Modernizing Privacy in Ontario: Empowering Ontarians and Enabling the Digital Economy

Ministry of Government and Consumer Services

Ontario Federation of Labour Submission

September 2021

Who we are

The Ontario Federation of Labour ("OFL") is pleased to provide these submissions in response to the government's White Paper, *Modernizing Privacy in Ontario: Empowering Ontarians and Enabling the Digital Economy*. The OFL represents 54 affiliated unions and one million workers across the province and is Canada's largest provincial federation of labour.

The OFL wishes to thank the Ministry of Government and Consumer Services for the opportunity to provide these observations.

Introduction

The case for extending Ontario's proposed new privacy legislation to trade unions has not been made out.

In proposing to regulate non-commercial entities in a provincial new privacy statute, the *White Paper* fails to carefully distinguish between different types of non-commercial entities. This is a fundamental mistake. There are basic differences between trade unions and other organizations in terms of how they use personal information. These differences significantly impact the case for regulation of trade unions.

Other organizations use personal information primarily for their own ends: commercial entities use it to generate profit; political parties use it to advance their electoral goals; and not-for-profits use it to further their own institutional mandates.

Trade unions do not use personal information for their own ends. Rather, they primarily use personal information to further the interests of the individuals to whom the information relates. Unlike other private sector entities, trade unions are democratic institutions whose purpose is to advance the collective interests of the workers that they represent. They cannot be equated with the other types of entities that the government is considering as part of this consultation process.

Even the Information and Privacy Commissioner of Ontario's submission during the first phase of this consultation reflects the fact that trade unions are different. In its submissions, the IPC supported an expansion of privacy laws to cover employees, non-commercial entities (including charities, associations, unions, and professional bodies), and political parties.[1] While the IPC provided a detailed rationale for the first and third categories, it provided almost no rationale at all for non-commercial entities, other than to state that a "growing number" of them "are engaging in non-commercial data collection activities, which are not covered under *PIPEDA*".

[1] IPC Submissions, pp. 25-26.

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It is notable that the IPC was unable to actually articulate a need for privacy legislation to capture trade unions, other than a vague "gap filling" rationale. This stands in stark contrast to the detailed analysis provided by the IPC justifying the regulation of political parties and employers vis-à-vis their workforce.

The fact that trade unions are not regulated by *PIPEDA* is not in and of itself evidence that they ought to be regulated by Ontario's proposed legislation.

As set out in the OFL's initial submissions to the Ministry, there is no policy-based reason to extend private sector privacy legislation to trade unions. They are already subject to extensive regulation under the *Labour Relations Act, 1995* and engage in an entirely different set of activities that raise none of the concerns about individual privacy that justify regulating other types of private entities.

Extending privacy laws to trade unions also threatens to undermine their ability to engage in activities that are required of them by statute, common law, and collective agreement provisions. It also interferes with the constitutional rights of its members under ss. 2(b) and (d) of the *Canadian Charter of Rights and Freedoms*.

The fact that the *White Paper* has included proposals for union-specific exemptions demonstrates this reality. While the proposed exemptions as currently drafted remain problematic, the fact that they have been included at all is an acknowledgement that extending a new privacy statute to unions is uniquely problematic.

Put simply, there is no pressing need to extend privacy laws to trade unions, and the desire to do so in order to "fill the gaps" in *PIPEDA* threatens to substantially interfere with the ability of workers to come together and advance their collective goals and aspirations. The government should reverse course and abandon its flawed plans to extend the scope of an Ontario privacy statute to trade unions.

If the government chooses to proceed with regulating trade unions under a new statute, the OFL has serious concerns with the specific proposals contained in the *White Paper*. Without retreating from its position that trade unions should not be captured by this legislation at all, the OFL offers the following comments about the *White Paper's* specific proposals.

Restrictions on Collection, Use, and Disclosure

As the OFL noted in its previous submissions, a blanket requirement to obtain consent to the collection, use, or disclosure of personal information is unworkable in the trade union context. The OFL welcomes the government's recognition of this, and the attempt in the *White Paper* to create exceptions that would meet the needs of trade unions.

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However, as currently set out, the proposed rules regarding consent – and exceptions thereto – remain problematic. In particular:

- The blanket requirement to record the purposes for which personal information will be used at the time of collection is unworkable for trade unions;
- The blanket limit on the collection, use, or disclosure of personal information solely to situations where it is "necessary" for the purpose(s) noted above is, in at least some contexts, unworkable;
- The differing language in the employer exceptions and the trade union exceptions are problematic. At a minimum the differences will invite confusion;
- The proposed "Collection by trade union relating to obligation under a collective agreement" exception is under-inclusive and must be expanded; and
- The proposed "Collection by bargaining organization relating to a labour dispute" exception is under-inclusive and not adequate to make the law constitutional.

We set out our concerns with respect to each of these matters below.

i. The requirement to determine the purposes for which information is collected at the time of collection is unworkable for trade unions

The *White Paper* proposes a blanket rule that collection, use, or disclosure of personal information can only be done "for purposes that a reasonable person would consider fair and appropriate in the circumstances."[2] The OFL supports this provision, on the understanding that traditional activities of a trade union (e.g. representing workers, establishing and defending bargaining rights, responding to litigation, complying with statutory, common law, or collective-agreement obligations, engaging in constitutionally protected associational or expressive activities) would always be "fair and appropriate in the circumstances."

However, the *White Paper* also proposes that, in connection with this rule, an organization would be required to "determine at or before the time of the collection of any personal information each of the purposes for which the information is to be collected, used, or disclosed and record those purposes."[3]

This requirement is unworkable for trade unions. Trade unions are often required to use personal information about their members in unexpected ways that cannot be predicted at the time of collection.

[2] *White Paper*, pp. 4-6.
[3] *Ibid*.

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As noted in the OFL's previous submissions, trade unions use personal information about the individuals that they represent for a wide range of purposes, including to:

- Identify and pursue objectives at the bargaining table on behalf of bargaining unit members;
- Give notice to bargaining unit members of information related to their jobs, such as proposed downsizing or voluntary early retirement programs;
- Communicate with bargaining unit members in respect to ratification votes for proposed collective agreements;
- Communicate with bargaining unit members with respect to strike votes;
- Represent workers in grievances or other forms of workplace dispute resolutions;
- Ascertain the interests of all bargaining unit members when considering whether to pursue individual, group, and policy grievances;
- Assist workers in accessing benefits and leaves;
- Participate in the workplace accommodation process required under the *Human Rights Code*;
- Verify workplace-related information provided by the employer; and
- Represent workers before regulatory bodies or other decision-making organs.[4]

This is far from a closed list. The difficulty trade unions face is that they are required to respond to a myriad of circumstances that arise in the workplace setting, often unexpectedly. This is also why a pure consent-based regime for the collection, use, and disclosure of personal information would be unworkable.

At best, the requirement to know and record all possible future uses for personal information could encourage the use of vague, boilerplate lists. In order to ensure that they could in fact abide by their legal obligations, trade unions would be forced to list every conceivable use for personal information, no matter how marginal or improbable. The result would be to subject them to an artificial process that does not in any sense meaningfully enhance the privacy interests of the workers they represent.

A requirement to state up-front how a person's personal information may be collected, used, and disclosed could play an important role in cases where collection, use, or disclosure is based on consent. Providing individuals with this information at the point of collection would allow them to decide whether or not to consent to such collection. However, in cases where personal information is collected, used, or disclosed without consent by a trade union, the requirement to know ahead of time how the information is to be used is neither useful nor workable.

[4] For an example where these kinds of union activities were accepted as justifying a need for access to bargaining unit members' personal information, see *Professional Institute of the Public Service of Canada v. Canada Revenue Agency*, 2011 PSLRB 31, aff'd *Bernard v. Canada (Attorney General)*, [2014] 1 SCR 227.

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The OFL therefore recommends that this proposed provision be deleted entirely, or else confined solely to situations where personal information is collected, used, or disclosed on the basis of the consent of the individual.

ii. The requirement that the collection, use, or disclosure of personal information is "necessary" is unworkable in at least some contexts

The OFL recognizes that the unnecessary collection, use, and disclosure of personal information by organizations can be problematic, particularly if it is done without the consent of the individual. This limitation appears to be well justified with respect to commercial entities.

However, imposing a "necessity" requirement on trade unions – as currently contemplated in the *White Paper*[5] – is problematic.

The problem arises from the fact that trade unions frequently engage in adversarial proceedings, in which it is impossible to assess whether a given use of personal information is, in fact, "necessary" to achieve the union's purpose (i.e. be successful against an opposing party).

The most common adversarial proceedings trade unions are involved in are grievance arbitrations. Under the proposed "Investigation or legal proceeding" exception to the consent requirement, a trade union could collect, use, or disclose personal information about a person if it were reasonable for the purposes of an arbitration.[6] However, under the government's current proposal, before actually using personal information for the purpose of pursuing a grievance, the union would also be required to ensure that such use is "necessary". This is an impossible task, as a trade union will rarely know ahead of time whether the use of any given piece of personal information is "necessary" for the purpose of achieving a successful outcome at arbitration.

Consider a scenario in which there is a factual dispute between a griever and a member of management about an incident that occurred in the workplace. The union might be aware that the employer planned to call two witnesses that would testify in support of their preferred version of events. The union is aware of two workers who also observed the incident and wished to interview them to determine if they could provide evidence in support of the union.

A diligent union, aware of the adversarial nature of arbitral proceedings, would use the personal information of both workers to contact and interview them. But what if the first worker provided evidence that would assist the union. Would it be "necessary" for the union to use the personal information of the second?

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[5] *White Paper*, pp. 4-6.
[6] *White Paper,* p. 20

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The answer would depend on whether the union would need the evidence of a second witness to overcome management's witnesses and win at arbitration. But this would test matters beyond the knowledge of the union, such as:

- How well will the two management witnesses testify?
- Will the arbitrator view the first union witness as credible?
- What other evidence might the union uncover through other efforts that could support its case?
- Does the employer have additional evidence that it has yet to disclose to the union, but intends to rely on?

Another example of the unworkability of a "necessity" requirement is in the context of an organizing campaign. Under the "Collection by trade union relating to obligation under a collective agreement" exception proposed in the *White Paper*,[7] a union may collect, use, or disclose personal information for the purpose of a campaign to establish bargaining rights.

Organizing campaigns are characterized by a high degree of uncertainty on the part of unions. While a union seeking to establish bargaining rights may have a sense of its support within a proposed bargaining unit, it will rarely have any certainty about whether it will be successful in its campaign until the conclusion of the process.

This uncertainty is amplified by several features of the certification process in Ontario:

- There may be disputes as to the proper description of the bargaining unit. This means that a union may be unaware of the actual size of the unit until after it has filed a certification application with the Ontario Labour Relations Board. Without knowing the size of the unit, the union cannot know with certainty whether it has the necessary number of supporters to trigger or succeed at a certification vote.[8]
- There may be disputes as to whether particular workers or groups of workers are within a proposed bargaining unit. This includes disputes regarding whether a particular individual fits within a proposed bargaining unit description, as well as disputes about whether an individual is excluded from the application of the *LRA* itself.[9] As a result, even if a union has a clear understanding of how many current supporters it has, it may not know for certain whether its supporters' votes will ultimately be counted by the Labour Board until after the vote has taken place.
- Individuals who initially express support for a union by signing membership cards may ultimately vote against certification, often due to pressure or implicit threats by employers. A trade union can never assume that it will have the

[7] *White Paper,* p. 20
[8] See *LRA, supra*, ss. 6, 8, 9.
[9] *LRA, supra*, s. 2(1).

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support during a vote of all of the workers who have agreed to sign membership cards.

In light of this uncertainty, a union will never know whether it is or is not "necessary" to collect or use the personal information of a potential bargaining unit member in order to establish its bargaining rights. A union will never know the exact number of supporters it needs in order to become certified until the process is over. During the course of an organizing campaign, a union will have no way of knowing whether reaching out to one additional worker to seek their support will be "necessary" to establishing their bargaining rights.

As these examples demonstrate, the concept of "necessity" does not rest well with the kinds of adversarial proceedings that trade unions engage in every day. It is a requirement that simply cannot be operationalized in practice.

The OFL recommends that the requirement that the collection, use, or disclosure of personal information be limited to what is necessary to achieve the purpose for which it is collected, be removed from the proposed legislation, at least as applied to trade unions.

The OFL recommends that the specific "necessity" requirement contained in the "Collection by trade union relating to obligation under a collective agreement" and "Collection by bargaining organization relating to a labour dispute" also be removed.

The government may wish to consider alternative limitations that are more workable in practice, such as:

- Restricting the use of personal information to the purpose for which it was collected or for a consistent purpose; or
- Limiting the use of personal information to that which is "reasonably necessary" for the purpose for which it was collected.

The "consistent use" concept is a well-known and workable principle that exists in both federal[10] and provincial privacy statutes.[11] Alternatively, the concept of reasonable necessity, which is used in Alberta's *Personal Information Protection Act*,[12] would provide trade unions with the flexibility to make reasoned assessments of what is required in the context of uncertain and evolving factual scenarios.

[10] *Privacy Act,* RSC 1985, c. P-21, ss. 7(b), 8(2)(a); *Personal Information Protection and Electronic Documents Act*, SC 2000, c. 5, ss. 7(1)(b.2), 7(2)(b.2), 7(3)(e.2); *Parliament of Canada Act*, RSC 1985, c. P-1, s. 88(1).
[11] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F.31 [*FIPPA*], ss. 41(1)(b), 42(1)(c); *Freedom of Information and Protection of Privacy Act*, RSA 2000, c. F-25, ss. 39(1)(a), 40(1)(c); *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 32(a), 32.2(a).
[12] *Personal Information Protection Act*, SA 2003, c. P-6.5 [*PIPA*], ss. 14.1(1)(a), 17.1(1)(a), 20.1(1)(a)

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iii. The differing language between employer and trade union exceptions to requiring consent are problematic and likely to result in confusion

The *White Paper* proposes exceptions to the requirement to obtain consent for the collection, use, or disclosure of personal information designed specifically for both employers and trade unions.

Under the government's current proposal, employers may collect, use, or disclose an employee's personal information if it is done solely "for the purpose of" establishing, managing, or terminating an employment (or volunteer) relationship, or to manage the post-work relationship with the individual.[13]

Trade unions, on the other hand, may only collect, use, or disclose personal information if it is "necessary" to establish bargaining rights, comply with a collective agreement, or represent a worker with respect to the terms and conditions of their employment.[14]

There are two reasons to be concerned with these different standards. First, there is no apparent justification for permitting an employer to use personal information merely "for the purpose" of a permitted end but restrict unions to using it only where it is "necessary" to do so. This is particularly true given that it is unions, and not employers, who are mandated to represent the interests of workers. The use of different language in the government's current proposals could reasonably be viewed as giving preference to the interests of employers over workers and unions.

The second issue is that it is not clear what the difference in language is intended to accomplish. Under the government's current proposals, even when an organization relies on an exception to consent, it must still meet the general requirement to collect, use, or disclose information only if it is "necessary" for the purpose for which it was collected.[15] In effect, the reference to "necessary" in the union provision is redundant, and the absence of a similar reference in the employer provision is, at best, misleading.

At a minimum, the difference in wording between the related employer and union exceptions to consent give rise to a significant risk of confusion about what the applicable standards are under each provision, and whether they are or are not the same.

As noted in the previous section, the OFL recommends removal of the "necessary" requirement from both the general "fair and appropriate" provision of the proposed legislation, as well as the specific trade union exceptions.

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[13] *White Paper,* pp. 20-21.
[14] *White Paper,* p. 21.
[15] *White Paper*, pp. 6, 24.

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However, if the government decides to retain a general necessity criterion applicable to all collection, use, and disclosure of personal information, then the OFL would recommend standardizing the language used in the union and employer exceptions. The OFL suggests that the better solution is to remove the references to "necessary" from the union related exceptions since the language would be redundant considering the general necessity requirement applicable to all collection, use, or disclosure of personal information.[16]

iv. The "Collection by trade union relating to obligation under a collective agreement" exemption is under-inclusive

The government proposal would permit the collection, use, or disclosure of personal information by a trade union in three circumstances: (a) to establish bargaining rights; (b) to comply with a collective agreement obligation or to deal with a collective agreement dispute; or (c) for the purposes of representing employees in respect of the terms and conditions of employment.

While these exceptions are critical to the workability of the proposed legislation, they are under-inclusive and need to be expanded. In particular, exemption (a) should be expanded to capture displacement and decertification applications.

As currently drafted, this exception permits a trade union to collect, use, and disclose personal information as part of a certification campaign to establish bargaining rights. The inclusion of this provision reflects the fact that the "Investigation or legal proceeding" exemption is not adequate to capture organizing campaigns. These campaigns may begin long before any legal proceeding (i.e. a certification application at the Ontario Labour Relations Board) has commenced.

The same considerations that justify an exception for establishing bargaining rights apply equally to displacement and decertification campaigns.

Displacement refers to the situation where an outside trade union seeks to "displace" an incumbent trade union and assume exclusive bargaining rights for a particular bargaining unit.[17] Decertification refers to the situation where one or more bargaining unit members seek to have an incumbent trade union removed as the unit's bargaining agent.[18]

As with certification campaigns, displacement and decertification campaigns may involve an extensive pre-litigation phase.

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[16] This submission applies equally to the "Collection by bargaining organization relating to a labour dispute", which also uses a "necessary" standard for collection, use or disclosure: *White Paper,* p. 21.
[17] *LRA, supra*, ss. 5(2)-(6).
[18] *LRA, supra*, s. 58.

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By limiting the exception only to "establishing" bargaining rights, the proposed exemption would lead to problematic asymmetries. In the displacement context, for example, the trade union who is seeking to displace the incumbent union would be permitted to collect, use, or disclose personal information without consent in support of its efforts, as its activities would fall under the "establishing bargaining rights" exception. The incumbent union, however, would not be able to do the same in order to defend against the displacement campaign prior to an application being filed with the Labour Board.

There is no policy justification for treating the two unions differently during the critical pre-litigation phase. It would also be against the interests of workers, who ought to have equal access to information from both competing unions in order to exercise their right to decide which side to support.

The OFL recommends that the proposed exception under the heading "Collection by a trade union relating to obligation under a collective agreement" be amended by inserting the phrase "or maintain" following the words "campaign to establish".

v. The "Collection by bargaining organization relating to a labour dispute" is under-inclusive and not adequate to make the law constitutional

As the OFL noted in its previous submissions, a blanket application of a consent requirement to trade unions for the collection, use, or disclosure of personal information has been ruled unconstitutional by the Supreme Court of Canada in the *UFCW* case.[19]

In *UFCW* the striking union took photographs of individuals who crossed its picket lines. The individuals who were photographed complained to Alberta's Information and Privacy Commissioner, who concluded that it violated the requirement to obtain consent to collect, use, or disclose personal information.

The Supreme Court found that the prohibition of collection, use, or disclosure of personal information without consent was unconstitutional "because its impact on freedom of expression in the labour context is disproportionate and the infringement is not justified".[20] While accepting that the legislation pursued the important objective of protecting privacy:

> The price *PIPA* [the *Personal Information Protection Act*] exacts, however, is disproportionate to the benefits it promotes. *PIPA* limits the collection, use, and disclosure of personal information other than with consent without regard for the nature of the personal information, the purpose for which it is collected, used, or

[19] *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] 3 SCR 733.
[20] *UFCW, supra* at para. 3.

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> disclosed, and the situational context for that information. As the Adjudicator recognized in her decision, *PIPA* does not provide any way to accommodate the expressive purposes of unions engaged in lawful strikes. Indeed, the *Act* does not include any mechanisms by which a union's constitutional right to freedom of expression may be balanced with the interests protected by the legislation. As counsel for the Commissioner conceded during oral submissions, *PIPA* contains a general prohibition of the Union's use of personal information (absent consent or deemed consent) to further its collective bargaining objectives. As a result, *PIPA* deems virtually all personal information to be protected regardless of context.[21]

The court recognized that this consent requirement "prohibits the collection, use, or disclosure of personal information for many legitimate, expressive purposes related to labour relations" including "ensuring the safety of union members, attempting to persuade the public not to do business with an employer, and bringing debate on the labour conditions with an employer into the public realm." The Court noted that "these objectives are at the core of protected expressive activity under s. 2(*b*) [of the *Charter*]."[22]

The government has attempted to respond to this constitutional issue by proposing an exception to the requirement of consent in limited circumstances:

> **Collection by bargaining organization relating to a labour dispute**
> A bargaining organization may collect, use, or disclose personal information about an individual for the purpose of informing or persuading the public about a matter of significant public interest or importance relating to a labour relations dispute involving the bargaining organization.[23]

This exception is modeled after provisions enacted in Alberta following the *UFCW* decision:

> **[Collection/Use/Disclosure] by a trade union relating to a labour dispute**
> Subject to the regulations, a trade union may [collect/use/disclose] personal information about an individual without the consent of the individual for the purposes of informing or persuading the public about a matter of significant public interest or importance relating to a labour relations dispute involving the trade union if:
>
> (a) The [collection/use/disclosure] of the personal information is reasonably necessary for that purpose; and

[21] *UFCW, supra* at para. 25.
[22] *UFCW, supra* at para. 28.
[23] *White Paper,* p. 21.

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(b) It is reasonable to [collect/use/disclose] the personal information without consent for that purpose, taking into consideration all relevant circumstances, including the nature and sensitivity of the information.[24]

Neither Ontario nor Alberta's proposals are constitutionally adequate. They fail to address the constitutional concerns identified by the Supreme Court in *UFCW*. The unconstitutionally narrow proposals contained in the *White Paper* should not be adopted.

The government's proposal imposes a number of limitations on the right of trade unions to collect, use, or disclose personal information in furtherance of the ss. 2(b) and (d) rights of unions and their members:

- It only relates to matters of "significant" public interest or importance, rather than matters of public interest or importance generally;
- The matter of significant public interest or importance must relate to a labour relations dispute; and
- The labour relations dispute at issue must involve the trade union itself.

None of these limitations are consistent with the constitutional principles set out in *UFCW*.

The requirement for a subject matter to rise to the level of "significant public interest or importance" is not consistent with the holding in *UFCW*. The phrase "significant public interest and importance" was used by the Court in the *UFCW* case in a single paragraph to describe the harmful effects of the Alberta statute.[25] In other words, the phrase described what the law did. It did not establish a threshold below which a statute would be constitutional.

The Court in *UFCW* found that the *Charter* was violated because the statute "prohibits the collection, use, or disclosure of personal information for many **legitimate, expressive purposes** related to labour relations."[26] Limiting expression related to "legitimate" matters related to labour relations is unconstitutional, even if the matter cannot be said to be one of "significant public interest or importance".

The requirement in the government's proposal for the collection, use, or disclosure to be related to a "labour relations dispute" is also inconsistent with the *UFCW* decision. The existence of a labour relations dispute (a strike) was merely the context in which the *UFCW* case arose. It was not a pre-condition for the union and its members having a constitutional entitlement to collect, use, or disclose personal information.

[24] *PIPA, supra*, ss. 14.1(1), 17.1(1), 20.1(1).
[25] *UFCW, supra*, para. 27.
[26] *UFCW, supra*, para. 28.

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The Supreme Court of Canada recognized that strikes and other labour disputes are not the only situations where unions are engaged in core expressive and associational activities. The Court emphasized that "expressive activity **in the labour context** is directly related to the *Charter* protected right of workers to associate to further common workplace goals under s. 2(*d*) of the *Charter*"[27] and that "in the labour context, freedom of expression can enhance broader societal interests."[28]

The Supreme Court has also recognized that organized union activities may attract a high degree of constitutional protection even outside of traditional strike activities:

> Picketing represents a continuum of expressive activity. In the labour context it runs the gamut from workers walking peacefully back and forth on a sidewalk carrying placards and handing out leaflets to passers by, to rowdy crowds shaking fists, shouting slogans, and blocking the entrances of buildings. Beyond the traditional labour context, picketing extends to consumer boycotts and political demonstrations. A picket line may signal labour strife. But it may equally serve as a physical demonstration of individual or group dissatisfaction on an issue.
> …
> Picketing, however defined, always involves expressive action. As such, it engages one of the highest constitutional values: freedom of expression, enshrined in s. 2(*b*) of the *Charter*.[29]

Unions and their members frequently participate in a range of marches, demonstrations, social media campaigns, media interviews, and other public activities directed as participating in broader social and political discourse. These activities are also constitutionally protected.[30] Prohibiting a union from collecting, using, or disclosing personal information in the course of doing so raises very significant constitutional concerns.

The proposed requirement that the labour relations dispute relate directly to the trade union itself is an additional limitation that is inconsistent with the *UFCW* decision. Unions frequently engage in expressive activity in support of causes that they are not directly connected with.

For example, an individual local of a national union might want to re-tweet a social media post from a peer local regarding a labour dispute that the latter is involved in.

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[27] *UFCW, supra* at para. 30 [emphasis added].
[28] *UFCW*, *supra* at para. 33.
[29] *RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 SCR 156, at paras. 30, 32 (internal citations omitted).
[30] E.g. *Working Families Ontario v. Ontario*, 2021 ONSC 4076.

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This would be an important expression of union solidarity, a concept that had deep historical roots and forms a key aspect of union expression.

However, if the original tweet contains personal information, the peer union could not engage in this form of expression since they were not themselves directly involved in the underlying dispute. In this union context, this would be a significant restriction on expressive rights.

The Alberta statute's constitutionality has yet to be determined in court.[31] However, it is manifestly inconsistent with the decision in *UFCW* and should not be adopted.

In this respect, it is notable that Ontario's proposal is even more restrictive than the Alberta statute. The Alberta statute only requires that the collection, use, or disclosure of the personal information be "reasonably necessary" for informing or persuading the public. Under Ontario's proposal, the exception would be subject to the more stringent "necessary" standard.

The OFL recommends that the government not proceed with privacy legislation that applies to trade unions until it has had an opportunity to properly address the constitutional issues related to the *UFCW* decision. This is a complex topic that cannot easily be addressed in the abstract, without a comprehensive draft statute to review and comment on. The *White Paper* does not provide an adequate basis to assess what, if any, exception for trade unions would be sufficient to pass constitutional muster.

In the alternative, the OFL recommends that the proposed exemption be reformulated as follows:

> **Collection by bargaining organization relating to a labour dispute**
> (1) A bargaining organization may collect, use, or disclose personal information about an individual for the purpose of informing or persuading the public about matters legitimately related to labour relations or a matter of public interest or significance if it is reasonable to do so in all of the circumstances.[32]
> (2) In assessing whether it is reasonable in all of the circumstances to collect, use, or disclose personal information, the following are relevant considerations:
> a. The nature and sensitivity of the personal information;
> b. The importance of the matter to both the bargaining organization and the public; and
> c. The importance of using, collecting, or disclosing the personal information in successfully informing or persuading the public about the matter.

[31] The closest was an attempt to have the Alberta Information and Privacy Commissioner find that *PIPA* was not in force due to a series of events that followed the *UFCW* decision. This constitutional issue was rejected on purely procedural grounds: *General Teamsters, Local Union No. 362 (Re)*, 2021 CanLII 27082 (AB OIPC), paras. 28-33.
[32] *White Paper,* p. 21.

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The Right to be Forgotten

The OFL is generally supportive of a "right to be forgotten" as part of a private sector privacy statute. However, as the *White Paper* recognizes, there are practical reasons why this right cannot be absolute.

The OFL is concerned that the government's current proposal does not include sufficient exceptions to a right to be forgotten. The result is that unions may be required to destroy personal information that it otherwise requires to fulfil its obligations under statute and common law, or to exercise its rights under the *Charter*.

As currently proposed, the right for an individual to request that an organization dispose of the person's personal information is subject to only four exemptions:

- Where the requested disposal would result in the disposal of another person's personal information, and the requestor's personal information is not severable;
- When a law or a reasonable term of a contract would prohibit disposal;
- When the personal information has been disclosed in the course of legal proceedings or is otherwise available to a party in a legal proceeding; or
- In other circumstances that may be set out in regulations.

These exceptions are inadequate to permit trade unions to fulfil their duties since they could undermine the ability of unions to rely on exceptions to consent to collect, use, or disclose personal information.

The inclusion of the union-specific exceptions to consent discussed above exist because trade unions must collect, use, and disclose personal information in a wide range of situations where it is impracticable for them to obtain consent.

As discussed in the OFL's previous submissions, one way in which a consent requirement can be problematic in light of unions' legal obligations arises with respect to "Rand employees" – individual workers who are not members of the union, but for whom the union has a duty to fairly represent. Frequently, Rand members are actively hostile towards the union. It is inevitable that many of these employees would ask trade unions to delete their personal information under a "right to be forgotten" provision.

If a bargaining unit member were to do this, it would not relieve the union of their obligation to fairly represent the member vis-à-vis the employer.[33] Fulfilling these representational obligations may require collection, use, or disclosure of the very personal information that the member could – under the government's proposal – require to be destroyed. This catch-22 scenario would place unions in an impossible position.

[33] *LRA, supra*, s. 74.

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The solution to this dilemma would be to add an exception to the right to be forgotten where personal information has been collected on the basis of one of the trade union-specific exceptions to consent.

The proposed right to be forgotten also undermines the constitutional rights of unions and their members. As discussed in the previous section, a blanket prohibition on the collection, use, or disclosure of personal information as applied to trade unions is unconstitutional, as it undermines s. 2(b) and (d) *Charter* rights.

A blanket right to be forgotten is equally unconstitutional as both have the same impact: removing the ability of a union to use personal information in order to communicate to the public on legitimate matters related to labour relations, or other matters of public importance. There is no meaningful difference between prohibiting the collection of a person's information without their consent and requiring destruction of the same information at the individual's request.

To be constitutionally compliant, any statute must build in an exception to the right to be forgotten that reflects a union's right to collect, use, or disclose personal information in the circumstances described by the Supreme Court in *UFCW*.

The OFL is also concerned about the litigation exception as is currently proposed. This exception to a right to be forgotten would prevent a litigant from using a right to deletion as a "sword" against a litigation adversary. However, as currently drafted, this proposal appears only to contemplate existing litigation, and not contemplate future litigation.

This presents a very practical problem for trade unions. Trade unions are not only engaged in litigation involving employers. They are also required from time to time to become engaged in litigation involving members. The most frequent example is responding to complaints by members that a union has violated their duty of fair representation, though unions may find themselves in *de facto* adversarial positions with respect to members in a range of other cases, such as grievances involving job competitions, or disputes about workplace harassment or violence between more than one bargaining unit member.

Under the current proposal, members may be able to use a right to be forgotten based on anticipated litigation that has not yet arisen. For example, a member who intends to take their union to the Labour Board in a duty of fair representation complaint might first ask the union to delete all of their personal information before filing their application. Because there is no ongoing litigation at that time, it would appear they would have such a right under the government's current proposal. If the member were then to proceed to file a complaint against the union, the union could be at a significant disadvantage in terms of justifying its conduct. This would be both unfair to the union, as well as to its membership as a whole.

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An organization should be permitted to refuse to delete information about a person not only if the information has been disclosed in the course of legal proceedings or is otherwise available to a party to a legal proceeding, but also if the organization has a reasonable basis to believe that they may be a party to a future legal proceeding in which the personal information may be relevant.

The OFL recommends that two additional exceptions to any right to be forgotten be set out in legislation: one that mirrors (at a minimum) the exceptions to consent for collection, use, or disclosure related to trade unions; and one that expands the litigation exception to take into account reasonably anticipated future litigation.

Access and Correction

The OFL supports a general right for individuals to access their personal information held by organizations, and to request its correction. However, there are circumstances in which it would not be appropriate to permit this to occur.

The *White Paper* implicitly recognizes this, when it notes that a right to access and correction is found in the *Freedom of Information and Protection of Privacy Act*. The *FIPPA*, while granting a right of access and correction, also contains numerous exceptions in recognition of the fact that there may be legitimate reasons why an individual should not have access to their own personal information.[34]

The government should not assume that the exceptions in the *FIPPA* are either appropriate or sufficient in the context of a private sector privacy statute. The reasons why private entities hold personal information are not necessarily the same as for public entities captured by *FIPPA*. The problems that may arise from disclosure may also differ.

With respect to trade unions, authorizing bargaining unit members to access records containing their own personal information will frequently raise significant concerns. Trade unions maintain numerous internal records that include personal information about members. These records are often highly sensitive and confidential. Union decision makers rely on the fact that their deliberations are confidential in order to ensure full candor when making difficult or controversial decisions.

For example, decisions about whether to pursue grievances can be highly politicized within a union. Decision makers need to know that their internal decisions are confidential so that they can freely air their perspectives on what is in the best interests of the bargaining unit. Records of these discussions will frequently include personal information about potential grievers.

[34] *FIPPA, supra*, s. 49.

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Unions frequently consult with legal counsel to obtain opinions. These communications also frequently contain personal information about bargaining unit members yet are also subject to solicitor-client privilege.

Put simply, unions need to be able to maintain a sphere of confidentiality in which they can make difficult decisions related to their representation of the bargaining unit. An unfettered right to access one's own personal information would be wholly inconsistent with the ability of unions to have sensitive discussions and make difficult decisions in the best interests of the workers that they represent.

In the absence of any proposals in the *White Paper* respecting exceptions to a right of access and correction, it is difficult to provide more specific comments.

The OFL, however, recommends that, at a minimum, the government consider the following exceptions to a right to access and correction:

- Records that are subject to solicitor client or litigation privilege;[35]
- Records that disclose internal communications or deliberations of a trade union;[36]
- Records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union;[37] and
- Records that also contain personal information related to individuals other than the requestor.[38]

Compliance and Enforcement

Any new privacy regime will entail a significant learning curve for newly regulated entities. Ontario's regulatory approach ought to be to assist organizations in complying with requirements that are themselves sensitive to the size, capacity, and purpose of the organization.

Trade unions come in many shapes and sizes. Some are sophisticated organizations with large in-house legal departments and an ability to assume new regulatory requirements quickly. Others are voluntary organizations with no paid staff or full-time officers. Many unions are little more than a filing cabinet in a worker's basement, and a small group of dedicated members who do union work on their evenings and weekends. Any approach to compliance and enforcement must be sensitive to this reality.

[35] Cf. *FIPPA*, ss. 19, 49(a).
[36] Cf. *FIPPA*, s. 12(1).
[37] Cf. *LRA*, s. 119(1).
[38] Cf. *White Paper,* p. 8; *FIPPA*, s. 49(b)

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The OFL supports an approach that provides non-commercial organizations with the supports they need in order to comply with their obligations, and which does not seek to punish organizations who attempt to comply with new privacy obligations in good faith.

This includes the proposals for certification programs and codes of practice.[39] However, the substance of the programs and codes must reflect the reality of trade unions generally, as well as the limited resources of smaller unions in particular. Any standards that are set ought to take into account the lack of resources and capacity of many trade unions and avoid setting them up to fail by imposing unrealistic expectations.

The OFL is not opposed to the use of Administrative Monetary Penalties (AMPs) in general but notes that they will rarely be effective as applied to smaller organizations who might fail to comply with legal requirements due to a lack of resources. Not every violation will warrant the imposition of an AMP.

More generally, the OFL is concerned that the proposed AMP provisions do not appear to be sensitive to the differences between commercial and non-commercial private organizations.

The government's proposal only distinguishes between individuals and non-individual organizations when it comes to the potential size of an AMP.[40] All non-individual organizations are subject to the same maximum penalty, namely $10,000,000 or 3% of global revenue. This fails to take into account important differences between commercial and non-commercial organizations.

The fact that the maximum penalty for organizations is partially defined by the concept of "global revenue" is a reflection that the government had large, commercial entities in mind when proposing its AMP regime.

Non-commercial entities, including trade unions, are fundamentally different from commercial entities in at least two ways. First, they do not have the same degree of "revenue" as commercial entities do. $10,000,000 for a global software firm may mean very little. $10,000,000 for the average Ontario union local is a magnificent sum. Imposing such a fine on the former would be an irritant; imposing it on the latter would constitute an existential crisis.

Secondly, the impact of imposing an AMP is qualitatively different. For commercial entities, the imposition of an AMP effectively disincentivizes conduct that violates privacy laws. These entities exist to make money, and the AMP deprives them of the ability to profit though the illegal exploitation of personal information.

[39] *White Paper,* pp. 33-34.
[40] *White Paper*, pp. 35-36.

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Non-profits, on the other hand, generally have more altruistic ends.[41] The imposition of an AMP on a trade union undermines their ability to represent the interests of their bargaining unit members. In effect, the AMP may punish innocent third parties in a way that they do not in the commercial context.

The OFL notes that, while the government's proposal sets out a number of factors that must be taken into account in determining the size of an AMP, the types of concerns discussed above are not contained on that list.

The OFL therefore recommends that the list of relevant factors that must be considered when imposing an AMP be amended to include consideration of:

- The size of the organization;
- Whether it is a commercial or a non-commercial entity; and
- The impact that the AMP would have on innocent third parties.

Conclusion

The OFL welcomes the government's continued consultation on a new privacy statute for Ontario. There is no question that in the digital age, personal information requires stronger, more comprehensive protections. In particular, the OFL strongly supports legislation to enhance the privacy rights of workers vis-à-vis their employer.

However, the government should exercise caution in expanding a privacy regulatory regime to trade unions. Doing so is likely to result in numerous unintended consequences, including undermining the interests and constitutional rights of the very individuals a privacy statute would seek to protect.

The government should abandon its current plans to make trade unions subject to its proposed new privacy legislation. Alternatively, significant changes to the proposals set out in the *White Paper* must be made.

The OFL would be pleased to further discuss these matters with the government as it continues its deliberations in this area.

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[41] This is at least true for charities and trade unions. The situation may be different for political parties.

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