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Decision P12-01

OTIS CANADA

Jay Fedorak Adjudicator

April 24, 2012

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Summary: Two employees complained that OTIS was collecting their personal information through Telematics equipment on company vehicles contrary to PIPA. OTIS requested the OIPC dismiss the complaint on the grounds of estoppel, the rule against collateral attack or abuse of process. OTIS based this request on the grounds that an arbitrator under the *Labour Relations Code* had already determined that the information at issue was not personal information, and, therefore, not subject to PIPA. The adjudicator found that holding an inquiry on this complaint would violate the principles of judicial economy, consistency, finality and the integrity of the administration of justice. The request of OTIS that an inquiry not be held is granted.

Statutes Considered: *Personal Information Protection Act*, ss. 3(2)(g), 50.

Authorities Considered: B.C.: Decision P07-02, [2007] B.C.I.P.C.D. No. 27; Decision F08-11, [2008] B.C.I.P.C.D. No. 36, Order 01-03, [2001] B.C.I.P.C.D. No. 3; Order P07-01, [2007] B.C.I.P.C.D. No. 32.

Cases Considered: *Saskatoon Credit Union v. Central Park Enterprises Ltd*. (1988), 22 B.C.L.R. (2d) 89 (S.C.); *Brown v. Miller,* 2010 BCSC 737; *Danyluk v. Ainsworth Technologies Inc*. 2001 SCC 44; *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63; *British Columbia (Workers' Compensation Board) v. Figliola* 2011 SCC 52; *Berry v. Pulley*, [2002] 2 S.C.R. 493; *Wilson v. The Queen*, [1983] 2 S.C.R. 594.

INTRODUCTION

[1] This case involves a company that constructs and maintains elevators, OTIS Canada Inc. ("OTIS"), requesting that the Office of the Information and Privacy Commissioner ("OIPC") dismiss complaints under the *Personal Information Protection Act* ("PIPA") from two of its employees, on the grounds

that another tribunal has already heard and decided the matter. The employees complained that OTIS was improperly collecting their personal information through Telematics equipment ("Telematics") that OTIS installed on its company vehicles. The equipment records information about engine usage of the vehicles.

[2] The International Union of Elevator Constructors ("Union"), which represents the employees and their colleagues, filed a policy grievance pursuant to its collective agreement with OTIS. The Union asserted that OTIS's installation of Telematics violated the terms of the collective agreement, s. 54 of the *Labour Relations Code* ("LRC") and PIPA. The LRC requires that all collective agreements must provide a mechanism to resolve such disputes through arbitration. The authority of an arbitrator to make a final and binding settlement of a dispute is found in the arbitration procedures provision in Part 8 of the LRC which, among other things, provides that an arbitrator can "interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement".[1] The grievance here proceeded to a hearing before an arbitrator. The decision of the arbitrator was that the installation of Telematics did not violate the collective agreement, and the information that the system collected was not personal information under PIPA.

[3] OTIS seeks the dismissal of the complaint on the grounds of action estoppel, issue estoppel, the rule of collateral attack or abuse of process. It characterizes the Union as attempting to obtain conflicting decisions from concurrent tribunals, which in OTIS's view would constitute an abuse of process and bring the proper administration of justice into disrepute.

ISSUE

[4] The question I must decide is whether an inquiry should not proceed on this matter on the grounds of the application of estoppel, collateral attack or abuse of process.

DISCUSSION

[5] **Background**—The Union wants OTIS to remove Telematics from vehicles that its members use, because it says that the devices are intrusive of their privacy. Prior to asking the OIPC to consider the matter, the Union filed a grievance on the following grounds:

1. that the devices are generally intrusive of workers' privacy;
2. the installation violated the technological change provision of the collective agreement; and
3. the installation violated the requirement under s. 34 of the LRC to notify the Union and consult with it.

[1] *Labour Relations Code*, [RSBC 1996] Chapter 244, s. 89(g).

[6] The Union's concern was that the devices track the location of employees, particularly when the vehicles are used for travel to and from the employees' homes. As part of the grievance, the Union specifically raised the issue that the device collected the personal information of the employees contrary to PIPA. The arbitrator dismissed the grievance. On the issue of the application of PIPA, he found that the information that the devices collected did not constitute the employees' personal information.

[7] OTIS asserts (and the Union does not deny) that the bargaining unit represented by the Union in the grievance included the two employees who have made the complaints under PIPA. One of them is a shop steward who acted as an instructing witness to the Union's counsel during the arbitration.

[8] The two employees did not make their complaint to the OIPC until after the arbitrator issued his decision.

[9] **Section 50 of PIPA—**Decision P07-02 is the one decision under PIPA that provides guidance concerning the exercise of the OIPC's discretion not to proceed with an inquiry under s. 50.[2] Section 50(1) provides as follows:

> 50(1) If a matter is not referred to a mediator or is not settled under section 49, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[10] In that decision, Adjudicator Francis held that decisions under the equivalent provision in s. 56 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") set out the principles for exercising discretion in favour of not holding an inquiry. These principles are as follows:

- the public body must show why an inquiry should not be held
- the respondent (the applicant for records) does not have a burden of showing why the inquiry should proceed; however, where it appears obvious from previous orders and decisions that the outcome of an inquiry will be to confirm that the public body properly applied FIPPA, the respondent must provide "some cogent basis for arguing the contrary"
- the reasons for exercising discretion under s. 56 in favour of not holding an inquiry are open-ended and include mootness, situations where it is plain and obvious that the records fall under a particular exception or outside the scope of FIPPA, and the principles of abuse of process, *res judicata* and issue estoppel
- it must in each case be clear that there is no arguable case that merits an inquiry.[3]

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[2] [2007] B.C.I.P.C.D. No. 27.
[3] Decision F08-11, [2008] B.C.I.P.C.D. No. 36, para. 8.

[11] I have taken the same approach here in applying s. 50 of PIPA.

[12] **Do the Principles Concerning Relitigation Apply to Administrative Tribunals?—**Where legislation creates two separate administrative tribunals and gives them jurisdiction over the same subject matter or issue—in this case, where an arbitrator and the Commissioner both have the authority to interpret and apply PIPA[4]—it is useful to begin by asking whether one decision-maker giving way to the other would undermine the intent of the Legislature in creating those concurrent jurisdictions.

[13] Where neither statute confers jurisdiction to decline, the answer may well be that neither statutory officer can decline to do its duty. However, where, as here, the Commissioner has discretion whether to proceed, it is not an infringement of legislative intent to exercise discretion in accordance with the principle of justice that takes into account the need for finality in decision-making, summarized by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry.... A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided. [5]

[14] Order 01-03[6] considered the doctrines of *res judicata* (also known as cause of action estoppel) and issue estoppel at some length. Former Commissioner Loukidelis said that estoppel can apply to administrative tribunals such as this one. He noted that its purpose is

> … to prevent a party from attempting, in a proceeding, to prove the contrary of that which has been proved in a previous proceeding.

[15] Shortly after Order 01-03 was issued, the Supreme Court of Canada issued its decision in *Danyluk v. Ainsworth Technologies Inc.*[7]

[16] *Danyluk* confirmed that the finality principles courts historically applied, with specialized technical labels such as abuse of process, *res judicata* and issue estoppel, now "extend, with some necessary modifications, to decisions being of a judicial or quasi-judicial nature pronounced by administrative officers and

[4] As noted at para. 2, the LRC s. 89(g) grants to an arbitration board the authority to interpret and apply any legislation intended to regulate the employment relationship of the persons bound by a collective agreement.
[5] 2001 SCC 44, para. 18.
[6] [2001] B.C.I.P.C.D. No. 3.
[7] 2001 SCC 44.

tribunals."[8] *Danyluk* confirmed that these finality principles can even bar a court action which has been finally decided in a prior administrative process.[9]

[17] In *British Columbia (Workers' Compensation Board) v. Figliola*, the Supreme Court of Canada confirmed that finality principles also apply where one statutory decision-maker is exercising discretion whether to hear a matter previously adjudicated by a different statutory decision-maker.[10]

[18] Therefore, I find it appropriate for me to consider and apply the finality principles described above. That is bearing in mind that I am to apply the underlying principles concerning relitigation rather than the actual doctrines of estoppel or the rules against collateral attack. In addition, I am to do so in the context before me under PIPA.

[19] **Do the Principles Concerning Relitigation Apply to this Case?**—*Toronto v. C.U.P.E.* is an example of the application of abuse of process. In that decision, Arbour J. explained:

> Courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process. The doctrine engages the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute. It has been applied to preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. The motive of the party who seeks to relitigate, and the capacity in which he or she does so, cannot be decisive factors in the application of the bar against relitigation. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different form.[11]

[20] That case involved a city employee who was convicted in criminal court of sexually assaulting a child under his supervision. The city terminated the employee after his conviction. The employee's union grieved the firing. The labour arbitrator did not accept the criminal conviction alone as proof in the arbitration case that the sexual assault occurred. Arbour J. stated:

> I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor was convicted in a criminal court and he exhausted all his avenues of

[8] *Danyluk v. Ainsworth Technologies Inc*., para. 21.
[9] However, on the facts in *Danyluk*, the Court held that it would be unjust to apply finality principles to the particular court action because fundamental procedural errors committed in the administrative process meant the claim "has simply never been properly considered and adjudicated" (para. 80).
[10] 2011 SCC 52.
[11] *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63, summary.

> appeal. In law, his conviction must stand, with all its consequent legal effects.[12]

[21] Estoppel did not apply in that case because the parties were different (the Crown versus the employee as opposed to the city versus the union) and the procedures were different (criminal as opposed to civil). The Court also found that the rule against collateral attack did not strictly apply either. However, the fact that estoppel and collateral attack did not technically apply did not matter because the doctrine of abuse of process did. In the words of Arbour J.:

> Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.[13]

[22] While that case described the rules against relitigation in the context of a prior criminal court decision, it has already been noted above that these principles apply to administrative tribunal decisions, whether as between administrative tribunals and courts (*Danyluk)* or as between administrative tribunals (*Figliola*).

[23] In *Figliola*, the Supreme Court of Canada held that the British Columbia Human Rights Tribunal should have refused to entertain a complaint alleging a breach of the *Human Rights Code* that the Workers Compensation Board had previously adjudicated between the same parties. The Tribunal was in that case exercising the discretion in s. 27(1)(f) of the *Human Rights Code*, which reads as follows:

> A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that ... the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding.

[24] The Court was critical of the Tribunal's overly technical approach to the finality doctrines, such as estoppel, and held that s. 27(1)(f) called for a more flexible approach—one which advanced the goal of avoiding unnecessary litigation. As noted by the Court in that case, the decision-maker:

> ...should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them.[14]

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[12] *Toronto v. C.U.P.E.*, para. 56.
[13] *Toronto v. C.U.P.E.*, para. 34.
[14] *British Columbia (Workers' Compensation Board) v. Figliola* 2011 SCC 52, summary.

[25] It is evident that *Figliola* involved the interpretation of a section of the *Human Rights Code* with its own language and history.[15] However, the larger principles the Court emphasized in *Figliola* are clearly relevant whenever an administrative decision-maker has discretion to exercise whether or not to proceed in the face of a prior administrative or judicial decision. *Figliola* supports the view that where, as here, there is discretion to consider finality principles, the exercise "does not call for the technical application of any of the common law doctrines—issue estoppel, collateral attack or abuse of process—it calls instead for an approach that applies their combined principles."[16]

[26] This point is critical with respect to the present case, because the facts do not fit precisely with the strict estoppel test. As summarized in Order 01-03, three criteria must be satisfied for issue estoppel to apply:

> [32] … (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. …

[27] In this case estoppel does not apply because the parties in the arbitration and this proceeding are, in a strictly technical sense, different. OTIS argues that the individual members of the Union who are making the PIPA complaint should not be considered distinct from their Union that made the policy grievance. In any case, according to OTIS, a relationship of privity exists between the Union and its members.

[28] I disagree with OTIS. In contemporary labour law, trade unions have separate legal personality from their members. For example, in *Berry v. Pulley*, Iacobucci J. observed:

> the field of labour relations has become increasingly sophisticated and regulated, with the granting of significant statutory powers and duties to trade unions. In light of these developments, unions have come to be recognized as entities which possess a legal personality with respect to their labour relations role. This status not only allows a union member to bring suit against his or her union directly, but also enables the union to enter into contracts of membership with each of its members.[17]

[29] The LRC recognizes the legal distinction between unions and employees. As the union is the party to the collective agreement representing the employees, it is the union that has carriage of any grievances under the LRC or any other matters relating to the collective agreement.

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[15] *British Columbia (Workers' Compensation Board) v. Figliola*, paras. 42-43.
[16] *British Columbia (Workers' Compensation Board) v. Figliola*, para. 44.
[17] *Berry v. Pulley*, [2002] 2 S.C.R. 493.

[30] Under PIPA, however, a union cannot make a complaint. PIPA applies only to the information about identifiable individuals. In accordance with ss. 46 and 47, only individuals may make complaints. In the present case, neither the Union nor the other employees of OTIS, which the complainants have listed in appendix 1, are parties to the complaint. The only parties are OTIS and the two complainants. Technically speaking then, the doctrine of issue estoppel does not apply.

[31] I also question whether, on a technical basis, the rule against collateral attack applies. This rule prevents parties from launching actions to overturn convictions (or other decisions) in a forum other than the appropriate forum for the appeal of that conviction (or decision).[18] In the present case, the appropriate forum for overturning the arbitrator's decision would have been through the designated appeal or judicial review process. Nevertheless, as was the case with *Toronto v. C.U.P.E.*, the complainants do not seek to overturn the decision of the arbitrator with respect to the policy grievance, but rather to challenge whether one aspect of the arbitrator's decision was correct, as part of a process of asserting their individual personal privacy rights under PIPA.

[32] Whatever the nuances of the formal "doctrinal catechisms" of estoppel or the rule against collateral attack, *Figliola* has given clear direction that the Commissioner's discretion is to be exercised in a fashion "that applies their combined principles." On the facts in *Figliola*, the Court concluded:

> ... it was patently unreasonable in large part because it represented the unnecessary prolongation and duplication of proceedings that had already been decided by an adjudicator with the requisite authority... .[19]

[33] In my view, it is appropriate for me to take into account the principles of judicial economy, consistency, finality and the integrity of the administration of justice. I note that relitigation can constitute an abuse of process, even in cases where estoppel or the rule against collateral attack does not apply, as was the case with *Toronto v. C.U.P.E.* Despite the lack of legal "privity" between the Union and the individual complainants, I can certainly take into account the practical fact that these individuals were being represented by the Union before the arbitrator.

[34] Applying the above test to this case, I find that, despite the fact that the parties are different and the statutory processes were different, the precise issue raised concerning whether the Telematics information was being collected contrary to PIPA is common to both. The Union of its own accord put that issue squarely before the arbitrator. He made a finding that he had the statutory authority to make. The complainants are now asking the OIPC to review the application of PIPA to the very same collection, use and disclosure of the same information that the Union put before the arbitrator, though to a different end.

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[18] See *Toronto v. C.U.P.E.* and *Wilson v. The Queen*, [1983] 2 S.C.R. 594.
[19] *British Columbia (Workers' Compensation Board) v. Figliola*, para. 54.

I see no injustice in refusing to duplicate the arbitrator's task in relation to a dispute arising out of this workplace, brought by the Union representing workers including the complainants. On the contrary, I find that this constitutes the kind of relitigation that abuse of process is intended to prevent, according to *Toronto v. C.U.P.E*..

[35] In all the circumstances, I find that hearing the complaint in the current case would constitute an abuse of process because it would violate the principles of judicial economy, consistency, finality and the integrity of the administration of justice.

[36] I close by emphasizing that this outcome does not, one way or the other, speak to the merits of arbitrator's decision under PIPA. Nor does it mean that I consider that the arbitrator had the same level of expertise in interpreting PIPA as does the OIPC. However, the Court in *Figliola* was clear that the relative expertise as between decision-makers is not an appropriate consideration in dealing with an issue of relitigation where two tribunals share jurisdiction.[20] Obviously, if and when a complaint similar to this one properly comes before the OIPC, the arbitrator's interpretation of PIPA would be relevant, but not binding.

CONCLUSION

[37] For the reasons noted above, I grant the application of OTIS to dismiss the complaints without an inquiry. An inquiry therefore will not proceed.

April 24, 2012

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

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[20] At para. 45.