Federal Court of Appeal

Cour d'appel fédérale

Date: 20100208

Docket: A-625-08

Citation: 2010 FCA 40

CORAM: **BLAIS C.J.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

ELIZABETH BERNARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on October 14, 2009.

Judgment delivered at Ottawa, Ontario, on February 8, 2010.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: BLAIS C.J.
TRUDEL J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] Elizabeth Bernard has been a federal public servant since 1991 and in all that time, she has declined to join the union which represents the members of her bargaining unit. She is, in the jargon of labour relations, a Rand formula employee, one who pays union dues in return for enjoying the benefits of union representation but who is not a member of the union. This application for judicial review arises because the Public Service Labour Relations Board (the Board) has ordered her employer to provide her home address and her home phone number to the union which represents

her bargaining unit (the union). Ms. Bernard argues that this is a violation of her privacy rights as well as a violation of her constitutional right to freedom of association which, as the Supreme Court of Canada pointed out in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, includes the freedom to refrain from association.

[2] The issue in this case is limited to the kind of information which the employer must provide to the union. The Board decided that the employer must provide some employee contact information in a decision dated February 21, 2008, a decision which Ms. Bernard, who is self-represented, has not challenged. The kind of information to be provided was settled in a Board decision dated July 18, 2008. It is this decision which is under review.

THE FACTS

[3] Ms. Bernard joined Revenue Canada-Taxation in August 1991. At that time, she was provided with a union membership card to fill out but she declined to do so, as was her right.

[4] In January 1992, Ms. Bernard received a letter from the union at her home address. When she inquired how it was that the union had her home address, she was advised that the employer provided the home addresses and social insurance numbers of all employees to the union, whether they were union members or not. In February 1992, Ms. Bernard filed a complaint with the Office of the Privacy Commissioner alleging that the employer had provided her personal information to a third party without her consent. After conducting an investigation, the Privacy Commissioner concluded that the employer had breached Ms. Bernard's privacy rights. As a result of the Privacy

Commissioner's intervention, the employer abandoned its policy of providing personal information to the union.

[5] In 1995, Ms. Bernard accepted a different position with the same employer (now known as the Canada Revenue Agency). As a result, she became a member of a different bargaining unit, represented by a different union. Once again, she was invited to join the union and, once again, she declined.

[6] Unbeknownst to Ms. Bernard, in August 2007, her "new" union asked the employer to provide it with each employee's name, position, title, telephone number and fax number at home and at work, as well as regular mail and email addresses at home and at work. The union made this request in connection with its preparation for bargaining the renewal of the collective agreement for Ms. Bernard's bargaining unit. The employer, while not refusing the request, replied that it had received several requests of the same nature and would respond to all unions at the same time. In fact, the employer never did respond any further to the union's request for contact information.

[7] The union reacted by filing complaints with the Board, alleging that the Canada Revenue Agency (the employer) had failed to bargain in good faith and that it had engaged in an unfair labour practice, contrary to paragraphs 190(1)(*b*) and (*g*) of the *Public Service Labour Relations Act*, S.C. 2003. c. 22, s. 2, (the *Act*). The complaint also named the Treasury Board as a respondent. The alleged unfair labour practices were that the employers (the Canada Revenue Agency and Treasury Board) interfered with the union's duty of fair representation and interfered in the

administration of the union in its representation of the members of the bargaining unit by failing to provide the requested contact information.

[8] Because the Board's decision with respect to these complaints set the stage for the order which Ms. Bernard now challenges, I propose to review the Board's decision in some detail.

[9] The Board decided to deal with the complaints by way of written representations. The employers and the union were invited to make their respective submissions. The employers made a joint submission. None of the Rand formula employees were given notice of the application, nor given a chance to intervene.

[10] In their written representations, the employers referred to the fact that they had sought an opinion from the Office of the Privacy Commissioner of Canada (OPC). The Board summarized the OPC's response (as disclosed by the employers' representations) as follows:

> …the OPC raised very serious concerns with regard to the availability and the accuracy of the information being requested by the bargaining agent. The OPC also addresses the case law that is in favour of disclosure and supports the argument that there is a significant difference in that the employer may not possess all the information requested and that the accuracy of the information that it does possess is questionable.
>
> Finally, the OPC did not see how the disclosure of the information being requested in this case could be considered a consistent use under the *Privacy Act*, as the accuracy of the information being requested is in question …
>
> Respondent's Record, p. 48.

[11] The employers did not refer to the previous investigation by the OPC as a result of Ms. Bernard's complaint, nor to the employer's decision to discontinue its previous practice on the basis of the OPC's response to that complaint.

[12] In its decision, reported at 2008 PSLRB 13, the Board rejected the union's complaint that the employers' refusal to provide contact information for employees was a breach of the duty to bargain in good faith. The Board found that the union had not shown that the failure to provide the requested information impaired its ability to carry out its responsibilities in collective bargaining. It also rejected the union's argument that the failure to provide the requested information was a breach of its duty of fair representation.

[13] The Board then addressed the issue of interference with the union's administration. It began by noting that the employers, while rejecting the allegation that they were in any way in breach of the *Act*, accepted that the union should receive employee contact information. The Board quoted the following passage from the employers' submissions:

> …The respondents do agree that the jurisprudence supports the disclosure of personal information for the legitimate purposes of the complainant…there is a willingness by the respondents to provide the requested information that they currently have in their possession.
>
> Respondent's Record, p. 55.

[14] This led the Board to comment that the real issue between the parties was not one of principle but of the implementation of that principle. The difficulty, for the Board, was to identify the statutory foundation for that principle. After a review of the jurisprudence, the Board found that

an employer's failure to provide employee contact information to a bargaining agent constitutes a form of interference in the latter's representation of employees. Having come to this conclusion, the Board articulated the specific question before it as follows:

> In these complaints, the fact that the bargaining agent requested information and that the employers failed to provide that information are undisputed. In my view, the main outstanding issue of "proof" is whether the information requested by the bargaining agent in its complaints ("the names, positions, titles, telephone numbers and home and email addresses for all employees in the bargaining unit") can be tied to legitimate representational purposes under the statute.
>
> Respondent's Record, p. 62.

[15] The Board then made the following observation which, as we shall see, is of some consequence for the disposition of this appeal:

> *Exactly what employee information is required, and when, for each of the representational purposes cited by the complainant may be subject to argument.* For purposes of my interim ruling at this stage, however, *I need not examine each purpose in detail nor be precise about the exact type of contact information required for a given activity.* The latter element becomes, in my view, an appropriate part of a discussion about redress.
>
> [Emphasis added.]
>
> Respondent's Record, p. 63.

[16] The Board then considered the decision of the Ontario Labour Relations Board in *Ottawa Carleton District School Board*, 2001 CanLII 11073 (O.L.R.B.) and endorsed the principle that the union must be able to communicate with employees, including non-members, outside the workplace. It then said:

> *Leaving aside for a moment the issue of whether home contact information is essential*…a failure by the employers to supply the complainant with the employee contact information necessary for that purpose [giving all employees a reasonable opportunity to participate in strike vote] would constitute interference in the representation of employees by the complainant…
>
> [Emphasis added.]
>
> Respondent's Record, pp. 63-64.

[17] As a result, the Board went on to conclude that the employers' failure "to provide the complainant with *at least some of the employee contact information that it requested*" (my

emphasis) comprised interference in the union's representation of employees. It repeated this conclusion in relation to the provisions dealing with putting the employers' last offer to the employees, saying that the employers' failure to provide the union with "*at least some of the employee contact information it requested*" (my emphasis) constituted interference with the union's activities.

[18] The Board then turned to the question of remedies and acceded to the parties' request that a separate hearing be held on that issue. It identified a number of issues with respect to which it desired further submissions:

> In practical terms, exactly what employee contact information do the employers possess or could they possess among the types of information sought by the complainant? How is that information maintained to ensure its accuracy and timeliness? What precise types of information are necessary with respect to the complainant's representational obligations, and which among those types of information should be provided by the respondents? When should the respondents supply information to the complainant? What are the recurring requirements, if any to update that information? Are there approaches under which the employers can meet their obligation to provide information in a fashion that reasonably addresses possible concerns arising under the *Privacy Act*? What, more specifically, are those concerns? Should any conditions be placed on the complainant's use of the information by the complainant once the employers have provided it?
>
> I am confident that I do not currently have a sound basis to address such questions. So as to be able to move beyond the finding in principle in this interim decision to a final determination of the complaints, further arguments – and possibly evidence – are required.
>
> Respondent's Record, p. 66.

[19] That said, the Board expressed its "strong conviction" that the details of the corrective action were best left to the agreement of the parties and invited the parties to meet and discuss the required remedial action.

[20] While this decision has significant implications for Ms. Bernard's position, she did not challenge it by way of application for judicial review because she was not aware of it at the material time. While she might have asked for an extension of time to bring such an application, she did not do so.

[21] The parties took the Board's exhortation to heart and when the Board reconvened some five months later, the parties presented it with their agreement which the Board, without more, incorporated into an order dated July 18, 2008. It is that order which is the subject of this application.

[22] The order requires the employers to provide the union, on a quarterly basis, the home mailing addresses and home telephone numbers of all bargaining unit employees which the employer has in its human resources information systems.

[23] Ms. Bernard, who had been away from work on leave, first learned of the order on October 20, 2008 and quickly brought a successful motion for an extension of time within which to bring an application for judicial review.

THE ISSUES

[24] Ms. Bernard attacks the Board's decision on the basis that it requires the employers to violate the provisions of the *Privacy Act*, R.S.C. 1985, c. P-5, since she has not consented to the release of her personal information to the union. She also argues that the Board must defer to the

Office of the Privacy Commissioner on privacy matters, particularly since that Office has already investigated this matter and ruled on the propriety of the employer providing personal information to unions without the individual's consent. Ms. Bernard is very critical of the employers' failure to bring her 1992 complaint and the Privacy Commissioner's response to the Board's attention. Ms. Bernard argues that as a party interested in the outcome of the matter, she ought to have been given notice of the proceedings and given a chance to participate. Finally, Ms. Bernard argues that the Board's decision breaches her right not to associate with the union, a right which she claims under the Supreme Court's decision in *Lavigne.*

[25] It is apparent that Ms. Bernard's arguments are, to some extent, overly broad. The Board has held that some contact information must be provided and that decision is not under review. The issue is the nature of the information to be provided and the circumstances under which it must be provided.

[26] The Attorney General argues that the standard of review of the Board's decision is reasonableness and that the decision falls within a range of possible outcomes, one aspect of reasonableness as described by the Supreme Court in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 47.

[27] The Attorney General largely repeats the arguments which were made to the Board to justify the decision which it made on February 21, 2008 to the effect that some of the information requested by the union would have to be provided by the employer. He does not address the

rationale for the Board's decision to order the disclosure of the employees' home address and home telephone numbers, as opposed to any of the other kinds of information originally requested by the union, namely each employee's name, position, title, telephone number and fax number at home and at work, as well as regular mail and email addresses at home and at work.

[28] As for Ms. Bernard's argument that her freedom not to associate with the union, as guaranteed by the *Charter*, has been infringed, the Attorney General argues that the constitutionality of the Rand formula was upheld in *Lavigne.* The Attorney General is silent on the specific question as to whether the disclosure of personal information to the union without her consent is, in itself, a violation of Ms. Bernard's freedom from compelled association with the union.

[29] The Attorney General responds to Ms. Bernard's argument that she was entitled to be given notice of the proceedings before the Board because she was a person who was directly affected by the Board's decision, by saying that Ms. Bernard is exercising her right of participation by means of this application for judicial review.

ISSUES

[30] As noted at the beginning of these reasons, the only question before this Court is the type of information which the employer must provide to the union. The Board's decision that the failure to provide such information amounts to interference in the administration of the union has not been challenged.

ANALYSIS

[31] Throughout its reasons with respect to the February 21, 2008 decision, the Board was careful to deal with the question of disclosure of information in general terms and left for further consideration the question of which information was to be provided. The passages from the Board's decision which I have cited and, in particular, the portions of those passages which I have highlighted, clearly show that the Board was aware of the need to address the privacy issues raised by the complaint before it.

[32] The Board went further and clearly articulated the questions which would have to be addressed in subsequent submissions. Those questions were neither raised nor canvassed by the Board when it simply adopted the agreement which the union and the employers had negotiated. In my view, in proceeding as it did, the Board failed to exercise its jurisdiction with respect to a matter which it was bound to consider.

[33] The Board is protected by a strong privative clauses which provide as follows:

51.(1) Subject to this Part, every order or decision of the Board is final and may not be questioned or reviewed in any court, except in accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(a), (b) or (e) of that Act.	51. (1) Sous réserve des autres dispositions de la présente partie, les ordonnances et les décisions de la Commission sont définitives et ne sont susceptibles de contestation ou de révision par voie judiciaire qu'en conformité avec la *Loi sur les Cours fédérales* et pour les motifs visés aux alinéas 18.1(4) a), b) ou e) de cette loi.

[34] Paragraph 18.1(4)(a) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 authorizes the Court to intervene where a tribunal has "acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction." This clause allows the Court to intervene if the Board has refused to exercise its jurisdiction, as it did in this case. Since the question of whether or not a tribunal has refused to exercise its jurisdiction is a jurisdictional question, the standard of review is correctness. See *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 42, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 59.

[35] The *Privacy Act* has been held to be quasi-constitutional legislation: see *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] 1 S.C.R. 441, at paragraph 28. The purpose of that legislation is "to protect the privacy of individuals with respect to personal information about themselves that is held by a government institution (s. 2).": *H.J. Heinz Co. of Canada Ltd* at paragraph 28.

[36] It will be recalled that the union's original demand for information asked the employer to provide it each employee's name, position, title, telephone number and fax number at home and at work, as well as regular and email addresses at home and at work.

[37] The *Privacy Act* defines personal information as follows:

"personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,	« renseignements personnels » Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment :
…	…

but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include	toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'article 19 de la *Loi sur l'accès à l'information*, les renseignements personnels ne comprennent pas les renseignements concernant :
(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,	j) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment :
(i) the fact that the individual is or was an officer or employee of the government institution,	(i) le fait même qu'il est ou a été employé par l'institution,
(ii) the title, business address and telephone number of the individual,	(ii) son titre et les adresse et numéro de téléphone de son lieu de travail,
(iii) the classification, salary range and responsibilities of the position held by the individual,	(iii) la classification, l'éventail des salaires et les attributions de son poste,
(iv) the name of the individual on a document prepared by the individual in the course of employment, …	(iv) son nom lorsque celui-ci figure sur un document qu'il a établi au cours de son emploi, …

[38] The information requested by the union fell largely within the category of personal information for which less protection is accorded. I say that less protection is accorded for certain information because, while the information is clearly in relation to an identifiable individual, it is not considered to be personal information for some purposes under the *Access to Information Act*, R.S.C. 1985, c. A-1. This class of information includes the name of the government employee, that person's function, title, business address and telephone number. The status of some of the

information requested is uncertain, such as their office email address and fax number, while the other information is clearly protected personal information, such as their home address, telephone number, and home e-mail address.

[39] Given the types of information which the union had requested, the Board had a choice as to the kind of information which it would order to be produced. It had carefully avoided confusing the issue of the obligation to disclose with the nature of the disclosure and correctly identified that the union's request raised important privacy issues. The Board asked the parties for submissions on whether:

> …there are approaches under which the employers can meet their obligation to provide information in a fashion that reasonably addresses possible concerns under the *Privacy Act*? …
> Respondent's Record, p. 66.

[40] By the Board's own admission, these were questions which required further submissions and, perhaps, further evidence. In light of all this, the Board erred in simply adopting, without analysis, the agreement between the employers and the union by which the union was to receive on a quarterly basis, out of all the information it requested, only that information which was fully protected under the *Privacy Act*. Even on the more deferential standard of review of reasonableness, this decision could not stand.

[41] The Board was seized of the questions which it had raised because those questions went beyond the interests of the employers and the union and engaged the interests of persons who were

not before it. Those persons had statutorily protected privacy rights of which the Board was well aware. The Board had an obligation to consider those rights and to justify interfering with those rights to the extent that it did. It could not abdicate that responsibility by simply incorporating the parties' agreement into an order.

[42] As a result, the matter must be remitted to the Board for re-determination and for a reasoned decision as to the information which the employer must provide the union in order to allow the latter to discharge its statutory obligations. However, given the position taken by the employers before the Board, it is difficult to see how they can be relied upon to make the case for the limited disclosure which Ms. Bernard desires. Without the addition of another voice to the debate, the Board is likely to be limited to hearing the employers and the union defend their agreement.

[43] Ms. Bernard argues that she is entitled to participate in this debate. Having brought this application, and having succeeded before this Court, Ms. Bernard should be heard when the Board reconsiders this issue. But I am uncertain that Ms. Bernard, acting on her own behalf, is in a position to fully canvas the privacy issues raised by the Board's February 21, 2008 decision. The entity which could provide the sophisticated analysis which would assist the Board is the Office of the Privacy Commissioner whose views were presented to the Board, second hand, by the employers. The Office of the Privacy Commissioner has previously intervened in other cases where privacy issues were raised: see *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] S.C.R. 773, *Ruby v. Canada (Solicitor General)* 2002 SCC 75, [2002] 4 S.C.R. 3, *Canada (Information Commissioner) v. Canada (Minister of Citizenship and*

Immigration), 2002 FCA 270, [2003] 1 F.C. 219, (F.C.A.), *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66, *Gordon v. Canada (Minister of Health)*, 2008 FC 258, [2008] F.C.J. No. 331, *Englander v. TELUS Communications Inc*., 2004 FCA 387, [2005] 2 F.C.R. 572.

[44] Section 14 of the *Public Service Labour Relations Board Regulations*, SOR/2005-79 (the *Regulations*) provides that persons who have an interest in proceedings before the Board may apply to be added as a party or as an intervenor. I would therefore order the Board to give the Office of the Commissioner of Privacy notice of the re-determination proceedings, together with a copy of these reasons, and to draw the latter's attention to section 14 of the *Regulations*, on the understanding that if intervenor status is sought, it will be granted with full rights of participation in accordance with the Board's usual practice in the case of contested matters.

[45] Given this disposition of the application, it would be premature to deal with the issues of the violation of Ms. Bernard's right of freedom of association. It is also not necessary to decide if Ms. Bernard was entitled to notice of the proceedings before the Board.

CONCLUSION

[46] In my view, the Board erred in declining to exercise its jurisdiction when it failed to consider the privacy issues raised by its decision of February 21, 2008 when issuing its order of July 18, 2008. Those issues involved the privacy rights of individuals whose interests were manifestly not represented by the parties. I would therefore set aside the Board's order of July 18, 2008 and

remit the matter to the Board for re-determination. I would order the Board to give the Office of the Commissioner of Privacy notice of the re-determination proceedings, together with a copy of these reasons, and to draw the latter's attention to section 14 of the *Regulations*, on the understanding that if intervener status is sought, it will be granted with full rights of participation in accordance with the Board's usual practice in the case of contested matters. The applicant, Ms. Bernard, should also be given notice of the proceedings and given the opportunity to participate.

[47] Ms. Bernard is entitled to her disbursements.

"J.D. Denis Pelletier"
J.A.

"I agree.
Pierre Blais C.J."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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