act that generally, people whose information is being collected should be told of the reason.

[para 92] Although, as described above, the Union provided notification of a purpose for its collection relative to which collection is not authorized under the Act, there is no evidence that it provided any notification of its authorized ("evidence-gathering") purpose. Thus to the extent the Union's collection of information was for a purpose authorized by the Act, its collection practice fell short in that it failed to provide such notification. As well, section 13(1)(b) requires the provision of the name of a person who is able to answer questions on behalf of the organization about the collection. While the striking Union members who were picketing likely did answer some such questions, the strict terms of the provision were not met.

[para 93] It follows from this conclusion that if the information collection in this case were continuing, I would require as a condition of continued collection that the requisite notice be provided, and, pursuant to my power under section 52(4) to specify terms or conditions in an order, that the posters indicating that the Union intended to post the information on its www.CasinoScabs.ca website be removed.

[para 94] While it is not the subject of a complaint in this inquiry, I note in passing that the Casino's recording of information for the same purposes appears also to have suffered from the defect of failing to give notice of the purpose of collection.

[para 95] There is also no evidence that the Union provided any notification of its purpose when it took of the still photo of Complainant B, or when it recorded the images of Complainant C which it subsequently included in still form in its poster and newsletters. However, this is a secondary point to the one that none of this dealing with the information was authorized under the Act.

[para 96] As I found earlier that the information was not collected, used or disclosed pursuant to section 8(2), section 13(4) does not apply (so as to make the requirements of section 13(1) inapplicable).

Issue D: If the Organization is collecting, using or disclosing "personal information" as defined in PIPA, is the collection, use or disclosure contrary to, or in compliance with, sections 11(1), 16(1) and 19(1) of PIPA (collection, use and disclosure for purposes that are reasonable)?

[para 97] Sections 11(1), 16(1) and 19(1) provide that an organization may collect, use or disclose personal information, respectively, only for purposes that are reasonable.

[para 98] With respect to the information that was collected for an authorized purpose, I find that it was reasonable to collect this information for the purpose of an investigation or a legal proceeding. It is implicit from its inclusion in the Act that this purpose is generally regarded as a reasonable one, and I find that it was reasonable to have this purpose in the circumstances of this case.

[para 99] I turn to the collection, use or disclosure of personal information that I have found to be neither authorized under other provisions of the Act nor done with consent under section 8 (that done for purposes other than gathering evidence). I note that in their submissions, two of the Complainants strongly stated their views that the Union's expressed purpose of posting images of people crossing the picket line on its website was unreasonable and unjustifiable. However, having made the finding that collection, use or disclosure other than for the "evidence-gathering" purpose was neither done with consent nor otherwise authorized by the Act, and thus the Union could not do it without contravening the Act, I will not consider whether this dealing with information for the other purposes was for purposes that are reasonable.

Issue E: If the Organization is collecting, using or disclosing "personal information" as defined in PIPA, is the collection, use or disclosure contrary to, or in compliance with, sections 11(2), 16(2) and 19(2) of PIPA (collection, use and disclosure to the extent reasonable for meeting the purposes)?

[para 100] Sections 11(2), 16(2) and 19(2) provide that an organization may, respectively, collect, use or disclose personal information only to the extent that is reasonable for meeting the purposes for which the information is collected.

[para 101] As the video tapes apparently no longer exist or the information was deleted, it is not possible for me to review them to decide whether any parts of the video tapes were excessive to meet the "evidence-gathering" objective, nor, given their volume, does it seem this would have been practicable at an earlier time. It must suffice to state that as much of the recording and photography as was required to enable the effective presentation of evidence of the activities of the picketers and other involved persons was reasonable for the purpose of an investigation or legal proceeding. Any other video recording or photographing, was, in the absence of consent, contrary to the Act.

[para 102] The same points apply to the use and disclosure of information for an investigation or legal proceeding. Only as much information may be given as it is reasonably necessary to share for this purpose. With respect to some of the collected information about Complainant C that was provided to police, I accept that it was reasonable to provide some such information, especially as Complainant C did not dispute this, and the evidence suggests that the Casino also provided a similar tape.

However, as I have no evidence as to the precise nature of this information given by the Union, I make no finding as to whether all of it was reasonable for the purpose under section 16(2) and 19(2).

[para 103] I have already stated, at paragraph 59, the manner in which information collected for the "evidence-gathering" purpose must be treated to ensure that its use or disclosure continues to accord with this purpose once it has been recorded.

[para 104] As I have found the collection of information for other purposes was neither done with consent nor otherwise authorized by the Act, and therefore the Union could not do this without contravening the Act, I will not consider whether the extent of the collection was reasonable for meeting these other purposes.

Request for deferral to the Labour Relations Board

[para 105] I turn to address the Union's request that I reconsider my decision not to defer to the Labour Relations Board in this matter. In addition to the reasons I have already given in the attached Appendix, it is not clear to me that the Complainants in this case would, should I decide to so defer, necessarily bring this matter before the Labour Relations Board. I note that this did not happen when the Commissioner earlier deferred similar complaints to the Board, and I note that significant resources have already been expended by some of the Complainants, who may be unwilling to expend them again in another forum. Neither do I know whether the LRB would entertain such a complaint so long after the fact. As well, with the passage of time, evidence that might be presented to the LRB would likely be inferior to that already before me.

[para 106] I reach my conclusion recognizing that I have been unable to address the constitutional validity of the Act, a matter which the Union had indicated that it wishes to challenge, and which the Complainants have also addressed by pointing out the importance of privacy protections and by arguing that the legislation is constitutionally sound. However, I adhere to my original point that a court is in a better position than the Labour Relations Board to rule on any challenge to the constitutional validity of the *Personal Information Protection Act*. I therefore decline to change my original decision on this point.

The question of whether the Union committed an offence under section 59 of the Act

[para 107] I turn finally to the fact that some of the parties discussed section 59 of the Act in their submissions. Section 59 lists actions that constitute offences under the Act. One of the Complainants suggested that the Union's activities in dealing with personal information in this case be referred for prosecution.

[para 108] In Order P2006-005, the Commissioner stated (at paras 100 and 101):

> Section 59 does not give me jurisdiction to make findings of guilt or innocence, to convict persons for offences under the Act, or to assess penalties. Instead, the

Provincial Offences Procedure Act gives jurisdiction to the Provincial Court of Alberta to decide whether a person had committed an offence under section 59 of the *Personal Information Protection Act* and to assess an appropriate penalty.

For these reasons, I find that I have no jurisdiction to convict an organization for an offence under section 59 of the Act.

[para 109] Section 59 was not raised as an issue in this hearing, and I note that under section 49(2), a complainant's ability to initiate a complaint is limited to the issues referred to in section 36(2), which does not deal with offences. For this reason, and for the reasons stated above, I cannot deal with the submissions relating to section 59 in this order, nor, within the context of an inquiry, to consider whether the matter should be referred for prosecution.

IV. DECISION AND ORDER

[para 110] I make this Order under section 52 of the Act.

[para 111] I find that in collecting the personal information of the Complainants and others that was necessary for the purpose of effectively presenting evidence of activities on or around the picket line, should the need for such evidence arise, the Union had authority under section 14(d) of the Act, and thus was in compliance with section 7(1) of PIPA. I further find that this was a reasonable purpose in the circumstances under section 11(1) of the Act, and that the part of the collection that was necessary as just described was reasonable for the purpose under section 11(2).

[para 112] I find that in using and disclosing the personal information of Complainant C, by providing it to the police, for the purpose of effectively presenting evidence of the incident relating to the taking of a poster by the Complainant, the Union had authority under section 17(d) and 20(f) and (m) of the Act, and thus was in compliance with section 7(1) of PIPA. I find that this use and disclosure was for a reasonable purpose under sections 16(1) and 19(1) of the Act. As I have no evidence as to the precise nature of the information that was given to the police, I make no finding as to whether the kind and amount of information given was reasonable for the purpose under section 16(2) and 19(2).

[para 113] I find that the Union's collection, use and disclosure of the personal information of the Complainants and others for any of the purposes presented by the Union, other than those set out in paras 111 and 112, was not authorized by any of the provisions of the Act that authorize collecting, using or disclosing personal information without consent. I further find that none of the Complainants gave their consent under section 8 of the Act for the collection, use or disclosure of their personal information for any other purposes. I cannot find that any other person gave consent except for the single individual mentioned at paras 36 and 44. Thus I find that the collection, use and disclosure of personal information for any purposes other than gathering evidence was in contravention of section 7(1) of the Act. I order the Union to cease collecting personal information for other purposes in the absence of consent. I also order it to destroy any

personal information of the Complainants and others still in its possession that it has collected in contravention of the Act. This would include any retained personal information of Complainant C that was placed in the Union's informational materials (posters and newsletters), and thus was collected (in part) for the purpose of placing it in these materials.

[para 114] I find the Union contravened section 13 the Act in failing to provide proper notice of its purpose, that was authorized under sections 14(d), 17(d) and 20(f) and (m) of the Act, to the Complainants and others whose information it collected for this authorized ("evidence-gathering") purpose.

[para 115] I order the Organization to notify me in writing, within 50 days of its receipt of a copy of this Order, that it has complied with my Order.

Christina Gauk, Ph.D.
Director of Adjudication