Privacy Rights and Unionized Employees



Less than a week ago, on February 7, 2014, in *Bernard v. Canada (Attorney General)*, the Supreme Court of Canada ruled that it is not a violation of privacy for unions to collect personal contact information of *all* employees who pay union dues, even if such employees are not members of the union.

Bernard v. Canada (Attorney General) came before the Supreme Court of Canada after a "legal odyssey" (as the Court put it) of three administrative tribunal proceedings and two rounds of judicial review, when Ms. Elizabeth Bernard appealed a finding of the Federal Court of Appeal that a decision of the Public Service Labour Relations Board (the "Board"), which concluded that a union was entitled to an employee's home contact information, was reasonable and did not violate the *Privacy Act*.

Background

The appellant, Elizabeth Bernard, worked for the federal public service and was a "Rand Formula employee", i.e., she was a member of a bargaining unit in the federal public service but was not a member of the union that held exclusive bargaining rights for the bargaining unit.

In 1992, Ms. Bernard filed a complaint with the Office of the Privacy Commissioner (the "OPC") because her employer had given her home address to the union. The OPC concluded that disclosure of such information without the employee's consent violated the *Privacy Act*, and the employer discontinued the practice. However, in 2005, when its representational obligations were significantly expanded as a result of amendments to the *Public Service Labour Relations Act*, the union once again sought home contact information from the employer. When the employer refused to provide the information based on privacy concerns, the union claimed that the employer was engaging in unfair labour practices. This led to the employer and the union bringing consolidated complaints before the Board in September 2007. In the meantime, Ms. Bernard had changed jobs within the federal public service in 1995 and had, once again, become a "Rand Formula employee" when she refused to join the union.

The Board concluded that the employer was required to provide home contact information about bargaining unit members to the union because this information was needed by the union in order to carry out its representational duties and that a refusal to do so amounted, "in principle", to an unfair labour practice. Based on an agreement reached by the parties, the Board then pronounced a consent order on July 2008, whereby the employer was required to disclose the home mailing addresses and home telephone numbers of employees on a quarterly basis. This disclosure was subject

to a number of conditions that related to “the sensitivity of the information being disclosed” and the union’s agreement to “ensure vigilant management and monitoring controls on this information at all times”.

When Ms. Bernard received an e-mail notification of the agreement that had been reached, she sought judicial review of the consent order claiming that the Board’s order to the employer to disclose her personal information without her consent violated the *Privacy Act*. She also claimed that the order violated her *Charter* right not to associate with the union. The Federal Court of Appeal concluded that the Board should have considered the application of the *Privacy Act* and sent the matter back to the Board for redetermination. Upon redetermination, the Board concluded that the original consent order satisfactorily addressed Ms. Bernard’s privacy concerns and that disclosure of home telephone numbers and addresses of bargaining unit employees to the union did not violate the *Privacy Act*, because the disclosure was consistent with the purpose for which the information was obtained. Nevertheless, it put two further safeguards in place – that the information should be provided to the union only on an encrypted basis and that expired home contact information had to be appropriately disposed of after the updated information was received.

Ms. Bernard sought judicial review of the Board’s decision for the second time and when the Federal Court of Appeal concluded that the Board’s decision was reasonable, Ms. Bernard appealed to the Supreme Court of Canada.

Supreme Court’s Decision

In considering Ms. Bernard’s appeal, the Court noted that it was important to understand the labour relations context in which Ms. Bernard’s privacy complaint arose. The Court stated that a key aspect of that context is the principle of majoritarian exclusivity whereby a union has the *exclusive* right to bargain on behalf of ***all*** employees in a bargaining unit, including Rand employees. Based on this right, the union had an obligation to represent ***all*** of the employees in the bargaining unit, including Ms. Bernard, fairly and in good faith. The Court agreed with the Board, that in order to discharge this representational duty, the union needed an *effective* means of contacting employees and that employee work contact information was insufficient for effective communication because the employer controls workplace communications and could monitor such communications, and because the union would not be able to contact employees who were not at work either because they were on some kind of leave, or because of a labour dispute.

The Court also agreed with the Board that a second reason why home contact information should be disclosed to the union was to ensure that the union and the employer were on an equal footing with regard to information that was relevant to the collective bargaining relationship.

The Court further noted that providing the home contact information to the union did not violate the*Privacy Act* because the union’s need to contact employees for representational purposes was a use that was consistent with the purpose for which the information was collected by the employer, such that an employee could reasonably expect that the information would be used in the proposed manner.

The Court also found no merit in Ms. Bernard’s *Charter* argument that she was compelled to associate with the union contrary to s. 2(d) of the *Charter*, because the Board’s order required the employer to provide her personal information to the union. Citing the Court’s decision in *Lavigne v. Ontario Public Service Employees’ Union*, the Court stated that payment of union dues by Rand employees for the purposes of collective bargaining did not amount to unjustified “compelled association” under s. 2(d) of the *Charter* and that even though s. 2(d) protected freedom *from* association

as well as freedom of association, it did not provide a “constitutional right to isolation” and was not intended to protect against association that was necessary and inevitable in a modern democratic community.

Privacy Implications

Privacy rights advocates see the Court’s decision as a significant blow to the protection of employee privacy rights as it opens the door for unions to collect home addresses and telephone numbers of bargaining unit employees. A main concern is that home addresses could be used to gather intimate details about employees, such as home ownership, family status, lifestyles, etc., which would of course be an invasion of privacy.

Privacy rights advocates argue that the Court’s decision goes too far, as there are other less intrusive communication methods that unions could use to contact employees; for example, social media and texting.

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About the Author

Heather Hettiarachchi is Chair of the firm’s Labour & Employment Practice Group. She is also a member of the Higher Learning Group. Her practice focuses on all aspects of employment and labour law, human resource management issues and mediation services.

Heather’s background differs from that of many other labour and employment lawyers as she has a unique combination of legal expertise and extensive, hands-on human resources management and labour relations experience. Prior to being called to the British Columbia Bar, she was a Human Resources Manager at a large Canadian University and Labour Relations Advisor to Vancouver’s oldest community college. Before immigrating to Canada, Heather managed the human resources of a large private insurance company.

Heather articled with a leading labour and employment boutique firm in Vancouver and was an associate in the labour and employment group of an eminent national firm prior to joining Clark Wilson.

While at university, Heather was actively involved in collective bargaining with CUPE and gained considerable experience in job evaluation, job classification and compensation, return to work issues, and health and safety. She was also on the President’s advisory committee on discrimination and harassment.

Heather was called to the Bar of British Columbia after attending law school at the University of British Columbia in order to obtain Canadian Accreditation of her legal qualifications. She previously graduated with a LL.B. (Honours) degree from the University of Colombo, Sri Lanka, in 1992. Heather also earned an M.Sc. in Training & Human Resources Management from the University of Leicester, UK, in 2001.

Heather has taught labour law as a Visiting Lecturer at the Faculty of Law, University of Colombo and the Open University of Sri Lanka.[/author]