BRITISH COLUMBIA LABOUR RELATIONS BOARD

SUNRISE POULTRY PROCESSORS LTD.

(the "Employer")

-and-

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1518

(the "Union")

PANEL:	Brent Mullin, Chair Bruce Wilkins, Associate Chair, Adjudication Jacquie de Aguayo, Vice-Chair
APPEARANCES:	Israel Chafetz, Q.C., for the Employer Chris Buchanan, for the Union
CASE NO.:	67338
DATE OF DECISION:	August 28, 2014

DECISION OF THE BOARD

1 The Union applies under Section 141 of the *Labour Relations Code* (the "Code") for leave and reconsideration of BCLRB No. B95/2014 (the "Original Decision"). The Original Decision found that the Board had jurisdiction under Section 99 of the Code to review an arbitration award of Stan Lanyon, Q.C. (the "Arbitrator") dated October 28, 2013, Ministry No. A-088/13 (the "Award"). In exercising that jurisdiction, the Original Decision went on to uphold the Award.

2 In the present application, the Union says the Original Decision erred on two bases. The first is that the Original Decision erred in finding the Board had jurisdiction to review the Award under Section 99 of the Code. The second alleged error is that the Original Decision erred in upholding the Award. The Employer disputes both bases upon which the Union seeks review of the Original Decision. We have reviewed and considered the Award, the Original Decision, and the submissions of the parties.

3 The comparative brevity of our decision which follows should not be misunderstood. While the Award and the Original Decision are lengthy, in our view they are justifiably so given their content. Further, as the Award notes, both the Union and the Employer have been "well represented by knowledgeable and experienced legal counsel in this matter" (Award, para. 34). As a result, as with the Award and the Original Decision, the submissions of the parties have been very helpful. The work which has already been done in this matter has enabled us to build upon what has been done and thus allows us to focus only on the dispositive points in respect to the issues before us.

4 Our decision concerns only the first basis upon which the Union seeks leave and reconsideration. It deals with the jurisdictional divide between Sections 99 and 100 of the Code. Sections 99 and 100 appear in the Code as follows:

> **Appeal jurisdiction of Labour Relations Board**
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> 99 (1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground that
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> (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
>
> (b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.

> (2) An application to the board under subsection (1) must be made in accordance with the regulations.

Appeal jurisdiction of Court of Appeal

> 100 On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award if the basis of the decision or award is a matter or issue of the general law not included in section 99 (1).

5 The law with respect to determining "the basis" of an arbitration award is helpfully set out in *Okanagan College Faculty Association v. Okanagan College*, 2013 BCCA 591 ("*Okanagan College*"). Based on the Court of Appeal decisions summarized therein (para. 35), we have proceeded on the basis that in cases of this nature, where an objection is made that a Section 99 application should be dismissed on the grounds that the proper forum for review is Section 100, the Board must also determine "the basis" of the award. The difficulty of making that determination was described by the Court in *Okanagan College* as follows:

> Often, the process of identifying the "real basis" of an award is relatively straightforward, where there is only one principal issue before the arbitrator, or where the arbitrator's analysis is principally focused on one element of a decision, despite touching on other issues tangentially. At other times, however, attempting to identify the "real basis" of an arbitrator's award, where there is more than one constituent element, is similar to deciding which leg of a table is the "real leg".
>
> But we are required to choose, under these unique provisions of the *Labour Relations Act,* which aspect of decision is *the* basis of the award, in order to determine whether jurisdiction falls to this Court. This sometimes artificial exercise appears to be what is statutorily required by this "brain teaser of the highest order" *(BC Nurses' Union* (2003) at para. 3). . . . (*Okanagan College,* paras. 85-86) (emphasis in original)

6 We find that description very accurately fits the circumstances and determination which must be made in this case. There is little if any dispute regarding the law to be applied. That law is set out in the Original Decision (paras. 69-72), the submissions of the parties, and most particularly in the summary of the law in the Court of Appeal's decision in *Okanagan College.* That law requires that the "real basis" of the Award be determined, what the Court of Appeal referred to, fittingly for this case, as "deciding which leg of a table is the 'real leg'" (*Okanagan College,* para. 85).

7 In respect to what the Original Decision found to be the "real basis" of the Award, it concluded:

> I find the issue in the present case is similar to the issue in *Teck Coal*, in that it involves a matter of general law (interim relief

> in that case, the right to privacy in this case), that arose as an ancillary issue to the "real substance of the matters in dispute" (to use the language of Section 82(2) of the Code). In both cases, the ancillary matter or issue arose in the specialized context of labour arbitration and is imbued with labour relations policy considerations. To the extent the issue requires interpretation of a statute of general application (in this case, *PIPA* [*Personal Information Protection Act*, S.B.C. 2003, c. 63]), that is merely a basis of the Award, not the basis. The Award concerns labour arbitration practice with respect to the naming of grievors and witnesses in awards, and how that practice is or should be affected by the right to privacy of participants in the labour arbitration process. In these circumstances, I find the Award falls within the Board's review jurisdiction under Section 99. (para. 84)

We find that what the Original Decision thus determines is the "real basis" of the Award concerns "labour arbitration practice with respect to the naming of grievors and witnesses in Awards, and how that practice is or should be affected by the right to privacy of participants in the labour arbitration process" (*ibid.*).

8 In reaching that conclusion, the Original Decision noted, among other matters, the alternative as well as the primary basis upon which the Union sought review of the Award (Original Decision, paras. 73-74) and the similarity of the present matter to what the Court of Appeal determined in *Okanagan College*, as well as *Teck Coal Ltd. v. United Steelworkers Local 9346 (Elkview Operations)*, 2013 BCCA 485 ("*Teck Coal*"). In respect to the determination in *Okanagan College,* the Original Decision says:

> In *Okanagan College*, the Court noted that the arbitrator's conclusions with respect to the application of the statute of general application in that case, the *Human Rights Code*, were "deeply intertwined with his conclusions regarding the nature and scope of the collective agreement, and the purposes for the evaluative regime set up by the parties", and this supported the conclusion that the award did not fall to be reviewed under Section 100 (para. 68). Similarly, in the present case, I find the Arbitrator's conclusions with respect to the application of *PIPA* in the arbitration context are deeply intertwined with his findings regarding the nature and scope of the labour arbitration process under the Code and the role and impact of participants' right to privacy in that specialized context. (para. 75)

9 We do not agree with the finding of the original panel with respect to the “real basis” for the Award. Among the various constituent elements of the Award we find the *PIPA* issue and the determination of it in the Award is not an ancillary issue but rather is “*the* basis” or the “real basis” of the Award**.** We do so for the following reasons.

10 *PIPA* was the primary argument of the Union. As well, the other matters or “constituent elements”, the “*Code*, common law, the *Charter* and the current practices of other tribunals and the Courts” (Award, para. 99), are all essentially part of the legal

context. The Award described that context as the "past practice of the last five decades [which] is important, but is no longer, in itself, determinative" (Award, para. 106). It is in that context that the Award ultimately turns to "provincial privacy legislation" (Award, para. 107), firstly dealing with the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 and the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, then ultimately turning to what the Union had argued in terms of *PIP*A. It is the provincial privacy legislation, and specifically *PIPA*, which, in terms of the Union's primary position, was to create the difference in approach required.

11 However, in addressing that issue, the Award does not agree that *PIPA* is applicable to labour relations arbitration (paras. 114-118). It then goes on to agree to a considerable extent with the Union's alternative position that there needs to be greater sensitivity to privacy concerns in labour relations arbitration practice on other bases (Award, paras. 119-141). In those other bases there are a number of constituent elements in Section 99/100 terms. They include publications from Privacy Commissioners, a Canadian Judicial Council report, Supreme Court of Canada privacy and Charter jurisprudence, consideration of the open court principle, and the practice of labour arbitrators in respect to privacy concerns. In our view, in respect to these various constituent elements, the *PIPA* argument, and determination in respect to it in the Award, is "*the* basis" or the "real basis" of the Award. We therefore find the question of the applicability of *PIPA* to arbitrators under the Code is a matter or issue of the general law not included in Section 99. This question does not involve consistency with the principles expressed or implied in the Code, or another Act dealing with labour relations**.**

12 As a result, we find that in light of the particular exercise which is required, as explained by the Court of Appeal in *Okanagan College*, we respectfully disagree with the determination in the Original Decision. As a consequence, we must overturn the jurisdictional determination in the Original Decision on the basis that review of the Award should properly be taken under Section 100 of the Code to the Court of Appeal.

13 In reaching this determination, there are three further matters to note. First, in our view the Award correctly describes itself as "a case of first instance" (para. 6), which is particularly true of its *PIPA* component, as explained above. As a result, it is our view that a review of the Award also falls under Section 100 of the Code on the basis that it is an instance of an initial interpretation of a matter of general law, rather than an application of established law within a labour relations context which would fall under Section 99(1)(b) of the Code: *Okanagan College,* para. 64.

14 A second point is that in reaching our determination we have not accepted the Employer's argument that the Award was in reality simply an adjunct to, or part of, the overall, previous discipline determination and Award (see the "Introduction/Background" in the Award at paras. 1-7). In reality, we find that the Award deals with a discrete matter which stands on its own. That matter stems from a reference to the Board by the Arbitrator under Section 98 of the Code, which the Board declined, remitting the issue to the Arbitrator. As the Arbitrator put it, his Award was "in respect of this single issue of privacy" (Award, para.82).

15 Third, we agree with the Union that *Teck Coal* is distinguishable as the basis of the award at issue in that case was an express provision in the Code, Section 92(1)(c).

16 In conclusion, in light of the above, leave and reconsideration are granted and the Original Decision is overturned on the basis that review of the Original Decision falls under Section 100 of the Code.

LABOUR RELATIONS BOARD

"BRENT MULLIN"

BRENT MULLIN
CHAIR

"BRUCE WILKINS"

BRUCE WILKINS
ASSOCIATE CHAIR, ADJUDICATION

"JACQUIE DE AGUAYO"

JACQUIE DE AGUAYO
VICE-CHAIR