Date: 20090218

Docket: T-1349-06

Citation: 2009 FC 170

Ottawa, Ontario, February 18, 2009

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

MARK WAXER

Applicant

- and -

PETER MCCARTHY

Respondent

- and -

J.J. BARNICKE

Respondent

- and -

THE PRIVACY COMMISSIONER OF CANADA

Added Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant, Mark Waxer, applies to strike the Respondent Peter McCarthy's amendments to his Motion Record.

[2] Mr. Waxer has applied to this Court for a review of his privacy complaint pursuant to section 14 of the *Personal Information and Protection of Electronic Documents Act,* S.C. 2000, c.5 (the "*PIPEDA")*. On motion by Martha McCarthy on November 23, 2008, I ordered removing Ms. McCarthy as an Added Respondent to this proceeding. I provided that the remaining parties to the Application were entitled to consider amending their Motion Records because the Motion Record and Affidavit of Ms. McCarthy were no longer a part of the record in the Application:

> Accordingly, an order will issue that Ms. McCarthy is to be removed as a party in this proceeding; that her motion record and affidavit will not be considered in the course of this proceeding and there will be an adjournment to allow counsel to decide whether they need to amend or augment their motion records.

[3] Peter McCarthy subsequently submitted an Amended Motion Record which contained much of the information from Ms. McCarthy's Motion Record concerning matters relating to Mr. Waxer's family law proceedings. Mr. McCarthy also added material as to how he became involved in this matter.

[4] Mr. Waxer objects to Mr. McCarthy's amendments to his Motion Record.

[5] As a result, I must decide whether the Mr. McCarthy's Amended Motion Record should be admitted in whole or in part in this application.

ISSUE

Should the portions of the Respondent Peter McCarthy's Amended Motion Record relating to the family law proceeding be struck?

[6] To answer this question, I have to consider what evidence is relevant in the *de novo* review of the *PIPEDA* complaint of Mr. Waxer.

Applicant's Submissions

[7] Mr. Waxer seeks to strike the amendments to Mr. McCarthy's Motion Record, pursuant to Rule 221(1) of the *Federal Courts Rules*, SOR/98-106, because the amendments relate to a family law dispute between Mr. Waxer and his ex-wife (who was represented by Ms. McCarthy).

[8] Mr. Waxer argues that Mr. McCarthy has acted contrary to my order by including the materials that were in Ms. McCarthy's evidence regarding the "separate and unrelated family law proceeding" in his Amended Motion Record. Mr. Waxer seeks to have the portions of the Amended Motion Record dealing with the family law dispute struck. He also seeks costs of this motion.

Respondent McCarthy's Submissions

[9] Mr. McCarthy argues that my order specifically contemplates the amendment and augmentation of the parties' respective motion records. Further, he submits that Rule 221(1) of the *Federal Courts Rules* is not applicable to applications.

[10] Mr. McCarthy argues that Part 4 of the *Federal Courts Rules* applies to all those proceedings that are not applications. Rule 169 provides that Part 4, which includes Rule 221(1), applies to all proceedings that are not applications (or appeals). As a result, a

motion to strike under Rule 221(1) cannot be considered in the case at bar because the proceeding is not an action, it is an application. Further, Rule 221(1) applies to pleadings, not material filed on an application. Mr. McCarthy also submits that the wording of Rule 221 indicates that the motion to strike is a discretionary power in the hands of the Court, and that in this case the Court should leave the amendments in place as they relate to the proceeding before it.

[11] Mr. McCarthy is of the view that I had not found, in my November 23, 2007 rder, that the family law proceeding was a "separate unrelated legal proceeding". Rather, he argues that I found that any allegations that the Applicant was making against Martha McCarthy were separate from the allegation raised against Peter McCarthy and J.J. Barnicke.

[12] Mr. McCarthy submits that evidence pertaining to the family law proceeding is relevant and ought to be before the Court on the hearing of the application. This scenario, according to Mr. McCarthy was specifically contemplated in my Order as is evidenced by the granting of an adjournment to allow counsel to decide whether they needed to amend or augment their motion materials.

[13] Mr. McCarthy submits that *prima facie* relevant evidence is admissible, subject to the Court's discretion to exclude where the probative value is outweighed by its prejudicial effect. He argues, citing *The Law of Evidence in Canada*, 2nd ed., that:

> the admissibility of evidence depends on its character and not upon its weight. If a piece of evidence is reasonably relevant,

> and not obnoxious to any exclusionary rule, it is admissible although its weight may not be very great.

[14] Mr. McCarthy argues that it is important that this Court be afforded the opportunity of reviewing the factual underpinnings which ultimately led up to the Privacy Commissioner's findings. He contends that the Applicant is improperly attempting to keep relevant evidence from this Court simply because it is unfavourable to him.

Added Respondent Privacy Commissioner's Submissions

[15] The Privacy Commissioner limited its submissions to the relevance of:

a. the Applicant's motive for initiating this application; and

b. the Applicant's private life and personal circumstances.

[16] The Privacy Commissioner takes no position on what, if any, portions of the Mr. McCarthy's Amended Motion Record could be characterized as evidence relating to the Applicant's motive for initiating this application and the Applicant's private life and personal circumstances.

[17] The Privacy Commissioner states that the jurisprudence is clear, evidence going to an applicant's motive will not assist a respondent to establish a defense on the merits. The Privacy Commissioner submits that the relevance of motive is limited to the assessment of damages owing, if any, and not as a potential bar to the action itself.

LEGISLATION

[18] Section 14(1) of *PIPEDA* provides:

Application	Demande
14. (1) A complainant may, after receiving the Commissioner's report, apply to the Court for a hearing in respect of any matter in respect of which the complaint was made, or that is referred to in the Commissioner's report, and that is referred to in clause 4.1.3, 4.2, 4.3.3, 4.4, 4.6, 4.7 or 4.8 of Schedule 1, in clause 4.3, 4.5 or 4.9 of that Schedule as modified or clarified by Division 1, in subsection 5(3) or 8(6) or (7) or in section 10.	**14.** (1) Après avoir reçu le rapport du commissaire, le plaignant peut demander que la Cour entende toute question qui a fait l'objet de la plainte — ou qui est mentionnée dans le rapport — et qui est visée aux articles 4.1.3, 4.2, 4.3.3, 4.4, 4.6, 4.7 ou 4.8 de l'annexe 1, aux articles 4.3, 4.5 ou 4.9 de cette annexe tels que modifiés ou clarifiés par la section 1, aux paragraphes 5(3) ou 8(6) ou (7) ou à l'article 10.

[19] The *Federal Court Rules* provide:

Application of this Part	Application
169. This Part applies to all proceedings that are not applications or appeals, including (*a*) references under section 18 of the *Citizenship Act*; (*b*) applications under subsection 33(1) of the *Marine Liability Act*; and (*c*) any other proceedings required or permitted by or under an Act of Parliament to be brought as an action.	**169.** La présente partie s'applique aux instances, autres que les demandes et les appels, et notamment : *a*) aux renvois visés à l'article 18 de la *Loi sur la citoyenneté*; *b*) aux demandes faites en vertu du paragraphe 33(1) de la *Loi sur la responsabilité en matière maritime*; *c*) aux instances introduites par voie d'action sous le régime d'une loi fédérale ou de ses textes d'application.
Motion to strike	Requête en radiation
221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	**221.** (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans

(*a*) discloses no reasonable cause of action or defence, as the case may be,	*a*) qu'il ne révèle aucune cause d'action ou de défense valable;
(*b*) is immaterial or redundant,	*b*) qu'il n'est pas pertinent ou qu'il est redondant;
(*c*) is scandalous, frivolous or vexatious,	*c*) qu'il est scandaleux, frivole ou vexatoire;
(*d*) may prejudice or delay the fair trial of the action,	*d*) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(*e*) constitutes a departure from a previous pleading, or	*e*) qu'il diverge d'un acte de procédure antérieur;
(*f*) is otherwise an abuse of the process of the Court,	*f*) qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

ANALYSIS

[20] Where the Privacy Commissioner has issued a report of findings and recommendations, as is the case here, an applicant is permitted under section 14(1) of the *PIPEDA*, upon receipt of the Privacy Commissioner's report, to apply for a hearing *de novo,* "in respect of any matter in which the complaint was made, or that is referred to in the Commissioner's report…".

[21] Since Rule 221(1) applies to actions, I agree it is not a basis for striking parts of a motion record.

[22] Given that I granted leave to the parties to amend their respective motion records by my Order dated November 23, 2007, I consider it appropriate to apply Rule 75(1), the Amendments with Leave provision. Rule 75(2) limits 75(1) such that no amendment shall be allowed unless the purpose is to make the document accord with the issues at the hearing.

[23] I now turn to the question of the relevance of the Applicant's motive and personal circumstances.

Relevance of Applicant's Motive

[24] In *Canada (Information Commissioner) v. Jaques-Cartier and Champlain Bridges Inc.*, [2000] F.C.J. No. 121, at para. 42, Justice Blais stated in the context of a judicial review that:

> [t]here is no need for me to rule on the possible reasons why someone might be making a legitimate request for access to information.

[25] In *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, at para. 32, Justice Gonthier for the Court stated:

> it is the nature of the information itself that is relevant -- not the purpose or nature of the request. The *Privacy Act* defines "personal information" without regard to the intention of the person requesting the information. Similarly, s. 4(1) of the *Access Act* provides that every Canadian citizen and permanent resident "has a right to and shall, on request, be given access to any record under the control of a government institution". This right is <u>not</u> qualified; the *Access Act* does not confer on the heads of government institutions the power to take into account the identity of the applicant or the purposes underlying a request. (underlining in original)

[26] In *Maheu v. IMS Health Canada*, 2003 FCA 462, at para. 5, Justice Evans held that, in determining whether an application for judicial review is frivolous and vexatious for the purpose of an order for security for costs under 416(1)(g) of the *Federal Courts Rules*, the Court is only entitled to consider whether there is any possibility that the application could succeed.

[27] In *Rousseau v. Canada (Privacy Commissioner)*, 2008 FCA 39, at para. 9, Justice Décary held that once an applicant has met the threshold for applying to this Court under s.14 of the *PIPEDA* for a hearing *de novo*, the applicant's motivation for doing so is irrelevant:

> **9** We have been informed at the hearing that as a result of a successful claim filed by Mr. Rousseau with the Ontario Superior Court of Justice, the matter between Mr. Rousseau and his insurer was settled. However, Mr. Rousseau is still seeking access to the notes. He is entitled to or he has a right under the PIPED Act to pursue his application, regardless of motivation. (see *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.J. No. 950, 2002 FCA 270 at para. 9). He did not file any representations in this appeal and his interests are defended by the Privacy Commissioner. (underlining added)

[28] I conclude that the motive of the Applicant is not relevant in an application for a review of a PIPEDA privacy complaint.

Relevance of the Applicant's personal circumstances

[29] The removal of Ms. McCarthy as an Added Respondent also removed her Motion Record from consideration in this proceeding (My Order, dated November 23, 2007, at para. 8). The matters that were of concern for Ms. McCarthy are not matters relevant to

Mr. Waxer's *PIPEDA* privacy complaint against the Respondents Peter McCarthy and J.J. Barnicke with the exception of how Mr. McCarthy came to be involved with Mr. Waxer. To allow the Respondent to submit evidence concerning the family law proceeding would allow Mr. McCarthy to achieve indirectly what I had directly excluded.

[30] Mr. Waxer's intent in filing the *PIPEDA* complaint is irrelevant. As a result, the family law materials which, Mr. McCarthy submits, serve as the factual underpinning of this application are also irrelevant. Whatever Mr. Waxer's intent, it has no bearing on determining whether the Applicant's *PIPEDA* rights were breached. The family law evidence Mr. McCarthy is seeking to have admitted should not be considered if its sole purpose is to impugn the Mr. Waxer's character. The issue here is whether a breach of Mr. Waxer's *PIPEDA* rights has occurred.

[31] For complainants who are already of the view that their privacy has been violated, the prospect of a public proceeding to protect their rights becomes even more daunting when having to defend their personal character or having irrelevant private facts publicized in order to obtain a remedy for a respondent's breach. Evidence of bad character alone is of no relevance to any privacy matter properly in issue before this Court. Parties to a public hearing should be discouraged from filing such materials.

[32] I conclude that the evidence dealing with Mr. Waxer's personal circumstances, namely the family law dispute between Mr. Waxer and his ex-wife, is irrelevant as to whether the Applicant's *PIPEDA* rights were breached.

[33] However, the exception I spoke of, the information conveyed to Mr. McCarthy that prompted him to act as he did, does not speak to Mr. Waxer's motive in filing the *PIPEDA* application but rather to Mr. McCarthy's motives. This information does not relate to Mr. Waxer's motive or personal circumstances and will be allowed to remain on the record.

CONCLUSION

[34] Mr. Waxer has put forth a motion to strike paragraphs 1, 2, 9, 14, 17-20, 24-28 and 48 of Mr. McCarthy's Amended Motion Record. He does not refer to the remaining amendments which do refer to the family law proceeding or Ms. McCarthy.

[35] The following paragraphs will not be struck for the respective reasons:

a. Paragraph 1: The information contained therein is information which Peter McCarthy would have knowledge of. Further, it does not speak to the Applicant's intent or motive in filing this application.

b. Paragraph 2: The portion of the paragraph dealing with the Privacy Commissioner's finding will not be struck: "Despite a finding of the Privacy Commissioner that there was no improper collection of information regarding Waxer and the complaint was dismissed." It is information which is available to all parties through the Privacy Commissioner's Report.

c. Paragraph 9: Subsections (a)-(f) will not be struck. Subsection (a) is the essences of what Mr. McCarthy learned from his sister. Subsection (f) is a finding made by the Privacy Commissioner at first instance.

d. Paragraph 20: It is information describing a conversation between Ms. McCarthy and Peter McCarthy.

e. Paragraph 26: It does not speak to the Applicant's motive of filing the *PIPEDA* application, rather it speaks to Mr. McCarhy's motive in sending out the one line email.

f. Paragraph 48: The portion of the paragraph which seeks to distinguish *Morgan v. Alta Flights (Charters) Inc.*, [2005] F.C.J. No. 523, from the case at bar is not struck: "Contrary to the argument put forward by the Applicant … information sought by an organization is, in fact, collected."

[36] The following paragraphs will be struck for the respective reasons:

a. Paragraph 2: The portion of the paragraph explaining Mr. McCarthy's view of why Mr. Waxer is using the *PIPEDA* process speaks to the Applicant's intent and motive and is therefore not relevant to whether his *PIPEDA* rights were breached: "Waxer has used this application … in their family law proceeding." As a result, this portion will be struck.

b. Paragraph 14: Speaks to the motive of Mr. Waxer's filing of the *PIPEDA* application.

c. Paragraph 17: Is a transcript of the phone message left by Mr. Waxer on the voicemail of Ms. McCarthy. While Mr. McCarthy would have

knowledge of the call being made this would not be true of the phone message itself or the words used.

d. Paragraph 18: As in paragraph 17, this is merely a transcript of the above voicemail.

e. Paragraph 19: It speaks to the family law proceedings.

f. Paragraph 25: It discusses outcomes in the family law proceeding.

g. Paragraph 26: This relates to the family law proceeding.

h. Paragraph 27: It discusses outcomes in the family law proceeding.

i. Paragraph 28: It discusses outcomes in the family law proceeding.

j. Paragraph 48: The portion of this paragraph which deals with the Applicant's intent in filing this application will be struck: "Waxer is using this application for an improper purpose. It is part of his ongoing campaign to harass his former wife's counsel, Ms. McCarthy."

ORDER

THIS COURT ORDERS that

1. Paragraphs 14, 17, 18, 19, 25, 26, 27, 28, and the denoted portions of paragraphs 2, and 48, are struck from the Respondent McCarthy's Amended Motion Record.
2. As success was divided, costs are in the cause.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1349-06
STYLE OF CAUSE:	Mark Waxer v. J.J. Barnicke Limited et al.
PLACE OF HEARING:	Toronto, Ontario
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APPEARANCES:

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