Federal Court of Appeal | Cour d'appel fédérale

Date: 20120316

Docket: A-184-11

Citation: 2012 FCA 92

CORAM: **BLAIS C.J.**
EVANS J.A.
SHARLOW J.A.

BETWEEN:

ELIZABETH BERNARD

Applicant

and

ATTORNEY GENERAL OF CANADA
AND PROFESSIONAL INSTITUTE OF THE
PUBLIC SERVICE OF CANADA

Respondents

and

PUBLIC SERVICE ALLIANCE OF CANADA

Intervener

Heard at Ottawa, Ontario, on February 29, 2012.

Judgment delivered at Ottawa, Ontario, on March 16, 2012.

REASONS FOR JUDGMENT BY: EVANS J.A.

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

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REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] Elizabeth Bernard is right to be concerned to protect her privacy and to attempt to minimize disclosure of her personal information. She has long attempted to prevent her employer, the Canada Revenue Agency (CRA), from disclosing her home contact information to the union that represents

her. Ms Bernard does not wish to receive communications at her home from the union, which she has declined to join, as is her right. However, under the "Rand formula" she must still pay union dues, and the union must represent all members of the bargaining unit fairly, whether they are members of the union or, like Ms Bernard, "Rand employees": *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211.

[2] In this, the latest, round of her campaign, Ms Bernard has brought an application for judicial review to set aside a decision of the Public Service Labour Relations Board (Board), dated March 21, 2011 and reported at 2011 PSLRB 34.

[3] In that decision, the Board rejected Ms Bernard's argument that the *Privacy Act*, R.S.C. 1985, c. P-21, protects her home address and telephone number from disclosure by the CRA to the Professional Institute of the Public Service of Canada (PIPSC). PIPSC is the bargaining agent for the Audit, Financial and Scientific (AFS) group of CRA employees to which Ms Bernard belongs.

[4] The Board held that the disclosure of this information to PIPSC was authorized by paragraph 8(2)(*a*) of the *Privacy Act*, because PIPSC's intended use of it was consistent with the purpose for which it was obtained by the CRA.

[5] For the reasons that follow, I have concluded that the Board's decision is reasonable and would therefore dismiss Ms Bernard's application for judicial review.

Background

[6] For twenty years, Ms Bernard has battled with tenacity and intelligence to protect her home contact information and other personal information from being disclosed by the CRA to the unions that have represented her. She has had some success.

[7] PIPSC and the Public Service Alliance of Canada (PSAC) have, at different times, represented occupational groups to which Ms Bernard has belonged. The unions have sought to require the CRA to disclose the home contact information of all employees in the bargaining units that they represent, regardless of whether the employees were also union members.

[8] In order to contextualize the present application, I summarize below the principal stages of the prior proceedings that have led up to it.

(i) *complaint to the Office of the Privacy Commissioner*

[9] Ms Bernard started her career as a federal public servant in Revenue Canada – Taxation (now the CRA) in 1991. Her position at that time was classified within the Professional and Management group, for which PSAC was the bargaining agent. Ms Bernard declined to join the union.

[10] In 1992, Ms Bernard received a letter from PSAC at her home. When she asked the CRA's human resources department how PSAC had her address, she was told that it was provided by the CRA, along with other personal information. She filed a complaint with the Office of the Privacy

Commissioner (OPC) alleging that the employer had disclosed her home address and Social Insurance Number (SIN) to PSAC without her consent, even though she was not a member of the union.

[11] In May 1993, Ms Bernard received a letter from the OPC upholding her complaint. In response to the OPC's recommendations, Treasury Board officials had discontinued disclosing employees' home address, and would cease to release their SIN. Ms Bernard thought that this victory concluded the matter.

(ii) ***proceedings before the Board***

[12] In 1995, she accepted a position in the CRA with a different job classification, which was subsequently reclassified as AFS. PIPSC is the bargaining agent for this group of employees.

[13] In 2007, PIPSC filed an unfair labour practice complaint with the Board. It alleged, among other things, that the CRA's refusal to provide it with home contact information for members of the bargaining unit breached paragraph 186(1)*(a)* of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (PSLRA). This provision prohibits employers from interfering in the administration of unions and their representation of employees. The contact information requested by PIPSC included employees' telephone numbers, email, and mailing addresses, both at work and at home.

[14] In a decision dated February 21, 2008 and reported at 2008 PSLRB 13 (February decision), the Board held that the CRA's refusal to provide any of the requested information breached

paragraph 186(1)*(a)*. This decision has never been challenged. The Board directed the parties to attempt to reach an agreement on how much contact information had to be disclosed to the union in order to bring the employer into compliance with the PSLRA.

[15] The parties were able to agree. Under the terms of a consent order dated July 18, 2008 and reported at 2008 PSLRB 58 (July decision), the CRA undertook to disclose to PIPSC on a quarterly basis the home addresses and telephone numbers of the AFS bargaining unit's members that the employer had in its human resources information system. PIPSC undertook to use that information only for the purposes of enabling it to fulfil its PSLRA representational obligations as exclusive bargaining agent, and to ensure that the personal information is securely stored and protected.

[16] Ms Bernard had received no notice of these proceedings and was not involved in them. However, when she became aware of the Board's July decision, she made an application for judicial review to have it set aside. Granting the application, the Court held that the Board had erred by simply adopting the agreement reached by the employer and the union when it was aware that its order affected the statutorily protected privacy rights of third parties, and raised issues requiring further consideration.

[17] Consequently, the Court remitted the matter for a reasoned decision on what information the employer must provide to enable the union to discharge its obligations under the PSLRA as the exclusive bargaining agent of the employees in the bargaining unit, without breaching employees'

rights under the *Privacy Act*. The Court's decision is reported as *Bernard v. Canada*, 2010 FCA 40, 398 N.R. 325 (*Bernard I*).

Decision of the Board

[18] As directed by *Bernard I*, the Board reconsidered its July decision. It received submissions from the CRA, PIPSC, and interveners, notably, Ms Bernard, the OPC, and other public service unions and employers.

[19] In careful and thoughtful reasons for the decision under review in this application, the Board concluded that its July order complied with the *Privacy Act*, but amended it by adding three further privacy safeguards. First, home contact information sent by the employer to the union must be password-protected or encrypted. Second, the employer must advise employees on their initial appointment to a position in the bargaining unit that their home contact information will be shared with the union. Third, home contact information provided by the employer must be appropriately disposed of when the union receives updated information from the employer.

[20] The Board acknowledged that employees' home contact information obtained by the CRA is "personal information" within the meaning of section 3 of the *Privacy Act* and may be disclosed only with the employees' permission (subsection 8(1)) or pursuant to a statutory provision authorizing disclosure. The Board relied on paragraph 8(2)(*a*) as the provision relevant to this case.

8. (2) Subject to any other Act of Parliament, personal information under the control of a government	**8.** (2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui

institution may be disclosed	relèvent d'une institution fédérale est autorisée dans les cas suivants :
(*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;	*a*) communication aux fins auxquelles ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins;
…	[…]

[21] The Board found that the CRA required employees to provide their home address and gave them the option of also providing their home telephone number, which Ms Bernard did. The Board also found that the CRA had obtained this information from employees for the purpose of contacting them about the terms and conditions of their employment. PIPSC wanted the information to enable it to discharge its PSLRA responsibilities as the bargaining agent for all members of the bargaining unit it represented, whether or not they were also members of the union.

[22] Those responsibilities include the duty to represent employees fairly in: collective bargaining; prosecuting complaints against employers; the filing and adjudication of grievances; and conducting strike and final-offer votes. The discharge of these duties may require the union to: gather employee input in order to prepare bargaining positions; verify information given by the employer; give notice of strike action; provide information when conducting strike votes; advise employees of planned downsizing and inquire whether they are considering early retirement; and communicate with employees who may be either affected by essential services agreements or involved in the grievance process.

[23] Drawing on labour board jurisprudence from other jurisdictions, the Board stated that the employment relationship in a unionized environment is “three-way”: employer, employee, and union. On this basis, it held that the CRA’s purpose for obtaining the home contact information (contacting employees about the terms and conditions of their employment) was consistent with the use for which PIPSC would use it (discharging its statutory duties as bargaining agent by contacting employees about employment-related matters).

[24] The fact that the CRA’s 43,000 employees are spread across Canada makes it particularly important for PIPSC to be able to communicate quickly and effectively with members of the bargaining unit. The Board considered means by which PIPSC could communicate with the employees it represents, other than by reaching them at home. These included contacting them at work, posting information on the union’s website, and using its stewards’ network.

[25] On the basis of evidence from PIPSC, the Board concluded that none of these methods were adequate for PIPSC’s purposes. For example, the employer controls its electronic networks and retains the right to review all electronic correspondence; employees’ work contact information often changes; PIPSC’s stewards’ network is patchy, and thus not a reliable means of communication; and PIPSC’s own website is not secure and can be accessed by the employer.

[26] Hence, the Board concluded that PIPSC had to be able to contact bargaining unit members directly and quickly in order to discharge its representational responsibilities, and that this use of home contact information was consistent with the purpose for which the CRA had obtained it.

Accordingly, disclosure to PIPSC of employees' home addresses and telephone numbers for the proposed use was permitted by paragraph 8(2)*(a)*.

Issues and analysis

[27] **Admissibility of evidence:** Objections were made to the inclusion in Ms Bernard's application record of exhibits to her affidavit that were not before the Board. Courts normally conduct judicial review on the basis of the material that was before the administrative decision-maker. In my view, there is no basis for including the impugned exhibits, which in any event are of little, if any, relevance to the issues in dispute in this proceeding.

[28] ***Canadian Charter of Rights and Freedoms*:** In *Bernard I*, the Court's order required the Board to identify the types of information that the employer must provide to PIPSC without violating Ms Bernard's rights under the *Privacy Act*. The Board declined to consider the Charter arguments advanced by Ms Bernard in support of her privacy claim, on the ground that the Court had remitted the matter to it for the sole purpose of determining what types of contact information could be disclosed to PIPSC without violating Ms Bernard's rights under the *Privacy Act*.

[29] Ms Bernard argued that the Board was wrong to so limit the scope of its inquiry because tribunals always have jurisdiction to determine Charter challenges to the exercise of their powers. Further, she noted, the Board had been willing to entertain Charter arguments advanced in the union's written representations prior to its February decision**,** even though, as it turned out, the Board was able to reach a decision without having to decide the Charter issues.

[30] I do not agree with this argument. No doubt, the Board has the statutory jurisdiction to decide any Charter issues necessary to resolve a matter before it; this is why it would have decided in its February decision the Charter issues raised by PIPSC**,** had it been necessary.

[31] The present case, however, is somewhat different, in that the decision under review was made pursuant to a Court-ordered re-determination of the Board's July decision. Hence, the scope of the Board's decision-making authority in that proceeding was defined by the Court's order in *Bernard I*. That order limited the Board to determining how much home contact information the CRA may disclose to PIPSC without infringing Ms Bernard's rights under the *Privacy Act*. It did not authorize the Board to reconsider its February decision in light of Ms Bernard's Charter rights.

[32] **Standard of review:** In the absence of previous jurisprudence involving the particular issues raised in this case, a brief standard of review analysis is required, focussing on the presence of the preclusive clause and, more important, on the nature of the question in dispute. The Board's expertise in labour relations has been judicially acknowledged, as have the statutory objectives of the PSLRA and the role of the Board in the administration of the statutory scheme: see, for example, *Public Service Alliance of Canada v. Senate of Canada*, 2011 FCA 214, 423 N.R. 200 at paras. 21, 27-30.

[33] First, the Board's decisions are protected by a strong preclusive clause in subsection 51(1) of the PSLRA. This provision is a clear signal from Parliament that courts should normally review the

Board's decisions on a standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R 190 at para. 52 (*Dunsmuir*).

[34] Second, whether the CRA can be required to disclose Ms Bernard's home contact information depends, in part, on whether paragraph 8(2)*(a)* of the *Privacy Act* applies. The Board was authorized to interpret and apply section 8 of the *Privacy Act* in this case in order to decide the matter before it. However, the *Privacy Act* is neither the Board's enabling statute, nor one closely related to it. Nor, as far as I am aware, is it a statute that the Board regularly applies. The interpretation of the *Privacy Act* is thus not within the scope of the Board's expertise, and the presumption of judicial deference applicable to the Board's interpretation of its enabling statute, or one closely connected to it, does not apply here.

[35] However, the Board had to decide two intermediate questions before determining if the use for which PIPSC wanted employees' home addresses and telephone numbers was "consistent" with the purposes for which the CRA had obtained this information within the meaning of paragraph 8(2)(*a*).

[36] To be precise, the Board had to make findings of fact about the CRA's purposes in collecting the home contact information and about the use that PIPSC proposed to make of it. In addition, it had to define the scope of the duties imposed by the PSLRA (the Board's "home statute") on PIPSC as the bargaining agent of all members of the AFS bargaining unit, including Ms Bernard. On findings of fact and the interpretation of the PSLRA, the Board is entitled to deference.

[37] Moreover, whether PIPSC's proposed use of the information and the CRA's purpose in obtaining it are "consistent" is a question of mixed fact and law that does not involve any readily extricable question of more general application that would elevate it to one of statutory interpretation. That the question in dispute does not involve the interpretation of the *Privacy Act* weakens the case for reviewing the decision for correctness, especially since the Board was applying a provision of that Act to a labour relations context, its undisputed area of expertise.

[38] On the basis of all these considerations, the decision of the Board in this case should be reviewed on a standard of reasonableness.

[39] **Was the Board's decision reasonable?** Reasonableness is a function of the cogency and transparency of the reasons given by the Board to justify its decision, and of whether the decision itself falls within a range of acceptable outcomes rationally defensible on the law and the facts: *Dunsmuir* at para. 47.

[40] Ms Bernard advances seven arguments to demonstrate that the Board's decision is unreasonable.

[41] First, the Board failed to afford sufficient weight to the submissions and recommendations made to the Board by the OPC to the effect that disclosure of her home contact information was not authorized by paragraph 8(2)*(a)*. Indeed, Ms Bernard went so far as to say that because the OPC had

greater expertise than the Board in privacy rights, the Board was bound to accept the OPC's submissions.

[42] I do not agree. The OPC appeared before the Board as an intervener in the proceeding, in order to ensure that the Board had the benefit of the OPC's particular perspective on issues that the Board had to decide. The Board's function was not to review the OPC's 1993 recommendation, which, as I understand it, was made without input from the public service unions. Rather, the Board's task was to apply paragraph 8(2)(*a*) in a manner that struck an appropriate balance between Ms Bernard's statutory privacy rights and the PSLRA responsibilities of bargaining agents in the federal public service. I would also add that, unlike the Board, the OPC's statutory powers only enable it to make recommendations, not to issue orders.

[43] Second, Ms Bernard argues that the Board did not consider all possible alternatives to the disclosure of employees' home contact information. For example, the CRA could give employees the option of providing a mailing address different from their home address, which the CRA would disclose to the union. Ms Bernard also submitted that the Board was wrong to reject other suggested alternatives because of their cost.

[44] I do not agree with this submission. I shall assume for present purposes that the existence of alternatives to disclosing personal information is relevant to determining whether the proposed use of information is "consistent" with the purpose for which it was obtained by the government institution within the meaning of paragraph 8(2)*(a)*.

[45] Even so, the Board's obligation cannot extend beyond considering alternatives put to it and reaching a conclusion that has a rational basis in the law and the evidence before it. Ms Bernard is seeking to hold the Board to a higher standard than that of reasonableness. It was reasonable for the Board to accept the evidence of witnesses for the CRA and PIPSC on both the feasibility and the cost of alternatives to disclosing employees' home contact information. It is not the function of the Board to canvass every possible means of communication that could be imagined. Moreover, in balancing privacy rights with the union's ability to discharge its statutory duties, the Board may reasonably have regard to the expense that any suggested alternative means of communication might impose on the union and the employer.

[46] Third, Ms Bernard submitted in oral argument that the Board did not consider the disclosure of home addresses and telephone numbers as separate issues. Her point was that, even if PIPSC's role as bargaining agent required it to contact members of the bargaining unit at home, it did not need to call them at home.

[47] However, Ms Bernard had not included this argument in her memorandum of fact and law. Indeed, counsel submitted that no distinction had been made before the Board between addresses and telephone numbers. In these circumstances, it would be unfair to the CRA, PIPSC, and PSAC to attach much weight to this argument.

[48] I would only say that in order to discharge at least some of its duties as bargaining agent (concerning strike votes, for example), PIPSC may often need a more immediate form of communication with employees than that provided by regular mail.

[49] Fifth, Ms Bernard submitted that the disclosure of employees' home contact information could not be necessary for the union to discharge the statutory duties of a bargaining agent. She pointed out that there have been no complaints that PIPSC has failed to discharge its representational duties during the time when it did not have access to this information.

[50] I do not agree. The fact that PIPSC has not had access to this information and an unsupported allegation that no employee has complained about a lack of communication from the union do not prove that the previous arrangements were satisfactory. There is no evidence to rebut the evidence from the official of PIPSC that the union must be able to contact employees at home in order to provide fair representation. The Board also found as a fact that other means of communication were not adequate to enable PIPSC to discharge its statutory responsibilities.

[51] Sixth, Ms Bernard said that she should be able to opt out of receiving timely communications from PIPSC on employment-related matters. However, she has not waived her right to fair representation by PIPSC, assuming that this were legally possible. Meanwhile, as the Board found, a union's ability to directly and quickly contact members of a bargaining unit is integral to the discharge of its duties of fair representation.

[52] Seventh, Ms Bernard notes disparities between the purpose for which she provided the CRA with her home contact information and the uses to which PIPSC proposed to put it. In my view, this misstates the issue. Paragraph 8(2)*(a)* refers to the purpose for which the government institution obtained the information, not the purpose for which the employee provided it. The form filled out by newly hired employees when providing their home contact information stated that it was needed by the CRA for compensation purposes. Ms Lücker, who testified for the CRA, also stated that telephone numbers were needed for business continuity purposes, so that a manager could contact an employee who was away from work, for example. PIPSC said that it required the information so that it could discharge its duties as bargaining agent under the PSLRA. Hence, Ms Bernard submitted, it was not reasonable for the Board to conclude that they were "consistent" for the purpose of paragraph 8(2)(*a*).

[53] I do not agree. A proposed use of information may be "consistent" with the purpose for which it was obtained, even if the government institution's purpose and the other person's proposed use are not identical. It is enough that there is a sufficiently direct connection between purpose and use that an employee would reasonably expect that the information could be used in the manner proposed. In the present case, there is a substantial overlap between the employment-related purposes of both employer and union, in which employees' compensation looms large. Hence, in my view, the Board's conclusion that paragraph 8(2)*(a)* applied to the facts before it was an acceptable outcome reasonably open to it on the facts and the law.

[54] Finally, Ms Bernard is concerned about the potential abuse of any personal information disclosed to PIPSC. In order to reduce this risk, the Board built into its order important protections to ensure that employees' privacy rights are minimally impaired. Thus, PIPSC may only use the personal information disclosed by the CRA for discharging its responsibilities under the PSLRA as bargaining agent, and must take specified measures to ensure that employees' personal information does not fall into others' hands.

[55] True, no safeguards are foolproof. However, to the extent that Ms Bernard's concerns are based on previous experience, I would note that her complaint to the OPC about the abuse of her personal information occurred twenty years ago, when privacy rights were less well protected than they are today. Ms Bernard may always complain to the Board if abuses occur, despite the safeguards that the Board has put in place – safeguards that did not exist in 1993 when the OPC investigated Ms Bernard's complaint.

Conclusions

[56] For these reasons, I would dismiss Ms Bernard's application for judicial review with costs payable to the Attorney General of Canada and to PIPSC.

"John M. Evans"

J.A.

"I agree
Pierre Blais C.J."

"I agree
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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