Date: 20061130

Docket: T-2126-05

Citation: 2006 FC 1455

[ENGLISH TRANSLATION]

BETWEEN:

JOHANNE LÉPINE

Applicant

and

BANK OF NOVA SCOTIA
and
THE PRIVACY COMMISSIONER
OF CANADA

Respondents

REASONS FOR ORDER

PROTHONOTARY MORNEAU

[1] This is a motion by the applicant to essentially seek a ruling in his favour regarding several objections raised by the respondent, the Bank of Nova Scotia (the Bank), during examinations on affidavit of the two affiants produced by the Bank in its response on the merits to an application for judicial review filed by the applicant in December 2005.

[2] That application for judicial review requires that this Court essentially examine all issues for which a complaint was filed by the applicant in September 2004 with the Privacy Commissioner of Canada (the Commissioner).

[3] The wording of the applicant's complaint with the Commissioner makes it hard to understand. However, I think that the Commissioner summarized it well when, in the beginning of her final report on November 2, 2005, she indicated the following:

> [TRANSLATION]
>
> In your complaint received by our office on September 22, 2004, you allege that one or more employees of the Bank of Nova Scotia obtained your personal information regarding one or more of your accounts, without your permission. The information obtained was then allegedly shared with a third party to launch legal seizure proceedings.

[4] In the "Complaint and Investigation" section of her final report, the Commissioner indicated as follows what she was able to determine from her investigation:

> [TRANSLATION]
>
> **Complaint and investigation**
>
> In June 2004, the Bank conducted its investigation, which revealed that a manager for the Quebec Region accessed your client profile eleven times on the following dates: 2004-01-16, 2004-01-19, 2004-01-20, 2004-01-21, 2004-02-11. According to the information received, a client's profile contains information about all dealings with the Bank: account numbers and balances, credit cards, mortgage, etc.
>
> In doing so, the employee in question found that you had taken out a mortgage on a property. The employee indicated several times during the investigation by the Bank that he had not shared the information obtained with anyone but the Branch Manager.

> The Bank advised us that disciplinary action had been taken against the employee at fault.

[5] In the “Conclusions” section of her final report, the Commissioner summarized and set out as follows the findings that led her to conclude that the applicant’s complaint was well-founded under the *Personal Information Protection and Electronic Documents Act* S.C. 2000, c. 5 (the Act):

> [TRANSLATION]
>
> **Conclusions**
>
> In its response to our notice of complaint, the Bank confirmed that one of its employees had accessed your profile without your consent. The employee indicated that he had not shared the information obtained with any third parties, other than the Branch Manager. Following its internal investigation, the Bank took disciplinary action against the employee in question.
>
> I therefore find that your complaint is well-founded.

[6] In her application for judicial review filed in December 2005, the applicant, in addition to a finding of damages, seems to be asking the Court to require that the Bank change some of its institutional approaches.

[7] For example, the applicant is demanding that the Bank show greater respect in the future for the Act and that it change its administrative and technical measures regarding the use of the computer system used by its employees to view a client’s profile (in this regard, see the first two remedies sought by the applicant in her application for review).

[8] In response to that application for review, among other things, the Bank filed an affidavit by Richard Groot, a Manager with the Bank for Eastern Canada, and an affidavit by John Mair, a Senior Manager with the Bank for security and investigations.

Analysis

[9] It is recognized that a party conducting a cross-examination on affidavit does not have the same latitude as they would have in a cross-examination for discovery of the opposing party.

[10] As noted in the following excerpts from *Imperial Chemical Industries Plc v. Apotex Inc.* (1988), 23 C.P.R. (3d) 362, at page 366 and page 368, the questions asked in a cross-examination on affidavit must be limited to the issue for which the affidavit was filed or to the credibility of the affiant:

> A party cross-examining his opponent's affidavit is not entitled to cover all matters that may be said to be in issue in the action. Rather, the range of inquiry is limited to the issue in respect of which the affidavit was filed or to the credibility of the witness. Moreover, the question must be a fair question in the sense of evincing a *bona fide* intention directed to these ends, rather than being something in the nature of a fishing expedition. See *Weight Watchers Int'l Inc. v. Weight Watchers of Ontario Ltd. (No. 2)* (1972), 6 C.P.R. (2d) 196; *Bally-Midway Mfg. Co. v. M.J.Z. Electronics Ltd.* (1983), 75 C.P.R. (2d) 160; and *Boots Co. PLC v. Apotex Inc.* (1983), 76 C.P.R. (2d) 265.
>
> (...)
>
> (...) if we were dealing with an examination for discovery, where the test of relevancy involves a consideration of what might reasonably be supposed to contain information likely to assist the party in advancing his own case and in damaging the case of his adversary. The same broad standard of relevancy is not an appropriate test of relevancy for cross-examination of an affidavit. In my opinion, the learned prothonotary erred in law in treating these questions as being properly relevant to the issue in respect of which the affidavit was filed or as going to the credibility of the witness. I consider that they are unfair and oppressive questions in the nature of a fishing expedition, and nothing more.
>
> (Emphasis added.)

[11] Objections 1 to 3 in the examination of Mr. Groot, reproduced in the applicant's written submissions, are all related to questions aimed directly or indirectly at identifying the identity of the employee at fault who internally shared personal information about the applicant.

[12] Those objections are upheld, as the identity of the employee at fault clearly exceeds the framework and purposes of the affidavits by Mr. Groot and Mr. Mair. Moreover, and without deciding here, as this issue could be examined by the Court on its merits, the identity of that employee would likely not be personal information about the applicant, but in fact personal information specific to that employee.

[13] These reasons also support the fact that the applicant could not receive the full text of Exhibit RG-1 from the affidavit by Mr. Groot, namely the disciplinary letter sent to the employee at fault. I have examined the full text of Exhibit RG-1 (which shall remain confidential at the Court for 30 days, and then destroyed unless my decision is appealed) and I am satisfied that the portions that were redacted were reasonably redacted to ensure that the identity of the employee at fault would not be directly or indirectly disclosed.

[14] Objections 6 to 8 of the same examination are related to questions that were answered without prejudice. Under Rule 95 of the *Federal Court Rules*, they are not to be addressed here and shall be the examined, as applicable, by the judge on their merits.

[15] Regarding the examination of Mr. Mair, objections 1 and 2 are also related to questions that were answered without prejudice. Under Rule 95, they are not to be addressed here and shall be the examined, as applicable, by the judge on their merits.

[16] Objection 3 is based initially on a premise, i.e. the locking of the applicant's account, that was not established in a positive manner during the examination of Mr. Mair. Therefore, the question covered by objection 3 is hypothetical in nature and will therefore not receive a response.

[17] The application to examine the Bank's Branch Manager to whom the employee at fault allegedly transmitted the information about the applicant at the time is dismissed, as that person did not file an affidavit, the three affidavits filed by the Bank in response are largely enough, and the application is clearly unnecessary and irrelevant to the application for judicial review.

[18] As noted by my colleague Tabib as follows in *Autodata Ltd. v. Autodata Solutions Co.*, [2004] F.C.J. No 1653, an application for judicial review is governed by a fairly narrow framework:

> 19 However, a cross-examination on affidavit is not a discovery, and an application is not an action. An application is meant to proceed expeditiously, in summary fashion. For that reason, discoveries are not contemplated in applications. Parties cannot expect, nor demand, that the summary process mandated for applications will permit them to test every detail of every statement made in affidavits or in cross-examinations against any and all documents that may be in the opposing party's possession. If a party is not required to "accept" a witness' bald assertion in cross-examination, it is however limited in its endeavours to test that assertion to the questions it may put to the witness and the witness' answers in the course of the cross-examination. To the extent documents exist that can buttress or contradict the witness' assertion, production may only be enforced if they have been listed, or sufficiently identified, in a direction to attend duly served pursuant to Rule 91(2)(c) (see Bruno v. Canada (Attorney General), [2003] F.C.J. 1604). I reiterate: a cross-examination on an affidavit is the direct testimonial evidence of the witness, not a discovery of the party.

[19] Consequently, remedies 1 to 4 set out in the applicant's notice of motion are dismissed. The applicant's motion shall therefore be dismissed with costs.

[20] The timeline to be followed hereafter in this case shall be as follows:

1. Applicant's Record to be served and filed on or before December 29, 2006;

2. Respondent's Record to be served and filed on or before January 29, 2007;

3. Applicant to serve and file a Requisition for Hearing Date on or before February 19, 2007.

"Richard Morneau"

Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2126-05

STYLE OF CAUSE: JOHANNE LÉPINE
Applicant
and
BANK OF NOVA SCOTIA
and
THE PRIVACY COMMISSIONER
OF CANADA
Respondents

WRITTEN MOTION EXAMINED AT MONTRÉAL WITHOUT APPEARANCES BY THE PARTIES

REASONS FOR ORDER: PROTHONOTARY MORNEAU

DATED: NOVEMBER 30, 2006

WRITTEN SUBMISSIONS:

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David E. Platts	FOR THE RESPONDENT BANK OF NOVA SCOTIA
Nathalie Daigle	FOR THE RESPONDENT THE PRIVACY COMMISSIONER OF CANADA

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