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Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

ELIZABETH BERNARD

Applicant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, TREASURY BOARD and CANADA REVENUE AGENCY

Respondents

Indexed as
Bernard v. Professional Institute of the Public Service of Canada, Treasury Board and Canada Revenue Agency

In the matter of a request for the Board to exercise any of its powers under section 43 of the *Public Service Labour Relations Act*

Before: Kate Rogers, a panel of the Public Service Labour Relations and Employment Board

For the Applicant: Herself

For the Respondents: Patrizia Campanella, counsel, Professional Institute of the Public Service of Canada, and Caroline Engmann, counsel, Treasury Board and Canada Revenue Agency

Decided on the basis of written submissions, filed August 14 and 22, 2014.

[1] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board (PSLRB or "the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*. Further, pursuant to section 395 of the *Economic Action Plan 2013 Act, No. 2*, a member of the former Board seized of this matter before November 1, 2014, exercises the same powers, and performs the same duties and functions, as a panel of the new Board.

I. Request before the Board

[2] On April 24, 2014, Elizabeth Bernard ("the applicant") requested that the former Board reconsider a decision, *Professional Institute of the Public Service of Canada v. Treasury Board and Canada Revenue Agency*, 2008 PSLRB 13 ("*PIPSC 1*"), rendered on complaints filed by the Professional Institute of the Public Service of Canada (PIPSC or "the union") against the Treasury Board (TB) and the Canada Revenue Agency (CRA) (collectively, "the employer") under paragraphs 190(1)(*b*) and (*g*) of the *PSLRA*.

[3] The applicant based her request for a reconsideration of *PIPSC 1* on the fact that employees who were directly affected by the decision were not given notice of the hearing and therefore were not afforded an opportunity to make submissions. She noted that the decision found that the union's representational responsibilities in the conduct of strike votes and final-offer votes, as set out in sections 184 and 187 of the *PSLRA*, justified the disclosure of the kind of personal information sought by the union in its complaint. She stated that the parties' submissions and arguments before Dan Butler, who heard *PIPSC 1*, failed to consider the legislative history surrounding the issue of strike votes and final-offer votes and, in particular, failed to reference the extensive parliamentary debate that surrounded proposed amendments to the *Canada*

Labour Code (R.S.C., 1985, c. L-2; "the *Code*") following the release of the report entitled, *Canada Labour Code Review, Seeking a Balance (1995).*

[4] The applicant attached a number of documents to her application for reconsideration, including the written submissions filed by the parties to *PIPSC 1*, an extract from the House of Commons, *Official Report of Debates (Hansard)*, 36th Parliament, 1st Session, No. 63, Volume 135 (Thursday, February 19, 1998), at 4166 (Hon. Lawrence MacAulay); an extract from the Senate of Canada, *Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology*, June 16, 1998; and an extract from the House of Commons, *Official Report of Debates (Hansard)*, 37th Parliament, 2nd Session, No. 110, Volume 138 (Tuesday, June 3, 2003), at 6775 (Mac Harb). She noted that she intended to provide additional documents, and on June 16, 2014, she provided a disc with a large number of documents that included copies of the bills introducing legislative amendments to the *Code*, a copy of the *PSLRA*, extracts from a number of House of Commons debates on the amendments to the *Code* and to the *PSLRA*, case law, and miscellaneous documents.

[5] The applicant submitted that the parties appearing before the parliamentary committees generally agreed that under of section 109.1 of the *Code* that employee home contact information would not be given to the union without the consent of employees. In the applicant's view, under the modern rules of statutory interpretation, the words of a legislative provision are to be read in their entire context and in their grammatical and ordinary sense, harmoniously and consistently with the scheme and object of the Act at issue and the intention of Parliament. The panel of the former Board did not have evidence of the legislative history in order to determine Parliament's intention when it found that there was a requirement to disclose under paragraph 186(1)(*a*) of the *PSLRA*.

[6] The applicant stated that the purpose of her request for a reconsideration was to allow the Board to consider evidence and argument of the relevant legislative history, which she believes should have been considered before the panel of the former Board rendered its decision in *PIPSC 1*. She stated that she could not have presented the evidence or argument at the original hearing because she was not given notice of it. She also noted that section 43 of the *PSLRA* does not contain a limitation period. Furthermore, she noted that the delay in seeking a reconsideration of *PIPSC 1* was caused because she was actively pursuing her rights under the *Privacy Act* (R.S.C.,

1985, c. P-21) and the *Canadian Charter of Rights and Freedoms* ("the *Charter*") through the former Board and the courts. Had she been successful, it would not have been necessary to ask for a reconsideration of *PIPSC 1.*

[7] The respondents opposed the request for reconsideration on the grounds that it was untimely and without merit. Their submissions are summarized below.

II. Background

[8] The applicant is a CRA employee and is in the Audit, Financial and Scientific (AFS) group. The AFS group is a bargaining unit represented by the union, although the applicant is a Rand formula employee in the bargaining unit and is not a union member.

[9] At the heart of her request for reconsideration is the applicant's determined attempt to prevent the disclosure of her personal information to the union. Although her battle on this issue began in 1992, when she filed a complaint to the Office of the Privacy Commissioner (OPC), the recent skirmish began in 2008 and ultimately involved three PSLRB decisions, two decisions of the Federal Court of Appeal (FCA), a decision of the Supreme Court of Canada (SCC) and a request for a reconsideration of the SCC decision. This request for a reconsideration of *PIPSC 1* cannot be considered in isolation from the extensive litigation history between the parties to it.

[10] In 2007, the PIPSC filed complaints against the TB and the CRA under paragraph 190(1)(*b*) of the *PSLRA*, alleging their failure to comply with the duty to bargain in good faith under section 106, and under paragraph 190(1)(*g*), alleging an unfair labour practice within the meaning of section 185. The complaints also alleged violations of the *Charter.* The PIPSC, the TB and the CRA were the parties to the complaints, which were dealt with by way of written submissions. Employees in the affected bargaining units, including the applicant, were not given notice of the complaints and were not afforded the opportunity to intervene in the process.

[11] At the heart of the complaints was the employer's refusal to provide to the union employee contact information. Specifically, the union wanted the employer to provide the names, position titles, phone numbers, home addresses and home email addresses for all employees in the six specified bargaining units at the CRA for which

the union was the certified bargaining agent, including the AFS bargaining unit that included the applicant.

[12] The union's claim was based on its understanding that section 187 of the *PSLRA* imposed on unions a legal obligation to represent their members in good faith and in a non-arbitrary manner, whether at the bargaining table or on grievances and complaints. To meet that obligation, the union had to be able to communicate with employees in the bargaining unit. It argued that rulings under provincial labour legislation and under the *Code* have affirmed that in order for unions to fulfill their statutory obligations, they must be able to communicate with employees in their bargaining units, and therefore, they are entitled to receive from employers personal information about employees in their bargaining units.

[13] The employer did not challenge the principle that the union was entitled to some disclosure of employee contact information for its legitimate purposes as bargaining agent. Its concerns arose from practical considerations, including a concern about the union's ability to manage employees' personal information in a manner consistent with the requirements of the *Privacy Act.*

[14] In what he described as an interim finding, Mr. Butler noted that the union had identified section 187 of the *PSLRA* as the source of its legal obligations. However, he considered that although section 187 provided the context for the union's obligations, the foundation of its concerns arose in the application of paragraph 186(1)(*a*). He found that the case law cited by the union from other major jurisdictions and from the Public Service Staff Relations Board (PSSRB) supported the conclusion that an employer's failure to provide employee contact information to the union constituted ". . . the type of interference in a bargaining agent's representation of employees that this type of statutory provision is intended to prevent." He held that proof that the union had submitted a request for information, that the information could be tied to legitimate representational purposes under the statute and that the employer refused the request would generally be sufficient to found a complaint.

[15] In considering whether the union's request for information was for legitimate representational purposes, Mr. Butler examined the representational obligations imposed on unions by the *PSLRA.* In particular, he considered the obligation to conduct a strike vote under section 184 or a final-offer vote under section 183 and the

obligations imposed under sections 119 to 134 on essential services. He found that both sections 183 and 184, for example, required the union to give every employee in the bargaining unit a reasonable opportunity to participate in either a strike vote or a final-offer vote. Therefore, he found that a failure by the employer to provide the employee contact information necessary for that purpose would constitute interference in the union's representation of employees within the meaning of paragraph 186(1)(*a*).

[16] Although Mr. Butler found that there was, in principle, a requirement on the employer to provide the union with at least some of the employee contact information it sought, he did not rule on the issue of whether home contact was essential. He stated at paragraph 61 of *PIPSC 1* as follows:

> *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.*

[17] Despite finding that there were in principle grounds to grant the union's complaint, Mr. Butler considered that he did not have sufficient information on which to grant a remedy. In particular, he indicated that he required more information on, for example, the content and accuracy of the employee contact information in the employer's possession and the precise information required by the union to meet its obligations under the legislation, in addition to information on the means by which the employer could meet its obligations to provide information that would also address any concerns arising under the *Privacy Act*. Believing that the parties could best determine the appropriate corrective action, he directed them to consult for the purpose of reaching a voluntary agreement on the employee contact information that the employer would provide to the union. However, if they were unable to reach an agreement, he stated that he would reconvene a hearing to hear submissions on the appropriate remedy.

[18] A hearing was reconvened in July 2008, but the parties reached an agreement that they asked the former Board to incorporate into an order of the Board. That consent order was issued on July 18, 2008 (2008 PSLRB 58; "*PIPSC 2*"). In it, the

employer agreed to disclose to the union employee contact information, including the home mailing addresses and home phone numbers of the employees in the bargaining unit that it had in its possession, on a quarterly basis, in accordance with certain technical conditions. The union agreed to ensure that the information disclosed would be used solely for the legitimate purposes set out in the *PSLRA* and agreed to a number of conditions with respect to protecting the privacy of the members of the bargaining unit and the security of the information. Both parties agreed that before the initial disclosure of the information to the union, they would jointly advise employees that the information would be disclosed, and they agreed to the text of the message to be sent to employees.

[19] When the applicant received a copy of the joint message to employees in the bargaining unit, she filed an application for judicial review of *PIPSC 2* with the FCA (*Bernard v. Attorney General of Canada*, 2010 FCA 40; "*Bernard 1*") on the grounds that the decision would require the employer to violate the *Privacy Act* by ordering it to release her personal information without her consent. She also claimed that the PSLRB had to defer to the OPC on privacy matters, particularly given the OPC's ruling on her complaint made in 1992. She also contended that she should have been given notice of the PSLRB proceedings. Finally, she argued that the decision breached her *Charter* right not to associate with the union.

[20] Since the applicant had not challenged *PIPSC 1*, which established that the failure to provide at least some of the employee contact information requested by the union constituted interference, in contravention of paragraph 186(1)(*a*) of the *PSLRA*, the FCA declared that the issue before it was ". . . the nature of the [contact] information to be provided and the circumstances under which it must be provided."

[21] The FCA upheld the judicial review application on the basis that the PSLRB should not have adopted the parties' agreement without considering the application of the *Privacy Act* to the disclosure of employees' personal information, particularly because the decision in *PIPSC 2* engaged the statutory privacy rights of people who were not before it. It remitted the matter back to the PSLRB for redetermination on the issue of the nature of the information the employer had to provide the union to allow it to discharge its statutory obligations. The FCA further directed that the applicant and the OPC were to be given standing to address the privacy issues raised by the

decision. It held that it would be premature to deal with the *Charter* issues raised by the applicant and found that it was not necessary to deal with the issue of notice.

[22] The redetermination hearing (*Professional Institute of the Public Service of Canada v. Canada Revenue Agency*, 2011 PSLRB 34; "*PIPSC 3*") was heard by Vice-Chair Mackenzie. The applicant, the OPC and other unions with agreements similar in nature to the one adopted in *PIPSC 2* were granted status as intervenors. Because of pre-hearing rulings, the issue at the hearing was limited to a consideration of the privacy rights of employees and would not include the *Charter* arguments that the applicant wanted to advance.

[23] Evidence and argument were presented about the union's need for employee contact information for the purposes of, among other things, giving employees in the bargaining unit notice of final-offer votes or strike votes (sections 183 and 184 of the *PSLRA*) and to develop essential services agreements. The union advanced the position that work contact information alone would not be sufficient to allow it to fulfill its statutory obligations and argued that its use of home contact information would be consistent with the purpose for which it was collected and that it was necessary for it to comply with its obligations under the *PSLRA.* On that basis, the union contended that disclosure is permitted under subsection 8(2) of the *Privacy Act.* It further noted that a number of other labour boards had found that disclosing home contact information was necessary in order for unions to comply with their statutory obligations. The union's evidence and argument on its requirement for employee contact information were supported by the arguments of the other union intervenors and were not challenged in any significant way by the employer.

[24] The applicant acknowledged that the union required some employee contact information to carry out its statutory obligations but argued that home contact information was not required. She suggested that there was no evidence that the union had not been able to meet the new obligations imposed on it by the statutory amendments that created the *PSLRA* in 2005, even though it had not had employee home contact information. She believed that her privacy rights could not be superseded by union rights, and she noted a number of practical concerns about the union securing and protecting her personal information.

[25] Mr. Mackenzie found that work contact information is not sufficient to allow the union to meet its obligation to represent all employees in the bargaining unit. He held that if the union is to fulfill its duty of fair representation, it must be able to contact the employees that it represents directly, quickly and effectively. He noted that disclosing home contact information to the union should not be confused with disclosing home contact information to the public. The union is a participant in a tripartite employment relationship, and providing it employee home contact information is an important consequence of that relationship.

[26] Noting that the PSSRB had examined the issue of disclosing personal information in 1996 and had concluded that doing so to the union was authorized under paragraph 8(2)(*a*) and subparagraph 8(2)(*m*)(ii) of the *Privacy Act* because the disclosure was consistent with the purpose for which the information was collected, Mr. Mackenzie concluded that disclosing home contact information was permitted under paragraph 8(2)(*a*). The employer obtained the relevant information for the purpose of contacting employees about employment-related matters, and the union intended to use the information to meet its obligations to represent employees in the bargaining unit on employment-related matters. He noted that labour boards in other jurisdictions had come to similar conclusions.

[27] Mr. Mackenzie reviewed the provisions of the consent order to determine whether employees' privacy interests were adequately addressed in it in light of the concerns raised by the OPC and the applicant. He found that in two areas, the consent order was deficient, and he ordered that additional measures be included to ensure the secure transmission of home contact information and the proper and timely disposal of out-of-date information. He also added a provision dealing with giving notice to employees, following their initial appointments to positions, about home contact information being shared with the union. The other provisions of the consent order in *PIPSC 2* remained intact.

[28] The applicant filed an application for judicial review of *PIPSC 3* (*Bernard v. Attorney General of Canada*, 2012 FCA 92; "*FCA Bernard 2*"). She argued that Mr. Mackenzie's decision was unreasonable on the grounds that he failed to give the proper weight to the OPC's submissions and recommendations, he failed to consider possible alternatives to disclosing employees' home contact information, and he failed to distinguish between disclosing home addresses and disclosing home phone

numbers. She contended that the union could not have needed the disclosure of employees' home contact information to meet its statutory obligations because there had been no complaints that the union had not met its obligations during the time that it did not have access to home contact information. She also contended that she ought to be allowed to opt out of receiving information from the union, although she did not waive her right to fair representation by the union. She also contended that the use of the contact information that the union proposed was inconsistent with the purpose for which she provided the information to the employer.

[29] Finding that the standard of review in the application before it was reasonableness, the FCA held that the *PIPSC 3* decision was reasonable and dismissed the application for judicial review. In particular, it did not agree that Mr. Mackenzie was bound to accept the OPC's submissions and recommendations and instead found that the Board's function was to find an appropriate balance between the applicant's statutory privacy rights and the obligations imposed on unions by the *PSLRA*.

[30] The FCA further found that it was reasonable for Mr. Mackenzie to accept the evidence of the employer and the union on the feasibility and costs of alternatives to disclosing employees' home contact information. It also held that since no one had argued that there was a distinction to be made between providing employees' home addresses and their home phone numbers, it would not have been appropriate to give that argument any weight. In any event, the FCA noted that to discharge its obligations under the *PSLRA*, the union might need a more immediate method of contacting employees in the bargaining unit than communicating with them by mail would allow and further noted that Mr. Mackenzie found as a fact that means other than home contact would not be adequate to satisfy the union's statutory obligations. It also noted that the applicant had not waived her right to fair representation by the union and that Mr. Mackenzie had found that the union's ability to contact employees in the bargaining unit quickly and directly was integral to the discharge of its duty of fair representation.

[31] Finally, the FCA dismissed the applicant's argument that the use that the union proposed for the home contact information was not consistent with the use for which the employer collected the information, and it dismissed her concern about the potential abuse of the information.

[32] The applicant sought and was granted leave to appeal *Bernard 2* to the SCC. The appeal was dismissed in *Bernard v. Canada (Attorney General)*, 2014 SCC 13 ("*SCC Bernard*"), with a partial dissent on the issue of whether the former Board was correct in declining to hear the applicant's *Charter* arguments in *PIPSC 3.*

[33] The SCC found that it was necessary to determine the reasonableness of the *PIPSC 3* decision within the labour relations context in which the applicant's privacy concerns arose. It noted that a union has the exclusive right to bargain on behalf of all employees in the bargaining units that it represents, including Rand employees. Concomitant with that right, the union has the obligation to represent all employees in the bargaining unit fairly and in good faith. Employees are not obligated to become members of the union but cannot opt out of the bargaining relationship and cannot waive the union's representational responsibilities.

[34] Under the *PSLRA*, the union is required to provide all employees in the bargaining unit with a reasonable opportunity to participate in a strike vote or final-offer vote and to be notified of the result of such a vote (sections 184 and 183). In that context, the former Board held that the employer's refusal to provide home contact information constituted an unfair labour practice within the meaning of subsection 186(1) because it interfered with the union's representation of employees.

[35] The SCC found that conclusion reasonable. It agreed that the union's obligations to all employees in the bargaining unit necessitated that it have an effective means of communication that could not be satisfied by relying on the use of the employer's facilities or workplace communications. It further agreed that the tripartite nature of the relationship meant that the union must be on equal footing with the employer and that the information disclosed to the employer that is necessary for the union to carry out its duties must be disclosed to the union to ensure that the employer and the union are on equal ground concerning information relevant to the collective bargaining relationship.

[36] In considering whether the union's proposed use of employee home contact information fell within the exception under paragraph 8(2)(*a*) of the *Privacy Act*, the SCC noted that the proposed use of the information need not be identical to the purpose for which the employer collected the information. Rather, the proposed use need only be consistent with that purpose. It agreed with the finding in *PIPSC 3* that

the union's proposed use of the information was for the purpose of contacting employees in the bargaining unit about terms and conditions of employment and that the union required the information to carry out its representational responsibilities. It further agreed that the union's proposed use of the information was for a purpose consistent with the purpose for which the information was collected, which was to allow the employer to contact employees about the terms and conditions of their employment.

[37] The SCC also considered and rejected the applicant's *Charter* arguments, even though the majority of the Court found that Mr. Mackenzie's determination was reasonable that his mandate on reconsideration did not include the applicant's *Charter* arguments. Accordingly, the applicant's appeal was dismissed. Her request that the SCC reconsider that decision was also dismissed.

III. Summary of the submissions

A. For the union

[38] Citing *Czmola v. Treasury Board (Solicitor General - Correctional Service Canada)*, 2003 PSSRB 93; *Quigley v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 125-02-77 (19980604); and *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 39, the union submitted that the purpose of a reconsideration is to allow a party to present new evidence or arguments that could not reasonably have been presented at the time of the original hearing. However, it is not an alternate method of appeal; nor is it a relitigation of the merits of the case.

[39] The union noted particularly the factors for a reconsideration set out in *Chaudhry*, which held that a reconsideration must not be a relitigation of the merits of the case, must be based on a material change in circumstances, and must consider only new evidence or arguments that could not reasonably have been presented at the original hearing. The new evidence or argument must be of such a character that it will have a material and determining effect of the outcome of the matter. Finally, there must be a compelling reason for a reconsideration, and it must be timely. The union also noted the caution set out in *Czmola* to the effect that a reconsideration should be used "judiciously, infrequently and carefully."

[40] The union submitted that the applicant's request for a reconsideration under section 43 of the *PSLRA* is an attempt to relitigate a matter to which she was not a party on the grounds that she should have been given notice of the proceedings and should have been given an opportunity to participate in it. However, it was open to the applicant to challenge the lack of notice to her and to seek judicial review of *PIPSC 1* at the same time as she sought judicial review of *PIPSC 2*. She did not. Her request for a reconsideration of *PIPSC 1* is an untimely and improper attempt to obtain standing. She understood the process, having applied for judicial review of *PIPSC 2* and having been given limited standing in *PIPSC 3* as a result of that application. It is too late for her to request a reconsideration of a decision that preceded the decision that she challenged.

[41] The union also submitted that the documents and information that the applicant wants to advance in support of a reconsideration of *PIPSC 1* do not fall within any of the grounds for a reconsideration. They do not relate to a material change in circumstances but instead concern an argument on historical interpretation based on documents that were readily available to her when she filed her application for judicial review of *PIPSC 2* and that could have been presented at the subsequent hearings.

[42] The union also argued that the documents and information in question could not reasonably be expected to have a material and determining effect on the outcome of *PIPSC 1*, especially in light of the litigation that followed, up to and including the SCC's decision.

[43] The union submitted that it is entitled to the timely and final resolution of its complaint under the *PSLRA*. The *PIPSC 1* decision was released over six years ago; therefore, the application for reconsideration should be found untimely and should be dismissed on that basis and on the basis that it does not meet the requirements for a reconsideration set out in *Chaudhry.*

B. <u>For the employer</u>

[44] The employer noted the guidelines for reconsideration set out in *Chaudhry*. It observed that the applicant's request was based on two grounds: first, that the parties' submissions leading to the decision in *PIPSC 1* focused on case law from provincial labour boards, and second, that the parties failed to make submissions on the

legislative history of the relevant statutory provisions; therefore, the former Board did not have the details of the relevant legislative history in order to determine Parliament's intent.

[45] The employer stated that the materials filed by the applicant suggest that the argument that she intends to advance on a reconsideration relates to privacy and *Charter* issues, which the SCC fully addressed. In essence, the applicant is seeking to relitigate the unfair labour practice complaint. Citing *Gilkinson v. Professional Institute of the Public Service of Canada*, 2013 PSLRB 141, the employer contended that relitigation is not an appropriate exercise of discretion under section 43 of the *PSLRA*.

[46] The employer quoted extensively from the SCC decision to demonstrate that the new arguments that the applicant wishes to advance through her application for reconsideration have already been considered by the highest court in the country and that the SCC implicitly affirmed *PIPSC 1.* On that basis, the employer requested that the application for reconsideration be dismissed.

C. Applicant's rebuttal

[47] The applicant stated that under section 14 of the *Public Service Labour Relations Regulations*, SOR/2005-79 ("the *Regulations*"), she was a person directly affected by the proceeding in *PIPSC 1* and that the former Board erred when it failed to give her notice of the proceeding. Had she been informed about the proceeding, she would have applied to intervene in accordance with section 14.

[48] The applicant acknowledged that she could have applied for judicial review of *PIPSC 1*. She stated that she chose to pursue arguments under the *Charter* and the *Privacy Act* instead of initiating a request for a reconsideration of the former Board's statutory interpretation of paragraph 186(1)(*a*) of the *PSLRA* in *PIPSC 1* because if her chosen course of action had been successful, it would not have been necessary to seek a reconsideration of *PIPSC 1.* She contended that her decision to pursue one remedy over another was sensible and was consistent with the approach mandated by the SCC in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, when it held that, at para 18, persons who claim to have been injured by government action should be able to pursue their claims through the legal system through processes that "minimize unnecessary cost and complexity."

[49] The applicant noted that section 43 of the *PSLRA* does not specify a time limit for applications for reconsideration. She stated that the former Board and its predecessor, the PSSRB, routinely considered reconsideration applications that were filed years after the original decisions were made. In that regard, she cited *Treasury Board of Canada v. Association of Justice Counsel*, 2014 PSLRB 68; *Professional Institute of the Public Service of Canada v. Treasury Board*, 2011 PSLRB 81; *Public Service Alliance of Canada v. Treasury Board*, 2010 PSLRB 57; *Treasury Board (Canada Border Services Agency) v. Public Service Alliance of Canada*, 2007 PSLRB 22; and *Association of Public Service Financial Administrators v. Treasury Board of Canada*, 2004 PSSRB 61.

[50] The applicant contended that it was absurd for the union to suggest that she could have presented her arguments with respect to the statutory interpretation of paragraph 186(1)(*a*) of the *PSLRA* at any of the hearings in which she participated. She noted that Mr. Mackenzie refused to allow her to present *Charter* arguments and that therefore he would not have allowed any evidence or argument relating to statutory interpretation. Furthermore, he refused to admit some documents that she wished to present on the grounds that they did not relate to the *Privacy Act* issue. The FCA also refused to allow her to submit documents that had not been before Mr. Mackenzie in the hearing of *Bernard 2*.

[51] The applicant also argued that the SCC made it clear that it was not reviewing the former Board's interpretation of paragraph 186(1)(*a*) of the *PSLRA* after the union opposed the suggestion that the interpretation of that provision was a threshold question. She noted that during the hearing, Justice Abella stated that the Court was not reviewing *Millcroft Inn Ltd. v. CAW-Canada, Local 448* (2000), 63 C.L.R.B.R. (2d) 181. Given the SCC's position, the applicant contended that it was clear that she could not have raised the issue of statutory interpretation at any of the proceedings that she participated in following *PIPSC 1.*

[52] The applicant submitted that the union had only itself to blame for the length of time that it has taken for the resolution of its 2007 complaint because it failed to present evidence that it possessed about the number of employees who would be affected by the proceedings in *PIPSC 1* and did not mention in its submissions to the former Board that it had informed the parliamentary committee during the debates on sections 183 and 184 of the *PSLRA* that it did not have access to Rand employee contact information before the legislation was passed.

[53] The applicant contended that the *Gilkinson* decision had no relevance to her application. Unlike the applicant in that case, she was not given notice of the proceedings in *PIPSC 1* and therefore did not have the opportunity to provide arguments or evidence concerning the former Board's interpretation of paragraph 186(1)(*a*) of the *PSLRA*.

[54] The applicant stated that it is a fundamental principle that the adversarial system operates by way of partisan advocacy. However, that was not the case in the *PIPSC 1* process. As noted by the panel of the former Board, the parties before it were largely in agreement. The applicant stated that the employer did not challenge the union's claim and did not argue as it should have that its refusal to provide home contact information was consistent with Parliament's intention and with the object and scheme of the *PSLRA* as a whole. The employer also did not argue that if it complied with the union's request, it would be interfering in the administration of the union, which is prohibited by paragraph 186(1)(*a*) of the *PSLRA*. The applicant stated that if the process in *PIPSC 1* had been properly adversarial, the employer would have argued that the PSLRB had no jurisdiction to order disclosure.

[55] The applicant stated that contrary to the suggestion that the SCC dealt with the interpretation of paragraph 186(1)(*a*) of the *PSLRA*, the Court's decision did not mention it, and Justice Abella's comments during the hearing suggested that no final determination on the point was made. Consequently, it cannot be said that the SCC implicitly affirmed the interpretation of paragraph 186(1)(*a*) adopted by the former Board in *PIPSC 1*. In any case, an implicit finding is not a final determination.

[56] The applicant further suggested that the SCC's determination that the former Board's decision was reasonable could not be maintained if the law underpinning the finding changed in any way.

[57] The applicant contended that her submissions have merit and deserve consideration. In particular, she noted that the principle of harmonization in statutory interpretation presumes harmony and coherence between statutes dealing with the same subject matter. Since the unfair labour practice provisions of the *Code* contain the same wording as those in the *PSLRA*, and since the *Code* contains a provision concerning the provision of employee home contact information, the principle of harmonization suggests that paragraph 186(1)(*a*) of the *PSLRA* cannot contain a

disclosure requirement. Furthermore, the Canada Industrial Relations Board has interpreted the *Code*'s unfair labour practice provisions as allowing employees to opt out of disclosure, while the PSLRB's interpretation of provisions with the same language does not permit employees to opt out of disclosure. Those facts were not put before the former Board in *PIPSC 1* and therefore were not addressed.

[58] The applicant contended that because she was not given notice of the hearing of *PIPSC 1* and was not afforded an opportunity to make submissions, because the adversarial process was absent, and because important information was not placed before the former Board, the decision in *PIPSC 1* should be reconsidered and a finding should be made that paragraph 186(1)(*a*) of the *PSLRA* does not require the employer to disclose employee home contact information to the union.

IV. Reasons

[59] This is an application for reconsideration under subsection 43(1) of the *PSLRA* of the 2008 decision in *PIPSC 1.* Subsection 43(1) provides as follows:

> ***43.*** *(1) Subject to subsection (2), the Board may review, rescind or amend any of its orders or decisions, or may re-hear any application before making an order in respect of the application.*

[60] The jurisprudence of the PSLRB and its predecessor, the PSSRB, established guidelines or criteria for exercising the Board's discretion to review or amend any of its orders or decisions. Those guidelines were synthesized in *Chaudhry* (affirmed by the FCA in *Chaudhry v. Canada (Attorney General)*, 2009 FCA 376), at para 29, as follows:

> *. . .The reconsideration must:*
>
> - *not be a relitigation of the merits of the case;*
> - *be based on a material change in circumstances;*
> - *consider only new evidence or arguments that could not reasonably have been presented at the original hearing;*
> - *ensure that the new evidence or argument have a material and determining effect on the outcome of the complaint;*
> - *ensure that there is a compelling reason for reconsideration; and*

- *be used "…judiciously, infrequently and carefully…" (*Czmola*).*

[61] A reconsideration under section 43 of the *PSLRA* is not an appeal or a redetermination of the decision. As the FCA stated in *Chaudhry*, ". . . it is a limited exception to the finality of the Board's decisions which enables the decision-maker [sic] to revisit the decision in the light of fresh evidence or . . . new argument."

[62] This application is based on the applicant's belief that the former Board did not have before it critical evidence and argument concerning the legislative history of the strike vote and final-offer vote provisions of the *Code* and the *PSLRA*. She suggests that those provisions were critical to the finding in *PIPSC 1* that the employer's failure to disclose employee contact information was an unfair labour practice within the meaning of paragraph 186(1)(*a*) of the *PSLRA.* In particular, she wants the Board to consider evidence of the House of Commons debates and House of Commons committee debates preceding amendments to the *Code* made in 2000. She also wants the Board to consider evidence arising from the House of Commons debate in 2003 on the *Public Service Modernization Act* (S.C. 2003, c. 22), which created the *PSLRA*, in addition to submissions made by union representatives appearing before parliamentary committees that examined the proposed amendments to the *Code* and, later, the provisions of the *PSLRA*.

[63] The applicant contends that that material is supportive of her argument that Parliament did not intend that employees' home contact information be given to unions without the employees' consent. She contends that the former Board should have had this information when deciding *PIPSC 1* but that, because she was not given notice of the hearing, she was effectively denied an opportunity to participate and to make submissions, and therefore, information critical to the decision was not placed before the former Board.

[64] This application raises a number of issues. First, the applicant was not, as noted, a party to the decision that she wants to have reconsidered, and I question whether she has standing to seek a reconsideration of *PIPSC 1*. In my opinion, there are reasons to find that she does not have standing.

[65] *PIPSC 1* concerned a complaint filed by the union against the employer under paragraphs 190(1)(*b*) and (*g*) of the *PSLRA.* The complaint under paragraph 190(1)(*b*)

concerned an allegation that the employer failed to bargain in good faith, as set out in section 106. The complaint under paragraph 190(1)(*g*) concerned allegations of interference by the employer into the union's representation of employees in the bargaining unit, in addition to a breach of the duty of fair representation. An individual employee would not normally have an interest or standing in a complaint filed by a union against an employer under the provisions concerning bargaining in bad faith or interference in the administration of the union or the representation of employees.

[66] The applicant was not a party to the complaint, but in the circumstances of *PIPSC 1*, it could perhaps have been argued that she was a person with a substantial interest in the outcome of the proceeding because the remedy sought by the union included, among other things, its request that the employer provide to it employee home contact information. Section 14 of the *Regulations* provides as follows:

> ***14.*** *(1) Any person with a substantial interest in a proceeding before the Board may apply to the Board to be added as a party or an intervenor.*
>
> *(2) The Board may, after giving the parties the opportunity to make representations in respect of the application, add the person as a party or an intervenor.*

[67] However, intervenor status is not automatic. All parties to a proceeding have a right to make representations on an application for intervenor status. It is undisputed that the applicant was not given notice of the proceeding and therefore did not seek intervenor status at the time of the hearing or at any later time. It is, in fact, difficult to know on what basis a person would apply to intervene in a matter that has been concluded. The remedy in those circumstances, it seems to me, would be an application for judicial review, which was the approach that the applicant took concerning *PIPSC 2*.

[68] Although it was open to the applicant to seek judicial review of *PIPSC 1*, she chose instead to file an application for judicial review of *PIPSC 2*, citing, among other grounds, the lack of notice and opportunity to participate in the proceedings of that matter. The standing that the FCA granted to her to participate in *PIPSC 3* was a direct result of her judicial review application of *PIPSC 2* and the Court's remedial order and not because she had an inherent right to standing. Even if *PIPSC 1*, which was an interim decision, could be considered part of the same proceeding as *PIPSC 2*, the

standing the FCA granted to the applicant in *Bernard 1* covered only her participation in the subsequent proceedings and was limited in nature.

[69] In my opinion, if the applicant is given standing to request a reconsideration of a decision to which she was not a party, she would effectively be circumventing the requirements of section 14 of the *Regulations.* That would put at risk the finality of the Board's decisions, since it would open the door to any person to seek a reconsideration of a decision to which he or she was not a party. That is a strong reason to find that only the parties to a decision can request a reconsideration.

[70] I also note that the application was made six years after the release of the decision that is the subject of the request. Therefore, there also is a question of timeliness. The applicant argued that the delay seeking a reconsideration was a result of her decision to pursue her *Privacy Act* and *Charter* issues through the courts. That might be the case, but it did not preclude her pursuit of a reconsideration at the same time as she pursued the issues through the courts. Even though she is correct in stating that there is no set time limit for a reconsideration, the former Board's decision in *Chaudhry* established that a request for a reconsideration should be made at the earliest opportunity.

[71] In the circumstances of this request, I cannot find that the applicant made her request at the earliest opportunity. The material that she wants to place before the Board on reconsideration predates both the hearing of *PIPSC 1* and all subsequent hearings on the issue of whether the union is entitled to employee home contact information. Therefore, it was available to the applicant long before this application for reconsideration was filed.

[72] According to the applicant, she made a reasonable tactical decision to pursue the judicial review applications that she filed in relation to *PIPSC 2* and *PIPSC 3* rather than seek a reconsideration of *PIPSC 1.* She stated that had she been successful on those applications, it would not have been necessary to pursue an application for reconsideration of *PIPSC 1.* However, the issue to be reconsidered in *PIPSC 1* must be distinct from the issues that were the subjects of the judicial review applications and appeals arising from *PIPSC 2* and *PIPSC 3*, or it would be moot. If the issue that the applicant wants reconsidered is distinct from the issues litigated in other proceedings, then there was no legitimate reason for her not to file an application for

reconsideration concurrently with her other legal processes. The success or failure of her other litigation should have had no bearing on whether there was an unrelated issue in *PIPSC 1* that should be reconsidered; if that was the case, then this application was not filed at the earliest opportunity.

[73] Although the lack of standing and the untimeliness of the application would be sufficient grounds to deny the applicant's request for a reconsideration, there are other significant barriers to reconsidering *PIPSC 1.* In particular, I note that the guidelines for reconsideration set out in *Chaudhry* require that, among other things, the new evidence or argument proposed for a reconsideration would have a ". . . material and determining effect on the outcome of the complaint . . . ." I cannot find that that would be the case in the circumstances of this application.

[74] The applicant wants the Board to consider what she characterizes as the legislative history relating to the interpretation of paragraph 186(1)(*a*) of the *PSLRA*. The legislative history to which she refers consists mainly of statements and comments made in parliamentary and committee debates relating to the legislative provisions of the *Code*, which were not under review in *PIPSC 1.* Therefore, there is a question relating to the relevance of the material in question. Furthermore, according to the applicant, the material proffered in support of a reconsideration goes directly to the issue of whether unions are entitled to employee home contact information and whether an employer's refusal to provide employee home contact information constitutes interference, in contravention of paragraph 186(1)(*a*).

[75] However, Mr. Butler did not conclude in *PIPSC 1* that the employer's failure to provide employee home contact information constituted interference under paragraph 186(1)(*a*) of the *PSLRA.* He found only that the employer's failure to provide some of the contact information the union requested constituted interference within the meaning of paragraph 186(1)(*a*). He was quite clear that he did not believe that he had sufficient evidence to determine, among other issues, the precise nature of the information necessary for the union to satisfy its representational obligations and, of that information, how much of it should be supplied by the employer. Those, and other questions, were left to be resolved at the subsequent hearing, namely, *PIPSC 2.*

[76] Because the material that the applicant wants the Board to examine in her reconsideration request goes to a conclusion that the former Board explicitly and

deliberately did not make in *PIPSC 1*, I do not believe that considering it would have a material and determining effect on the outcome of the complaint, and therefore, it would not meet the test in *Chaudhry.*

[77] It seems to me that this application is a thinly disguised attempt to reopen an issue already decided by the highest court of the land. Although the applicant claims that she was denied an opportunity to present evidence relating to the legislative history of the provisions examined in *PIPSC 1* because she was not a participant in that proceeding, in fact, the interpretation of the relevant statutory provisions was a recurrent theme through all the subsequent litigation, in which she was an active participant. The SCC decided the issue finally and completely (in 2014 SCC 13) when it upheld as "clearly justified" the finding in *PIPSC 3* ". . . that the employer's refusal to disclose employee home contact information constituted an unfair labour practice because it interfered with the union's representation of employees."

[78] Given all those reasons, I find that this request for a reconsideration of *PIPSC 1* is without merit and that it must be dismissed.

[79] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[80] The request for a reconsideration of the decision in *PIPSC 1* is dismissed.

June 29, 2015.

Kate Rogers,
a panel of the Public Service Labour Relations and Employment Board