CANADIAN PRIVACY LAW REVIEW

Volume 11 • Number 5 April 2014

In This Issue:

Privacy Rights and Unionized Employees
Heather Hettiarachchi.................. 41

Federal Court Balances Copyright Enforcement and Internet Privacy
R. Scott MacKendrick, Jerry Z. Chen, and Tamara Winegust........................ 44

New Anti-Spam Legislation Could Bolster Canadian Privacy Commissioner's Call for Greater *PIPEDA* Enforcement Powers
David Spratley............................... 45

Like It or Not—Nova Scotia Courts Decide on Production of Electronic Information
Brian Perry and Ian Dunbar.............. 46

Fixing Alberta's Privacy Legislation
Bob Pakrul..................................... 49

Ontario Court Allows Privacy Class Action to Proceed
Catherine Beagan Flood and Nicole Henderson........................ 51

LexisNexis

Privacy Rights and Unionized Employees

Heather Hettiarachchi
Associate
Clark Wilson LLP

On February 7, 2014, in *Bernard v. Canada (Attorney General)*,[1] 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*.[2]

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*,[3] the union once again sought home contact information from the employer. When, based on privacy concerns, the employer refused to provide the information, 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 in 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".[4]

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 of Rights and Freedoms* ("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

Canadian Privacy Law Review

The **Canadian Privacy Law Review** is published monthly by LexisNexis Canada Inc., 123 Commerce Valley Drive East, Suite 700, Markham, Ont., L3T 7W8, and is available by subscription only.

Web site: www.lexisnexis.ca

Design and compilation © LexisNexis Canada Inc. 2014. Unless otherwise stated, copyright in individual articles rests with the contributors.

ISBN 0-433-44417-7 **ISSN 1708-5446**
ISBN 0-433-44418-5 (print & PDF)
ISBN 0-433-44650-1 (PDF)
ISSN 1708-5454 (PDF)

Subscription rates: $265.00 (print or PDF)
$405.00 (print & PDF)

Editor-in-Chief:

Professor Michael A. Geist
Canada Research Chair in Internet and E-Commerce Law
University of Ottawa, Faculty of Law
E-mail: mgeist@uottawa.ca

LexisNexis Editor:

Boris Roginsky
LexisNexis Canada Inc.
Tel.: (905) 479-2665 ext. 308
Fax: (905) 479-2826
E-mail: cplr@lexisnexis.ca

Advisory Board:

- **Ann Cavoukian**, Information and Privacy Commissioner of Ontario, Toronto
- **David Flaherty**, Privacy Consultant, Victoria
- **Elizabeth Judge**, University of Ottawa
- **Christopher Kuner**, Hunton & Williams, Brussels
- **Suzanne Morin**, Ottawa
- **Bill Munson**, Information Technology Association of Canada, Toronto
- **Stephanie Perrin**, Service Canada, Integrity Risk Management and Operations, Gatineau
- **Patricia Wilson**, Osler, Hoskin & Harcourt LLP, Ottawa

Note: This Review solicits manuscripts for consideration by the Editor-in-Chief, who reserves the right to reject any manuscript or to publish it in revised form. The articles included in the *Canadian Privacy Law Review* reflect the views of the individual authors and do not necessarily reflect the views of the advisory board members. This Review is not intended to provide legal or other professional advice and readers should not act on the information contained in this Review without seeking specific independent advice on the particular matters with which they are concerned.

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*,[5] 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"[6] 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, because this decision 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, because there are other less intrusive communication methods that unions could use to contact employees (*e.g.*, social media and texting).

---

1 [2014] S.C.J. No. 13, 2014 SCC 13.
2 R.S.C. 1985, c. P-21.
3 S.C. 2003, c. 22.
4 *Supra* note 1, para. 10.
5 [1991] S.C.J. No. 52, [1991] 2 S.C.R. 211.
6 *Supra* note 1, para. 38.