Case In Point

Privacy Rights vs. Union's Duty to Represent its Membership: The Bernard Case Concludes

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The Supreme Court of Canada dismissed the appeal in *Bernard v. Canada (Attorney General)*, thus ending the "legal odyssey" of an employee who did not want her personal information disclosed to the unions which she declined to join during her years of employment with the federal government, but to which she was mandatorily obligated to pay union dues.

As previously reported, Ms Bernard filed a complaint with the Office of the Privacy Commissioner after learning that her employer had disclosed her home address to the union representing the bargaining unit to which she then belonged. The employer subsequently ceased disclosing such information, ultimately causing the Professional Institute of the Public Service of Canada ("PIPSC") to file an unfair labour practice complaint with the Public Service Labour Relations Board ("Board") against it. The Board ruled that the employer's failure to provide employee home addresses and phone numbers to the bargaining agent interfered in the union's representation rights. It ordered disclosure of the requested information for all bargaining unit employees, whether employees were union members or—like Ms Bernard—not. The Board concluded that PIPSC required Ms. Bernard's personal information to properly discharge its duties as her bargaining agent and discharge its representational duties under the *Public Service Labour Relations Act* ("PSLRA"). This disclosure was authorized by section 8(2)(a) of the *Privacy Act* because the purpose for disclosure was consistent with the reasons for which it was collected – i.e. "compensation" and "business continuity" purposes.

A majority of the Supreme Court of Canada found that the Board's decision was reasonable, and specifically, that PIPSC's use of home contact information was "consistent" with the purpose for which it was collected within the meaning of s. 8(2)(a) of the *Privacy Act.* Central to the majority's decision was its consideration of the labour relations context in which Ms Bernard's privacy complaints arose. It noted that a key "cornerstone" of labour relations law in Canada is majoritarian exclusivity: the union has an "*exclusive* right to bargain on behalf of *all* employees in a given bargaining unit," [para. 21] including so-called "Rand employees" like Ms Bernard. While Rand employees are not required to join the union, they are not permitted to "opt out of the exclusive bargaining relationship, nor the representational duties that a union owes to employees" [para. 21].

Against this backdrop, the Court accepted the two rationales underlying the Board's finding that the employer's refusal to disclose employee home contact information constituted an unfair labour practice. First, the majority recognized that unions need an "*effective* means" of contacting employees in order to discharge the specific representational duties imposed by the PSLRA [para. 24]. Second, unions must be on an "equal footing" with the employer with respect to relevant employee information in the context of a collective bargaining relationship [para. 26]. In finding the Board's conclusions on both points "clearly justified," the Court ruled as follows:

[27] …The union's need to be able to communicate with employees in the bargaining unit cannot be satisfied by reliance on the employer's facilities. As the Board observed, the employer can control the means of workplace communication, can implement policies that restrict all workplace communications, including with the union, and can monitor communications. Moreover, the union may have representational duties to employees whom it cannot contact at work, such as employees who are on leave, or who are not at work because of a labour dispute.

[28] The second rationale — equality of information between the employer and the union — further supports the Board's conclusion. The tripartite nature of the employment relationship means that information disclosed to the employer that is necessary for the union to carry out its representational duties should be disclosed to the union in order to ensure that the union and employer are on an equal footing with respect to information relevant to the collective bargaining relationship.

[29] Moreover, an employee cannot waive his or her right to be fairly — and exclusively — represented by the union. Given that the union owes legal obligations to *all* employees — whether or not they are Rand employees — and may have to communicate with them quickly, the union should not be deprived of information in the hands of the employer that could assist in fulfilling these obligations.

In determining whether the disclosure of Ms. Bernard's personal information by the employer to the PIPSC was authorized by section 8(2)(a) of the *Privacy Act*, the Court noted that a use must be "*consistent*" with the purpose for which information was collected – not identical to that purpose. In its view, "there need only be a sufficiently direct connection between the purpose and the proposed use, such that an employee would reasonably expect that the information could be used in the manner proposed" [para. 31]. Here, the Court found that the Board made a reasonable determination in identifying PIPSC's proposed use as being "consistent" with the purpose for which it was collected – that is, contacting employees quickly and effectively about terms and conditions of their employment, in order to discharge their representational duties under the applicable legislation [para. 32].

A majority of the Court summarily dismissed Ms Bernard's *Charter*-based arguments that disclosure of her personal information violated her freedom of association as provided by section 2(d), which the Board had declined to consider. Moreover, Ms Bernard could not assert the disclosure amounted to an unconstitutional search and seizure within the meaning of section 8 of the *Charter*, as in this labour relations context, there is no reasonable expectation of privacy in such employee information.

Bernard v. Canada (Attorney General)