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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

MICHAEL HOGG

Grievor

and

TREASURY BOARD
(Department of Public Works and Government Services)

Employer

Indexed as

Hogg v. Treasury Board (Department of Public Works and Government Services)

In the matter of an individual grievance referred to adjudication

Before: David Olsen, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Simon Cott, employment relations officer

For the Employer: Andréanne Laurin, counsel

Decided on the basis of an agreed statement of facts and written submissions, filed July 12 and 22 and August 5 and 12, 2022.

REASONS FOR DECISION

I. Introduction

[1] Michael Hogg ("the grievor") grieved that the collective agreement was violated, including but not limited to article 4 (management rights) (should read article 5), and including, but not limited to, ss. 7 and 8 of the *Privacy Act* (R.S.C., 1985, c. P-21) as a result of his personal information, including but not limited to leave balances, pay system, and pension information, being transferred to another employee with the same name employed with Industry Canada. He claimed that all his personal information was amended to that of the other Michael Hogg, employed by Industry Canada. By way of corrective action, he wanted the outstanding issues resolved in a timely manner, together with an official letter of acknowledgement and a sincere apology signed at the deputy minister level or higher and any and all other remedies to make him whole.

[2] The employer, the Treasury Board, raised a preliminary objection concerning the jurisdiction of the Federal Public Sector Labour Relations and Employment Board ("the Board") to hear the grievance. The parties agreed to deal with the objection in writing. They agreed on a written statement of facts together with documents appended to it as annexes, to establish the basis for the legal arguments. They filed written submissions on the preliminary objection. In this decision, "the Board" refers to the current Board and any of its predecessors.

II. The agreed statement of facts

[3] For greater clarity and completeness, I have included text from the documents in the annexes when the statement of facts refers to them.

[4] The grievor was employed by the Treasury Board, and by delegation of powers by the Department of Public Works and Government Services, as a supply specialist classified at the PG-04 group and level.

[5] The grievor was subject to the collective agreement between the Treasury Board and the Professional Institute of the Public Service of Canada ("the bargaining agent") for the Audit, Commerce and Purchasing (AV) Group that expired on June 21, 2018 ("the collective agreement").

[6] At the beginning of February 2017, the grievor started to notice that his leave balance appeared incorrect in the employer's leave-management system.

[7] From February 7 to 28, 2017, in the pay system, the grievor was incorrectly transferred to a position with the Department of Industry, referred to by the parties as Innovation, Science and Economic Development Canada, rather than another individual with the same name from another department.

[8] On February 22, 2017, the grievor did not receive his pay. He immediately informed his manager. On February 23, 2017, they received confirmation that an overlap was generated because of two employees with the same name. The manager immediately initiated procedures for the grievor to receive an emergency payment and to correct the situation. He received that payment the following week.

[9] That error resulted in the grievor's personal information being merged or replaced with that of another employee with the same name in another department. The error impacted his leave balance and his pay and pension information.

[10] The employer formally advised the grievor of the error in a letter dated July 27, 2017.

[11] The letter read in part as follows:

> …
>
> *The Compensation Sector at Public Services and Procurement Canada (PSPC) administers pay for the federal Government. It came to our attention on May 10, 2017, that from February 7th at 10:49 am to February 28th at 8:34 am EST you were incorrectly transferred to a position at Industry Canada, rather than another individual with the same name from another department. While unlikely, your personal information may have been available to this person.*
>
> *The personal information could have included your name, address, phone number, email address, gender, date of birth, employee start date and social insurance number. We understand that this is protected personal information and wish to reassure you we are taking this matter very seriously.*
>
> *We have verified that the other employee had his own PRI since 2009 and could not use this PRI to access your personal information. We have confirmed that you have been reverted to the correct position number in PSPC, and that the other person with the same name was not assigned to your position number at PSPC. Consequently, this individual did not have access to your position or pay related information.*
>
> *The PSPC Corporate Security and Access to Information and Privacy (ATIP) Directorates have been apprised of this incident.*

> *Should you have any questions regarding this incident, you may communicate with the undersigned at* [phone number redacted], *or contact the PSPC ATIP directorate at* [phone number redacted]
>
> *Please note that under the* Privacy Act *you are entitled to make a complaint to the office of the Privacy Commissioner of Canada with regard to this breach. You may do so by writing to:*
>
> *Office of the Privacy Commissioner of Canada*
>
> [address redacted]

[12] The employer took the necessary steps to address the error and correct it.

[13] The grievor filed a grievance on August 24, 2017, alleging that the collective agreement was violated, including but not limited to article 5 (management rights), and that the *Privacy Act* was violated, including but not limited to ss. 7 and 8.

[14] The grievance reads as follows:

> …
>
> *I grieve that the collective agreement was violated including but not limited to Article 4 (Management Rights) including but not limited to sections 7 & 8 of the Privacy Act. This is a result of my personnel information including but not limited to; Leave Balances, Pay System & Pension Information being transferred to another employee with the same name as mine (Michael Hogg) employed with Industry Canada. All of my personal information was amended to include a revised Pay Office Number, Department Code, Paylist Number & PRI Number all of which belong to the other Michael Hogg employed by Industry Canada. As a result of my personnel information being transferred to another person within another department, I (as a human being) had actually been replaced and/or terminated causing a domino effect that included but not limited to:*
>
> *- Leave Balances: All of my Leave Balances were replaced with leave balances associated with the other employee*
>
> *- Pay: Loss of Pay as a result of removal from the Pay List System*
>
> *- Pension Information: Another person's information (PRI #, Dept Code, Pay Office, Paylist Number) replaced my original information associated with my Personal Information and Notification of Plan Membership.*
>
> *Corrective action requested …*
>
> *Resolve the following outstanding issues in a timely manner:*
>
> *Pension - Update Member Profile*

> *1. My employee information shows "Crown P#* [number redacted]*". This needs to be removed as it belongs to employee with the same name employed with Industry Canada.*
>
> *2. My "Notification of Plan Membership" shows "Pay Office:* [number redacted]*". This needs to be changed to "Pay Office:* [number redacted]*" as Pay Office:* [number redacted] *belongs to employee with same name employed with Industry Canada.*
>
> *MyGCHR - Leave Requests and Absence Balances*
>
> *3. My GCHR currently lists an employer for which I have never worked (Policy Officer-SBTMS-DirTourism). This needs to be removed as it belongs to employee with the same name employed with Industry Canada.*
>
> *Pay - Viewing Pay Stubs*
>
> *4.Pay - Viewing pay stubs. My employee ID also shows "Crown PRI* [number redacted]*". This needs to be removed as it belongs to employee with same name employed with Industry Canada.*
>
> *Official letter of Acknowledgement & Sincere Apology: (signed by Deputy Minister level or above)*
>
> *"Any and all other remedies to make me whole"*
>
> …
>
> [*Sic* throughout]

[15] The grievor made a complaint with the Privacy Commissioner on or around April 26, 2018, alleging that Innovation, Science and Economic Development Canada contravened the accuracy provisions of the *Privacy Act* when it did not take all reasonable steps to ensure that the personal information that it used to staff a position was as accurate, up to date, and complete as possible. The complaint was investigated, and the privacy commissioner produced a report in a letter from the commissioner's office dated April 30, 2018. (Note that despite the Board's request to the parties, the commissioner's final report was not filed with the Board. The employer advised the Board that it did not have the report, and the bargaining agent did not respond to the request.)

[16] The employer replied to the grievance at the final level of the grievance process on October 11, 2018. After referring to the contents of the grievance, the reply stated in part as follows:

> …
>
> *During the grievance hearing, you stated that you do not place blame on the Department or a specific person, that you understand that what occurred was that of human error through*

your former department. As a result of this error, you were in effect "terminated" in the system, your personal information was exposed and it has an impact on you, your pay and benefits and your retirement planning. You also mentioned that you filed a complaint with the Privacy Commission and were waiting for the outcome and recommendations and that you were very concerned about your information being shared even though Public Services and Procurement Canada (PSPC) have worked hard to get things fixed, the fact remains that this is created stress in your life for at least the last year and a half.

During the hearing, you did confirm that most of the outstanding issues have been dealt with and resolved, with the exception of the discrepancy with your leave credits and some outstanding questions you have related to the division of your benefits and how this will affect your pension.

You also stated that you should be awarded some financial compensation for the administrative burden this has caused you, as well as the pain and suffering.

…

Pertaining to the outstanding matters, I have confirmed with our internal resolution team that the discrepancy pertaining to your leave credits was identified. In terms of outstanding questions/information you require pertaining to your pension, [name redacted], *who accompanied me at the grievance hearing will be in contact with you to provide you with a direct contact who will be able to help you address your questions. I have also reviewed the findings of your privacy complaint and note that the Privacy Commission found your complaint to be founded and noted that your previous employer has taken steps to address the issue and put measures in place to protect employee personal information in the future and no further recommendations were made.*

I find it truly unfortunate to see the impacts that the situation has caused you and on behalf of the department I would like to offer you my sincere apology in this regard. However, I am not in a position to grant you additional financial compensation in this regard but if you do have out of pocket expenses related to these issues. I strongly encourage you to avail yourself to the claim process that has been put in place. If this is the case, [name redacted] *remains available to help you through this process. You can contact her directly in this regard.*

Since some of the grievance requests have been resolved, but no compensation for damages has been awarded to you, I consider your grievance partially upheld.

Yours sincerely,

[name redacted]

Acting Assistant Deputy Minister

…

[*Sic* throughout]

[17] After the grievance was allowed in part at the final level of the grievance process, the grievor referred it to adjudication on November 16, 2018, pursuant to s. 209(1)(a) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2 ;"the *Act*").

III. The employer's submissions on the preliminary objection

A. Overview

[18] The Board does not have jurisdiction to hear this matter since 1) article 5 of the collective agreement has a general clause that does not grant an employee any rights of recourse, 2) another administrative procedure for redress existed to address the particular events raised by the grievor, and 3) the grievance did not meet the required parameters, established by the *Act*, to be referred to adjudication.

B. The facts

[19] The employer referred to the agreed statement of facts that was filed with the Board on July 12, 2022.

C. The issue

[20] Does the Board have jurisdiction to hear this matter?

D. The submissions

[21] The Board's jurisdiction is limited by the *Act*, and the Board must exercise its authority within those limits.

1. Article 5 of the collective agreement has a general clause that does not grant an employee any rights of recourse

[22] The grievor filed his grievance under s. 208(1)(a) of the *Act* and then referred it to adjudication under s. 209(1)(a) (the collective agreement interpretation section), citing article 5 of the collective agreement.

[23] Article 5 provides as follows: "**5.01** All the functions, rights, powers and authority which the Employer has not specifically abridged, delegated or modified by this Agreement are recognized by [the bargaining agent] as being retained by the Employer" [emphasis in the original].

[24] That clause is a general-purpose clause that does not grant any substantive rights to employees. General-purpose clauses act as guides to interpreting substantive provisions.

[25] Article 5 mentions only that the employer preserves its rights to manage when they are not expressly limited by the collective agreement.

[26] It constitutes a general clause, and it did not grant the grievor any right to file a grievance pertaining to it.

2. Another administrative procedure for redress existed to address the particular events raised by the grievor

[27] Because another administrative procedure for redress existed, the grievor was barred from filing this grievance.

[28] Moreover, in his grievance, the grievor alleged that the employer violated ss. 7 and 8 of the *Privacy Act* after his personal information was merged with that of an employee from another department who shares his name. However, his grievance could not be referred to adjudication under the *Act* as another administrative procedure for redress existed to address that specific situation under the *Privacy Act*, which the grievor prevailed himself of.

[29] Clause 34.08(a) of the collective agreement provides as follows:

> ***34.08*** *Subject to and as provided for in the Public Service Labour Relations Act, a grievor who feels treated unjustly or aggrieved by an action or lack of action by the Employer in matters other than those arising from the classification process is entitled to present a grievance in the manner prescribed in clause 34.06, except that:*
>
> *a. where there is another administrative procedure provided by or under any act of Parliament to deal with the grievor's specific complaint such procedure must be followed,*
>
> *and*
>
> *b. where the grievance relates to the interpretation or application of this collective agreement or an arbitral award, an employee is*

> *not entitled to present the grievance unless he has the approval of and is represented by the* [bargaining agent].

[30] That clause serves the same purpose as s. 208(2) of the *Act*, which provides as follows under the heading "Individual Grievances": "An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*."

[31] According to *Canada (Attorney General) v. Boutilier*, [2000] 3 FC 27 (C.A.) at para. 3, this section was intended to do the following:

> *… intended to remove from the normal grievance procedures under the* [*Public Service Staff Relations Act* (R.S.C., 1985, c. P-35), a former version of the *Act*] *certain specialized areas which it was thought should be dealt with under the administrative process set out in the legislation governing those particular areas.*

[32] Section 29(1)(a) of the *Privacy Act* provides a right of recourse for an individual who alleges that ss. 7 or 8 of that Act was violated. After a complaint is made, the privacy commissioner has the authority to investigate it and, if it is founded, to make findings and recommendations.

[33] The privacy commissioner also has the authority to request that notice be given of the actions that were taken by the federal government institution. The authority to determine whether the *Privacy Act* was violated is specifically delegated to the privacy commissioner. The grievor prevailed himself of the complaint recourse pursuant to s. 29(1)(a) of the *Privacy Act*.

[34] Consequently, the grievor was not entitled to present a grievance based on his allegations or to refer it to adjudication. Section 208(2) of the *Act* expressly refuses employees the right to present a grievance when the allegations can be addressed through another administrative recourse.

3. The grievance did not meet the required parameters, established by the *Act*, to be referred to adjudication

[35] Alternatively, in *Boivin v. Treasury Board (Canada Border Services Agency)*, 2009 PSLRB 98, the adjudicator considered an allegation of a breach of s. 5 of the *Privacy Act* in light of s. 209(1) of the *Act*. In the reasons section, the adjudicator explained as follows:

> …
>
> *22 Section 209 of the* PSLRA *is very clear as to what type of grievances can be referred to adjudication.*
>
> …
>
> *24 The grievor's argument on my jurisdiction for the contravention of section 5 of the* Privacy Act *is interesting, but it fails. He may have the right to file a grievance based on the interpretation that Justice Noël (see* Murdoch*) gives to redress as far as the* Privacy Act *is concerned, but even if I were to rule that he can file a grievance based on the contravention of section 5 of the* Privacy Act*, he cannot refer it to adjudication as it does not fit any of the parameters of section 209 of the* PSLRA *….*
>
> …

[36] The same reasoning must apply in this case. Unfortunately, a department made an administrative error that the employer had to address. But it did not constitute an exercise of management rights in any way. This grievance does not relate in any way to the application or interpretation of the collective agreement as required by s. 209(1)(a) of the *Act*. It is also not related to any of the situations listed in ss. 209(1)(b), (c), and (d). Consequently, this grievance does not fit any of the parameters established by s. 209(1) of the *Act*, and the Board does not have jurisdiction to decide it.

E. Order sought

[37] For all those reasons, the employer respectfully requests that its objection be allowed and that the grievance be denied for lack of jurisdiction.

IV. The bargaining agent's reply submissions on the preliminary objection

[38] The employer's argument was fatally flawed in three key respects.

[39] First, the employer contended that article 5 of the collective agreement is a general-purpose clause that by its nature cannot form the basis of a grievance. The bargaining agent submitted that article 5 imposes substantive obligations on the employer and that breaches of it are properly addressed through the grievance process.

[40] Second, the employer argued that the grievance is barred from adjudication by the fact that the grievor could have (and did) make a complaint to the privacy commissioner. The bargaining agent submitted that the privacy commissioner

complaint process cannot (and did not) provide the grievor with redress in any meaningful sense.

[41] Third and finally, the bargaining agent submitted that none of the cases that the employer cited applies to the facts of this case or supports its position.

[42] The bargaining agent submitted that the issue raised in Mr. Hogg's grievance is within the Board's statutory jurisdiction and that it must be resolved by the Board at a full hearing.

A. Article 5 does not have a general-purpose clause

[43] The employer cited paragraph 4.23 of Brown and Beatty, *Canadian Labour Arbitration*, 5th edition, titled "Headings, Preambles and General Purpose Clauses", for the proposition that a general-purpose clause may act as a guide to interpretation but does not create enforceable rights or obligations. That is true but irrelevant to the question at hand because article 5 of the collective agreement neither sets out the general purpose of the agreement nor is intended to act as an interpretive guide.

[44] While Brown and Beatty rightly caution against giving too much weight to headings, the facts that article 1 of the collective agreement is entitled "purpose of Agreement" and that article 2 is entitled "interpretation and definitions" certainly suggest that the general-purpose and interpretation clauses are found somewhere other than in article 5, which is confirmed by the agreement's text. Article 1 states this:

> ***1.01 The purpose of this Agreement*** *is to maintain harmonious and mutually beneficial relationships between the Employer, the employees and the* [bargaining agent]*, to set forth certain terms and conditions of employment relating to remuneration, hours of work, employee benefits and general working conditions affecting employees described in the certificate issued by the Public Service Labour Relations and Employment Board on June 16, 1999, covering employees of the Audit, Commerce and Purchasing Group.*
>
> ***1.02 The parties to this Agreement share a desire*** *to improve the quality of the Public Service of Canada, to maintain professional standards and to promote the well-being and increased efficiency of its employees to the end that the people of Canada will be well and effectively served. Accordingly, they are determined to establish within the framework provided by law, an effective working relationship at all levels of the Public Service in which members of the bargaining units are employed.*
>
> [Emphasis added]

[45] The general-purpose clause is clearly found at clause 1.01, and clause 1.02 is a similarly non-operative statement about the desires and motivations of the parties to the agreement.

[46] There is no question that those clauses do not create rights or obligations and that neither party would be able to rely on them as the basis for a grievance. They have no effect on the parties' relations; at best, they enumerate some of the topics that might be addressed in the collective agreement. They are the paradigm of the kind of non-operative general-purpose clause referred to in paragraph 4.23 of Brown and Beatty.

[47] Article 5 must be read in the context of the entire collective agreement. Not only does its specificity stand in stark contrast to the generality of article 1's statements of purpose and motivation, but also, it should be read alongside article 6 (entitled "rights of employees"), which states this: "Nothing in this Agreement shall be construed as an abridgement or restriction of an employee's constitutional rights or of any right expressly conferred in an act of the Parliament of Canada".

[48] It explicitly establishes the inner and outer boundaries of the employer's authority in matters beyond the collective agreement. Taken together, those articles clearly describe the legal relations between the parties and cannot be dismissed as redundant, superfluous, or ornamental. They explicitly describe the allocation of rights and obligations to the employer and the employees and by doing so go far beyond any mere statements of purpose or motivation.

B. The question of whether the employer met its obligations is not jurisdictional

[49] Article 5 clearly allocates rights to the employer, and with those rights come reciprocal obligations. The questions of how those obligations apply to the specific facts of Mr. Hogg's grievance and whether they were met are not jurisdictional. Rather, they are precisely the kind of questions of "… interpretation or application … of a collective agreement …" referred to in s. 209(1)(a) of the *Act* and are squarely within the Board's statutory jurisdiction.

C. The *Privacy Act* did not and cannot provide the grievor redress

[50] While it is true that the grievor made a complaint to the privacy commissioner, which the privacy commissioner investigated and determined that was well founded,

none of it provided the grievor with any redress. Under the *Privacy Act*, the commissioner's role is closer to regulatory than remedial, since the commissioner can do nothing more than issue reports to Parliament and make recommendations.

[51] Nothing in the *Privacy Act* empowers the privacy commissioner to grant a remedy to a complainant, and it contains no provisions that allow a complainant to seek or receive a remedy for a breach of their rights. That stands in contrast to the federal privacy legislation for entities not in the public sector, which is the *Personal Information Protection and Electronic Documents Act* (S.C. 2000, c. 5). At ss. 14 to 16, it sets out a regime through which a complainant may seek monetary damages, "… including damages for any humiliation that the complainant has suffered."

[52] As the adjudicator noted at paragraph 24 of *Boivin*, the Federal Court has endorsed that view of the limits and characterization of the privacy commissioner's authority. (The adjudicator then found for other reasons that the grievance in that case was not adjudicable. As will be explained, the bargaining agent's position is that that aspect of the adjudicator's finding is not applicable to Mr. Hogg's grievance.)

[53] The collective agreement bars filing grievances if redress is available elsewhere. While the privacy commissioner can receive a complaint, investigate it, determine whether it is well founded, and make a report and recommendations based on the investigation, crucially, the commissioner's power stops short of providing any kind of remedy to a complainant. If a process cannot provide a remedy to a complainant, it is hard to see how that process could be understood to provide redress. A fire marshal might be able to investigate a fire and make a report based on the investigation, but it falls to an insurer or a court to provide compensation. Similarly, the privacy commissioner can investigate and make reports, but the redress for the breach must be found elsewhere.

D. Cases that can be distinguished

[54] The employer cited *Boivin* for the proposition that a grievance arising from a breach of the *Privacy Act* is not adjudicable. However, *Boivin* has a number of idiosyncratic features that limit its precedential value generally and in particular distinguish it from Mr. Hogg's grievance.

[55] In *Boivin*, the grievor grieved three distinct issues, each of which presented its own jurisdictional problem. In the case of his *Privacy Act* issue, he did not connect the grievance to a collective agreement provision, which stands in distinction to Mr. Hogg, who alleged that by violating his rights under the *Privacy Act*, the employer violated the collective agreement. So Mr. Hogg did not make the same error that deprived the Board of jurisdiction in *Boivin*.

[56] Additionally, the grievor in *Boivin* proceeded without his bargaining agent's support, which on its own would prevent referring to adjudication any grievance other than one arising from ss. 209(1)(b) and (c) of the *Act*, specifically those relating to discipline, non-disciplinary demotions and terminations, or deployments without consent. Mr. Hogg does have bargaining agent support, and therefore, he was not barred from referring a grievance to adjudication under s. 209(1)(a).

[57] The grievor in *Boivin* grieved a *Privacy Act* breach without connecting it to a collective agreement breach and proceeded without his bargaining agent's support. In this grievance, the grievor alleged that the breach of his *Privacy Act* rights amounted to a violation of the employer's obligations under article 5 of the collective agreement, and he proceeded with his bargaining agent's support. Because of those key differences, *Boivin* cannot provide any support to the employer's position.

[58] In both *Mohammed v. Canada (Treasury Board)* (1998), 148 F.T.R. 260 (T.D.), and *Boutilier*, the grievances were denied because the grievors had access to recourse from the Canadian Human Rights Tribunal (CHRT). Unlike the privacy commissioner, the CHRT has extensive remedial authority. So the fact that the Board did not have jurisdiction in cases in which redress could be found at a body with broad remedial powers has no bearing on a grievance like Mr. Hogg's, in which the purported alternate source of redress is a body that has no remedial authority.

[59] Like *Mohammed* and *Boivin*, *Lâm v. Treasury Board (Department of Health)*, 2008 PSLRB 101, involved potential recourse to the CHRT, so it can be easily distinguished on the same grounds. However, there is more.

[60] In *Lâm*, the grievance was filed under an article substantially similar to article 1 of the collective agreement. Although the wording varies slightly (in particular because the grievor in *Lâm* was represented by the Public Service Alliance of Canada or PSAC), the clause that the Board reproduced at paragraph 25 of *Lâm* was strikingly similar

and functionally identical to article 1(the paragraph 25 referred to is found in the decision from the Federal Court in *Canada (Attorney General) v. Lâm*, 2008 FC 874 and not in the Board decision).

[61] The bargaining agent agreed that article 1 cannot form the basis of a grievance, but it did not file the grievance under it. So *Lâm* is of no relevance to the employer's objection and no assistance to its argument.

[62] Article 1 of the collective agreement at issue in *Lâm* read in part as follows:

> …
>
> *1.01 The purpose of this Agreement is to maintain harmonious and mutually beneficial relationships between the Employer, the* [PSAC] *and the employees and to set forth herein certain terms and conditions of employment for all employees described in the certificate issued by the Public Service Staff Relations Board on June 7, 1999 covering employees in the Program and Administrative Services Group.*

E. Summary

[63] The employer's argument was based on a mischaracterization of article 5 of the collective agreement and an overstatement of the privacy commissioner's ability to provide redress. Additionally, the cases that the employer cited refer to circumstances that differ in important and meaningful ways from this grievance, and they cannot support the employer's objection.

F. Order sought

[64] For all those reasons, the bargaining agent respectfully requested that the employer's preliminary objection be dismissed.

V. The employer's reply to the bargaining agent's submissions

A. Article 5 of the collective agreement has a general-purpose clause that does not grant an employee any rights of recourse

[65] The employer disagrees with the bargaining agent's affirmation that article 5 of the collective agreement sets obligations for the employer and provides an employee with a right of recourse. That article has a general clause that simply states the fact that the employer retains "[a]ll the functions, rights, powers and authority which the

Employer has not specifically abridged, delegated or modified by [the collective] Agreement …".

[66] Those other functions, rights, powers, and authority might set some obligations for the employer. However, they are not included in the collective agreement. It is well established that an employee can grieve almost any situation that is related to the employee's terms and conditions of employment, subject to the limitations established by the *Act*.

[67] However, only some grievances may be referred to adjudication, as set out in s. 209 of the *Act*. Consequently, a grievance pertaining to those management rights that are not expressively included in the collective agreement cannot be referred to adjudication as a grievance pertaining to the agreement's interpretation and application.

[68] Article 5 of the collective agreement recognizes only the fact that the employer retains its right and responsibility to manage its operation in all aspects that are not covered or modified by the collective agreement. An analysis of each specific management right would be required to determine the proper recourse available to an employee, if there is one.

B. The alternative administrative recourse need not provide the same remedies

[69] The fact that the remedies provided by the alternative recourse are not the grievor's preferred ones is not sufficient to determine that no alternative administrative recourse is available to him. The alternative administrative recourse need not provide the same remedies or procedure as the grievance process, but it must provide a real remedy, one that meaningfully and effectively deals with the substance of the grievance. In a situation of a *Privacy Act* breach, the relevant redress would be to ensure that personal information is protected, and the breach ceased, which the privacy commissioner has the authority to ensure.

[70] In his submissions, the grievor failed to explain why his complaint to the privacy commissioner did not provide him with redress. He simply stated that he was not entitled to any compensation. In this case, by the time the grievor made his complaint to the commissioner, the employer had already addressed the situation and had ensured the protection of his personal information. Then, there was no other

relevant remedy left for the privacy commissioner other than an affirmation stating that the complaint was well founded. Compensation would not deal with the substance of the grievance.

C. Order sought

[71] For those reasons, the employer respectfully requests that its objection be allowed and that the grievance be dismissed for lack of jurisdiction.

VI. Issue

[72] Does the Board have jurisdiction to hear and determine the grievance, which alleges that the collective agreement was violated, including but not limited to article 5 (management rights), and including but not limited to ss. 7 and 8 of the *Privacy Act*?

VII. The facts, and the relevant provisions of the collective agreement

[73] The facts are not in dispute.

A. Article 5, the management rights clause

[74] The management rights clause reads as follows:

…

> ***Article 5: management rights***
>
> ***5.01*** *All the functions, rights, powers and authority which the Employer has not specifically abridged, delegated or modified by this Agreement are recognized by the* [bargaining agent] *as being retained by the employer.*

[75] The grievance was filed under s. 208(1)(a) of the *Act* and was referred to adjudication under s. 209(1)(a). The grievance claimed in part that the collective agreement was violated, including but not limited to the management rights clause. The employer argued that that the management rights clause is a general-purpose clause, does not grant any substantive rights to employees, and serves only as a guide for interpreting substantive provisions.

[76] The bargaining agent submitted that article 5 imposes substantive obligations on the employer, breaches of which are properly addressed through the grievance process. The article allocates rights to the employer, and with those rights come

reciprocal obligations. The questions of how those obligations apply to the specific facts of the grievance and whether they have been met are not jurisdictional.

[77] The employer replied that while residual managerial rights might confer some obligations on it, they are not included in the collective agreement.

[78] In addition, the employer submitted that unfortunately, a department made an administrative error that the employer had to address. But it did not constitute an exercise of management rights in any way.

VIII. Analysis

[79] The parties do not agree on whether a management rights clause contains rights and obligations that may be grieved and referred to adjudication under the *Act*.

[80] I refer the parties to the following jurisprudence on this issue.

[81] In *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, the Supreme Court of Canada summarized the arbitral and court jurisprudence with respect to management rights clauses, whether they contain rights and obligations and whether those clauses may be grieved and referred to adjudication or arbitration in the context of a case in which it had to determine whether an employer had validly exercised its management rights under a collective agreement when it unilaterally imposed a mandatory, random alcohol-testing policy for its employees.

[82] In *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55, the Supreme Court of Canada heard an appeal from the Federal Court of Appeal of a Board adjudicator's decision concerning a federal government employer's mandatory standby-duty directive enacted pursuant to a management rights clause. The Court determined that the adjudicator's decision that the directive contravened the collective agreement was reasonable and that his order that the employer stop applying the directive should be reinstated.

[83] These decisions set out that it has long been established that rules unilaterally made in the exercise of management discretion under a collective agreement must be consistent with the agreement.

[84] In this case, the grievance alleges in part that the collective agreement was violated, including but not limited to the management rights clause. Clearly, based on the jurisprudence, the Board has jurisdiction to determine whether the employer contravened the collective agreement. In addition, whether the facts at issue fall within the ambit of the management rights clause is an issue within the Board's jurisdiction as it involves the interpretation and application of the collective agreement.

IX. Alleged contravention of the Privacy Act

[85] The employer also contends that with respect to the alleged contravention of the *Privacy Act*, there exists another administrative procedure for redress under that Act that would preclude the employee from presenting an individual grievance under the provisions of s. 208(2) of the *Act*.

A. The parties' submissions

[86] The employer submitted that the grievor's damages claim, which was based on its alleged violation of ss. 7 and 8 of the *Privacy Act*, could not be referred to adjudication under the *Act* as another administrative procedure for redress existed under the *Privacy Act*, which he pursued.

[87] The employer relied upon clause 34.08(a) of the collective agreement, which creates an exception to an employee's entitlement to present a grievance. It also relied upon s. 208(2) of the *Act*, which provides that an employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

[88] The employer argued that s. 29(1)(a) of the *Privacy Act* provides a right of recourse for an individual who alleges that s. 7 or 8 of that Act was violated. The privacy commissioner has the authority to investigate a complaint and, if it is founded, to make findings and recommendations. The authority to determine whether the *Privacy Act* was violated is specifically delegated to the commissioner.

[89] Consequently, the grievor was not entitled to present a grievance or refer it to adjudication.

[90] In the alternative, relying on *Boivin v. Treasury Board (Canada Border Services Agency)*, 2009 PSLRB 98, the employer argued that even were the Board to rule that the

grievor could have filed a grievance based on a contravention of the *Privacy Act*, he could not have referred it to adjudication, as it would not have fit any of the parameters of s. 209 of the *Act* as it would not have related to the application or interpretation of the collective agreement. Nor would it have related to any of the situations listed in ss. 209(1)(b), (c), and (d).

[91] The bargaining agent submitted that the privacy complaint process cannot and did not provide the grievor with redress in any meaningful sense and that none of the jurisprudence that the employer cited is applicable to the facts of the case and does not support its position.

[92] While it is true the grievor made a complaint to the privacy commissioner, which investigated it and determined that it was well founded, none of this provided him with any redress.

[93] Under the *Privacy Act*, the privacy commissioner's role is closer to regulatory than remedial. While the commissioner may receive a complaint, investigate it to determine whether it is well founded, and make a report and recommendations based on the investigation, crucially, the commissioner's power stops short of providing any kind of remedy to a complainant.

[94] *Boivin* may be distinguished as the grievor in that case grieved a breach of the *Privacy Act* without connecting it to a collective agreement breach and proceeded without bargaining agent support. In this grievance, the grievor alleged that the breach of his *Privacy Act* rights amounted to a violation of the employer's obligations under article 5 of the collective agreement, and he proceeded with the bargaining agent's support.

[95] The employer responded by stating that although the remedies provided by the alternative recourse were not the grievor's preferred remedies, it is not sufficient to determine that no alternative administrative recourse was available to him. That recourse need not provide the same remedies or procedure as the grievance process, but it must provide a real remedy that meaningfully and effectively deals with the substance of the grievance.

[96] In a situation of a *Privacy Act* breach, the relevant redress would be to ensure that the personal information is protected and that the breach has ceased, which the privacy commissioner has the authority to ensure.

[97] When the grievor made his complaint, the employer had already addressed the situation and ensured that his personal information was protected. The privacy commissioner could have provided no other relevant remedy other than an affirmation that the complaint was well founded.

B. Conclusion

[98] The grievor alleges that the breach of the *Privacy Act* amounts to a violation of the employer's obligations under the collective agreement and that unlike the factual situation in *Boivin*, he is proceeding with the bargaining agent's support.

[99] It is clear that the Board has jurisdiction to hear and determine a grievance relating to the interpretation and application of the collective agreement if the grievor has bargaining agent support.

[100] Accordingly, I conclude that as the Board has jurisdiction to interpret and apply the collective agreement, it has jurisdiction to determine whether the issues raised in this grievance constitute a violation of the collective agreement. The Board reserves its decision on the question of whether the grievor was precluded from presenting a grievance because there was another administrative procedure for redress within the meaning of s. 208(2) of the *Act*.

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

(The Order appears on the next page)

X. Order

[102] The employer's objection to the Board's jurisdiction to hear and determine the grievance is dismissed in part.

[103] The grievance will be returned to the Board's Registry for scheduling a hearing on the merits.

February 26, 2024

David Olsen,
a panel of the Federal Public Sector
Labour Relations and Employment Board