Federal Court  Cour fédérale

Date: 20100917

Docket: T-1459-08

Citation: 2010 FC 934

Ottawa, Ontario, September 17, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JAVIER BANUELOS

Applicant

and

TD BANK FINANCIAL GROUP

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks to have the Court find that TD Bank Financial Group disclosed his personal information without consent and award special, general, aggravated and punitive damages in the amount of $5,498,065.18. The Office of the Privacy Commissioner of Canada determined

that the respondent had not disclosed the information in question. The applicant, representing himself, disputes that finding. For the reasons that follow, the application is dismissed.

BACKGROUND:

[2] This is an application for judicial review pursuant to section 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of a "Report of Findings" made by the Office of the Privacy Commissioner of Canada, dated August 7, 2008, wherein it was concluded that the applicant's complaint was not well-founded.

[3] According to subsection 14(1) of the *Personal Information Protection and Electronic Documents Act*, 2000, c. 5 (PIPEDA), a complainant may, after receiving the Commissioner's report, apply to the Court for a hearing regarding any matter in respect of which the complaint was made, or that is referred to in the Commissioner's report.

[4] The underlying complaint in this matter arose out of a series of events in April 2003 relating to the applicant's parents' separation and divorce proceedings. At the time, he was 18 years of age. The father, who was then living outside of Canada, had arranged for the applicant to join him for a holiday in Costa Rica. In several communications prior to the trip, the father instructed the applicant to collect a cheque drawn on his Canadian business account for just over $6800 in Canadian funds. The applicant was to cash the cheque at a branch of the TD Bank in Aurora, Ontario in US dollars and then carry the cash with him on the flight to Costa Rica. On April 14, 2003 the father sent TD a letter by facsimile to authorize release of the funds to the applicant. The applicant collected the funds on April 15, 2003 but they were "intercepted" by the mother on April 18, 2003, the day before his departure.

[5] In her evidence in the divorce action, filed as exhibits to the applicant's affidavit in this application, the mother acknowledged having searched the applicant's luggage prior to his departure "to find out what was going on". She did this, as she put it, because the applicant refused to give her any information about his plans. According to the mother's evidence, the bank account was supposed to have been frozen pursuant to a court order. The mother stated that she used the intercepted funds to provide support for herself and her four children.

[6] The applicant later attempted to have his mother charged with theft for taking the cash. A police officer, to whom he took his complaint, refused to investigate as it arose from a matrimonial dispute. A subsequent attempt in 2005 to have the matter addressed by the Ontario Court of Justice was also unsuccessful. The applicant says that this was due to the fact his only evidence was his mother's admission under oath in the divorce proceedings. It would have also been difficult to prove that the mother had no claim to the money in these circumstances.

[7] The applicant says that in December 2005 he discovered a copy of the letter which his father had faxed to TD in Aurora on April 14, 2003 attached as an exhibit to his mother's October 8, 2003 affidavit. Also attached to the affidavit in the same exhibit was a handwritten note and e-mail message to the applicant from his father regarding the funds transfer. The applicant says that because he was named in the letter to the bank he inquired about the legality of this document having been disclosed without his authorization or consent.

[8] The affidavit evidence of the applicant and his father is that no copy was made of the April 14, 2003 letter and that the original was destroyed after it had been faxed to the bank manager. However, in a declaration prepared for the police when the applicant was attempting to lay criminal charges against his mother following his trip to Costa Rica, the applicant included this statement:

> Copy of the cheque and the letter sent by my father to the TD Canada Trust bank are attached.

[9] This statement suggests that the applicant was in possession of a copy of the letter in the weeks following the incident. When asked about this contradiction, the applicant stated that the declaration was incorrect and that he did not have the letter at the time that it was prepared. He asserts that the only way that his mother could have obtained the letter was if it was disclosed to her by staff at TD's Aurora branch.

[10] In January 2006, the applicant contacted the office of the Privacy Commissioner regarding these concerns and was advised to first convey them to the TD bank in order to establish if the bank was in a position to explain how the document had appeared in an affidavit introduced in court proceedings without the applicant's permission. The applicant then wrote to TD setting out the history of the affair and his belief that the Aurora branch had disclosed personal information about him without his authorization.

[11] In a letter from the TD corporate privacy officer dated March 1, 2006, the applicant was advised that disclosure of client information was contrary to the bank's *Code of Conduct and Ethics* and PIPEDA, aside from in certain defined circumstances. As the branch manager named in the applicant's complaint was no longer an employee of the bank, the privacy officer stated that it was

not possible for the bank to ascertain or deny the applicant's allegations. The privacy officer offered to attempt to assist the applicant to investigate his allegations through other means, with his consent. This referred to an approach to the applicant's mother and lawyer who, presumably, would have had knowledge of how the letter came into the mother's possession.

[12] The applicant did not take advantage of the bank's offer and chose to pursue his complaint with the Privacy Commissioner. He requested, among other things, that the bank manager and tellers be cross examined under oath as to their knowledge of the matter, that an inquiry be conducted as to why the manager had left the bank and that the telephone records of the bank and of his mother's law firm be secured and examined. The Privacy Commissioner conducted a more limited investigation and ultimately published a report of her findings.

[13] The applicant claims that the disclosure of the letter caused him to suffer a number of serious and adverse consequences for which he should be compensated through damages. He claims that his present alienation from his mother is directly related to the said disclosure. He says that he was also denied a share of child support for his education. According to the applicant, this resulted in the loss of several years of attendance at university. He was unable to receive equal credit for those years when he transferred to another college. His mother' assertion of a claim to the matrimonial assets has deprived him of expectations as to his inheritance. He also claims the loss of projected income had he graduated from the university program on schedule. In addition, the applicant claims to have suffered humiliation in seeking redress through the laying of criminal charges such as having to sit in courthouses with other persons of an "insalubrious" nature.

[14] As a result of the compound effect of these events, the applicant says he suffered anxiety, depression and emotional distress for which he should be compensated. He claims a total of $498, 065.18 in pecuniary damages and a total of $5,000,000 in general, aggravated and punitive damages.

Report of findings of the Office of the Privacy Commissioner – August 7, 2008

[15] The report of findings in the letter of the Assistant Privacy Commissioner dated August 7, 2008, states that in making their determinations, the Office applied Principle 4.5 of Schedule 1 to the Act. That principle states that personal information must not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law.

[16] The investigator was unable to interview the officer who had initially received the April 14, 2003 letter of instruction given that she had left the employ of the bank at some point during the three-year interval between the time of the alleged disclosure and the filing of the complaint. The investigator did, however, reach the lawyer who had represented the complainant's mother in 2003 and had submitted the affidavit in question to which the disputed letter of direction had been appended. When asked whether she had obtained a copy of the letter directly from TD, the lawyer replied that, according to her recollection of events, the bank had not released the document to her.

[17] The report found that it was regrettable that the applicant had not accepted the bank's apparently sincere invitation to investigate his allegations through other means as the Act encourages individuals to exhaust grievance or review procedures otherwise reasonably available before making a formal complaint. In the circumstances of this case, including the inability to interview the former bank manager and the information provided by the mother's lawyer, it was concluded that there were no reasonable grounds to find that TD disclosed the personal information without consent.

[18] In a letter to the respondent dated November 5, 2008 the Assistant Privacy Commissioner wrote that the August 7, 2008 report was ambiguous and should have stated affirmatively that the Office determined that TD did not disclose the documents in question and that they came into the possession of the complainant's mother independently of any involvement of the respondent organization. She added that pursuant to subsection 20 (3) of *PIPEDA*, the Privacy Commissioner's discretion to disclose information to the extent necessary to establish the grounds for findings contained in the report issued under the Act "was exercised to take into consideration various sensitivities involving family members, which came to light in the course of investigating this complaint".

STATUTORY FRAMEWORK:

[19] I think it necessary to refer only to selected provisions of the Act. Section 2(e), of the PIPEDA defines 'personal information' as:

"personal information" means information about an	« renseignement personnel » Tout renseignement concernant

identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization.	un individu identifiable, à l'exclusion du nom et du titre d'un employé d'une organisation et des adresse et numéro de téléphone de son lieu de travail.

[20] Subsection 5(1) reads:

5.(1) Subject to sections 6 to 9, every organization shall comply with the obligations set out in Schedule 1	5.(1) Sous réserve des articles 6 à 9, toute organization doit se conformer aux obligations énoncées dans l'annexe 1.

[21] Schedule 1 incorporates the Canadian Standards Association National Standard for Canada entitled "Model Code for the Protection of Personal Information", CAN/CSA-Q830-96. As indicated above, the relevant principle is 4.5 which reads as follows:

4.5 Principle 5 — Limiting Use, Disclosure, and Retention	4.5 Cinquième principe — Limitation de l'utilisation, de la communication et de la conservation
Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfilment of those purposes.	Les renseignements personnels ne doivent pas être utilisés ou communiqués à des fins autres que celles auxquelles ils ont été recueillis à moins que la personne concernée n'y consente ou que la loi ne l'exige. On ne doit conserver les renseignements personnels qu'aussi longtemps que nécessaire pour la réalisation des fins déterminées.

[22] Sections 14(1) and 16 govern applications for review of the Commissioner's reports to the Federal Court:

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.
Remedies	Réparations
16. The Court may, in addition to any other remedies it may give,	16. La Cour peut, en sus de toute autre réparation qu'elle accorde :
(a) order an organization to correct its practices in order to comply with sections 5 to 10;	a) ordonner à l'organisation de revoir ses pratiques de façon à se conformer aux articles 5 à 10;
(b) order an organization to publish a notice of any action taken or proposed to be taken to correct its practices, whether or not ordered to correct them under paragraph (a); and	b) lui ordonner de publier un avis énonçant les mesures prises ou envisagées pour corriger ses pratiques, que ces dernières aient ou non fait l'objet d'une ordonnance visée à l'alinéa a);
(c) award damages to the complainant, including damages for any humiliation that the complainant has suffered.	c) accorder au plaignant des dommages-intérêts, notamment en réparation de l'humiliation subie.

ISSUE:

[23] The issue raised by the parties in their submissions is the following:

> Has the applicant adduced any admissible evidence which establishes that the respondent TD breached the provisions of PIPEDA and disclosed the applicant's personal information?

ANALYSIS:

Standard of Review

[24] The hearing of an application made after receipt of a report of the Privacy Commissioner under subsection 14(1) of the PIPEDA is not a judicial review of the Commissioner's findings and recommendations. Section 14, in effect, provides for *de novo* review in court of "any matter in respect of which the complaint was made": *Waxer v. McCarthy*, 2009 FC 169 at para. 25; *Arcand v. Abiwyn Co-Operative Inc.*, 2010 FC 529 at para. 27.

[25] In *Englander v. Telus Communications Inc.*, 2004 FCA 387, [2005] 2 F.C.R. 572, at paragraphs 47 and 48, Justice Robert Décary of the Federal Court of Appeal held that:

> What is at issue in both proceedings is not the Commissioner's report, but the conduct of the party against whom the complaint is filed.
>
> ....
>
> ... the hearing under subsection 14(1) of the Act is a proceeding *de novo* akin to an action and the report of the Commissioner, if put into evidence, may be challenged or contradicted like any other document adduced in evidence.

[26] Accordingly, this Court is engaged in a finding of fact whether the respondent, TD, disclosed the complainant's personal information without consent. If it is found that there was indeed disclosure of information by the respondent, this Court must decide, as a matter of law,

whether the alleged disclosure constitutes a “violation of the complainant’s privacy” as contemplated by PIPEDA (*Waxer*, *supra* at para. 25).

[27] If a violation of PIPEDA by TD is found, this Court will need to consider the remedies that are available to the complainant: *Johnson v. Bell Canada*, 2008 FC 1086, [2009] 3 F.C.R. 67, at para. 54.

[28] The respondent submits that the Court should require that the applicant meet the normal civil burden of proof on a balance of probabilities and that the findings of the Privacy Commissioner should be accorded deference.

[29] If this were a case in which the Privacy Commissioner’s special expertise in privacy matters was called into question I would have little difficulty accepting that some deference was called for. But here the issue turns on a simple finding of fact. In these circumstances, the Court is equally capable of making that determination. I note that in *Englander v. Telus*, above, at paragraph 48 Décary, J. suggests that deference is not appropriate under s. 15 of the Act, as the Commissioner may appear as a “party” at the hearing. Therefore, and according to Décary, J, “[t]o show deference to the Commissioner’s report would give a head start to the Commissioner when acting as a party and thus could compromise the fairness of the hearing”. In this case, the Office considers that it has no further role in the proceedings because of its determination that TD was not involved in the disclosure.

[30] In making its findings, the Office of the Privacy Commissioner employed a reasonable grounds standard. I think it appropriate that the Court employ the same standard in conducting its *de novo* review under s. 14. A reasonable grounds standard is something less than a balance of probabilities but more than mere suspicion: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 at para. 114. In the context of this case, the Court does not have to weigh the evidence to determine whether one version of the facts is probable or more likely than not but it must be satisfied that there is sufficient objective evidence to establish that the grounds for the complaint have been made out.

[31] The applicant argues that the Commissioner erred in finding that there were no reasonable grounds to conclude that TD disclosed his father's personal information without consent. The applicant submits that what was at issue was the disclosure of his *own* information and documentation, not that of his father. I do not agree that the Commissioner erred.

[32] The letter in question authorized the bank to pay out funds to the applicant which it held in the account of a corporate entity controlled by the father. The father could have arranged to have the funds wired to him in Costa Rica. In her evidence in the divorce proceedings, the mother alleged that it was done in this manner to avoid disclosure of the father's location which was then unknown to her and her counsel. Whether that is correct or not, the letter was a communication of instructions by a client to his bank which only incidentally concerned the applicant.

[33] As a client of the bank, it was the father to whom the bank owed the duty not to disclose personal information. The applicant's role in the process was simply to act as his father's agent and

courier to transfer the funds from the account in Aurora to the father in Costa Rica. The father had to authorize the bank to release the funds to the son. To accomplish that purpose, the applicant was named in the letter of authorization. That is the extent of the relationship which the applicant had with the bank as far as I can determine from the record. In that regard, therefore, I believe the Commissioner was correct to characterize the complaint as one involving the father's personal information and not that of the applicant.

[34] In any event, the complaint is now before me *de novo*. I am satisfied that nothing turns on whether the alleged violation of PIPEDA concerns the father's personal information or the son's or both. There is insufficient evidence to find that the bank disclosed the information in question. There is a suggestion in the mother's examination on her affidavit that she may have gone to the bank to complain when she discovered that they had released funds which were supposedly subject to a court restraining order. But that line of inquiry was not pursued and the Court is left with no evidence establishing that that is how she obtained the letter.

[35] The applicant urges the Court to infer that the copy of the letter that he found attached as an exhibit to his mother's October 2003 affidavit must have been provided by TD as his evidence and that of his father is that neither retained a copy of the original which was faxed to the bank. Thus the only copy in existence, they say, was that received by the bank. Thus the bank must have given a copy to the mother.

[36] Factual inferences must be carefully distinguished from conjecture or speculation: *Caswell v. Power Duffryn Associated Collieries Ltd.* [1940] A.C. 152 (H.L.) 169-170 as per Lord Wright,

quoted with approval in *Lee v. Jacobson*, [1994] B.C.J. 2459; 120 DLR. (4th) 155 at para. 26 (B.C.C.A.). As noted by Justice David Doherty in *R. v. Morrissey* (2005), 22 O.R. (3d) 514; 97 C.C.C. (3d) (Ont. C.A.), "An inference is a deduction of fact that can be reasonably and logically drawn from a fact or group of facts established by the evidence".

[37] From the evidence before me in this matter, while one might speculate that the mother obtained the letter from the bank, it would not be reasonable to make that speculation a finding of fact. The assertion that the applicant and his father did not retain a copy of the original letter, coupled with the mere fact that the bank possessed a faxed copy, does not provide an adequate basis on which the Court can draw such an inference.

[38] The applicant was asked by the Commission investigator to explain why the copy which the mother obtained does not bear headers and footers, that is, the blocks of text which are commonly seen on faxed documents. The applicant provided no explanation to the Commission and none to the Court to account for this anomaly, other than to suggest that the headers and footers may have been "whited out" for some unknown reason.

[39] The mother's copy of the letter formed part of an exhibit to her affidavit that included a handwritten note and an e-mail message from the father to the applicant with detailed instructions for obtaining the money. The applicant has no explanation for how his mother came into possession of those two other documents. An alternative inference that the Court could draw from the evidence is that the mother found the father's communications to the applicant regarding the funds, including the faxed authorization, the handwritten note and the e-mail, when she searched her son's room and luggage.

[40] The mother's lawyer, when contacted by the Commission investigator, stated that to the best of her recollection she did not get the letter from the bank. The lawyer, of course, was constrained by her professional responsibilities not to disclose any confidential information received from her client.

[41] As noted above, the statement which the applicant was prepared to give to the police in support of his attempt to have his mother criminally charged refers to a copy of the letter being attached. This occurred some time after the applicant returned to Ontario from Costa Rica. The applicant says he did not have the letter at that time but is unable to explain the apparent contradiction.

[42] In the result, I am not persuaded that the evidence supports the inference which the applicant wishes the Court to draw. I find that there are no reasonable grounds to establish the complaint against TD. The Office of the Privacy Commissioner was correct, in my view, to dismiss the complaint as will be this application.

[43] If I am in error in that conclusion, I think it appropriate to add that the evidence does not support the applicant's contention that the claimed damages flowed from disclosure of the letter. Even if I were to have concluded that TD improperly disclosed the letter to the mother I would not have found that the applicant was entitled to more than a modest remedy in damages. The personal information in question was primarily that of the father and not of the son. And while I understand that from his perspective, the applicant's plans for his future went awry from that fateful night in

April 2003, any subsequent events flowed from the breakdown of the marriage and the alienation of the son from the mother.

[44] The respondent has requested costs. As the successful party, the respondent is entitled to them. Nonetheless, in the unfortunate circumstances of this case the respondent may wish to consider itself content with the outcome and choose not to exercise its entitlement to recover its costs.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that:

1. the application is dismissed;

2. the respondent is awarded costs to be calculated according to the normal scale.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1459-08
STYLE OF CAUSE:	JAVIER BANUELOS and TD BANK FINANCIAL GROUP
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 14, 2010
REASONS FOR JUDGMENT:	MOSLEY J.
DATED:	September 17, 2010

APPEARANCES:

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Colin C. Taylor	FOR THE RESPONDENT

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