Federal Court  Cour fédérale

Date: 20110310

Docket: 11-T-7

Citation: 2011 FC 290

Montréal, Quebec, March 10, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ROBERT LAVIGNE

Applicant

and

CANADIAN HUMAN RIGHTS COMMISSION

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Lavigne seeks, by way of motion, an extension of time to file his Notice of Application and, if necessary, his affidavit; a sum of $3500 in advance costs plus disbursements; and such other and further order that the Court sees just under the circumstances.

[2] For the reasons that follow, I have come to the conclusion that Mr. Lavigne's motion ought to be dismissed.

I. The facts

[3] Mr. Lavigne requested personal information from the Canadian Human Rights Commission ("the Commission") on October 7, 2009. During the course of the processing of that request, the Commission consulted with Canada Post Corporation ("Canada Post"), as is customary when a third party has an interest in a record and/or the record originates from that party. In the present case, both criteria were met. Canada Post objected to the disclosure of the one-page record at issue based upon s. 27 of the *Privacy Act* which protects certain information through solicitor-client privilege.

[4] On or about January 11, 2010, the Commission released to Mr. Lavigne all 1879 pages of his personal information, except the one page objected to by Canada Post and some other material exempted pursuant to s. 26 of the Act, which protects information that concerns other individuals.

[5] On or about June 24, 2010, Mr. Lavigne filed a *Privacy Act* complaint based upon the Commission's use of these exemptions. On or about October 22, 2010, the Office of the Privacy Commissioner determined that Mr. Lavigne's complaint was well-founded with respect to the s. 27 exemption. The complaint was deemed resolved, however, as a result of the Commission agreeing to provide to Mr. Lavigne with the one page that they had sought to protect through s. 27.

[6] However, there was a delay in Mr. Lavigne's receipt of that page because the Commission then sought Canada Post's consent to release the record, in accordance with s. 47(3) of the *Canadian Human Rights Act*. The record at issue emanated from a conciliation, and s. 47(3)

provides that information received by a conciliator in the course of attempting to reach a settlement of a complaint is confidential and may only be disclosed with the consent of the person who gave that information.

[7] After some discussion between the Commission and Canada Post, the latter finally consented to the release of the record on February 9, 2011. There is no dispute that Mr. Lavigne has now received the one page at issue.

II. The issues

[8] The motion filed by Mr. Lavigne raises three issues:

a. Has Mr. Lavigne met the criteria for granting an extension of time to file his Notice of Application?

b. Should Mr. Lavigne be granted an additional extension beyond the time allotted in the *Federal Courts Rules* to file his affidavit materials? and

c. Does Mr. Lavigne meet the criteria for the awarding of advance costs?

Of course, the second and third questions need only be answered if the Court comes to the conclusion that Mr. Lavigne should be granted an extension of time to file his Notice of Application.

III. Analysis

[9] It is trite law that for an extension of time to be granted, an applicant must demonstrate:

i. That he had a continuing intention to pursue his application;

ii. That the application has some merit;

iii. That no prejudice to the respondent arises from the delay; and

iv. That a reasonable explanation for the delay exists.

[10] In the case at bar, there is no need to consider the first, third and fourth criteria, as the second one is clearly not met.

[11] In the application for judicial review that Mr. Lavigne asks permission to file, he seeks an order from the Court for the release of documents withheld pursuant to s. 27 of the *Privacy Act*. Yet, Mr. Lavigne has received all of his personal information in accordance with the *Privacy Act* request which he made. He has received all of the records which the Office of the Privacy Commissioner recommended for release. Therefore, there is no longer a triable issue.

[12] Indeed, this case is on all fours with the decision of this Court in *Connolly v Canada Post Corporation* (2000), 197 FTR 161, aff'd 2002 FCA 50. In that case, the applicant had similarly applied, pursuant to s. 41 of the *Privacy Act*, for review of the manner in which Canada Post dealt with a *Privacy Act* request made to the Privacy Commissioner in respect to a refusal by the Canada Post to provide access to personal information relating to the applicant. Dismissing the application, Mr. Justice MacKay wrote the following:

> 9. In this case, at the time he filed his application for review Mr. Connolly had received copies of all of the information he had requested to which he was entitled under the *Act*. The Court could not order more than that. It has no authority under the *Act* to review the process of denial and order any redress where there has been ultimate release of the information requested. That review may be done by the Privacy Commissioner in his report of investigation of a complaint. He may find, as was the case here, that in

> his opinion the complainant's *Privacy Act* rights were contravened. If it were within the Court's authority I would say that clearly seems to have been the case her, over many months, until the information requested was finally fully released in May 1999. Thereafter, it could not be said that the applicant's *Privacy Act* rights continued to be infringed.

[13] In his application, Mr. Lavigne also asks that the Court order the Commission to pay $5000 in damages pursuant to s. 41 of the *Privacy Act*. However, damages may not be awarded pursuant to the *Privacy Act*. Both this Court and the Court of Appeal have repeatedly decided that an award of damages is not available under the *Privacy Act*. Once again, Mr. Justice MacKay was quite explicit in that respect:

> 10. The rights assessed under the *Privacy Act* are those set out in that *Act*, and any redress for their contravention exists by virtue of that *Act*. There is no common law remedy, and no remedy is provided by the *Act*, for wrongly withholding publicly held personal information from the person requesting it. There is no right to damages under the common law or under the *Privacy Act*.

[14] In his application, Mr Lavigne seeks a declaration that *Connelly* should not be followed and that damages can be awarded pursuant to s. 41 of the *Privacy Act*. I do not think that it is open for this Court to make such a declaration. Not only has the decision reached in *Connelly* been upheld by the Court of Appeal, but it has repeatedly been followed by this Court: see, for example, *Keita v Canada (Minister of Citizenship and Immigration)*, 2004 FC 626, at para 12; *Murdoch v Royal Canadian Mounted Police*, 2005 FC 420. In this last decision, Mr. Justice Noël commented:

> 22. Nor is the Federal Court able to award any further remedies in a case such as the one at bar. As noted above, the Federal Court's jurisdiction to review decisions of the Privacy Commissioner is found in s. 41 of the *Privacy Act* for those cases where access to

> personal information requested under s. 12 has been refused and s. 18.1(3) of the *Federal Courts Act*. In addition to this, the power of the Federal Court to grant a remedy in such a situation is largely restricted to those which the Privacy Commissioner itself could order, i.e., the ordered disclosure of non-disclosed documents (see ss. 48-50 of the *Privacy Act* and s. 18.1(4) of the *Federal Courts Act*). Here, no such information has remained undisclosed, and so this remedy would not be appropriate.
>
> See also: *Galipeau v Canada (Attorney General)*, 2003 FCA 223, at para 5.

[15] Mr. Lavigne submitted that these decisions ought to be reviewed on the basis that they are inconsistent with the case law that has developed in the context of the *Official Languages Act*. It is true that courts have sometimes granted damages for infringements of that Act, on the basis of a provision (s. 77) that is worded similarly to s. 48 of the *Privacy Act*. In both cases, the Court is given jurisdiction to grant a remedy or to make such order as it consider or deems "appropriate". But similarity of language is not enough. The scheme of those two Acts must also be taken into consideration. While the *Official Languages Act* creates a number of rights or duties, the *Privacy Act* only envisions the right for an individual to obtain information. In that context, I do not think it would be appropriate to expand the remedies a Court may grant on judicial review to encompass damages. As the Court of Appeal stated in *Connelly*, *supra*, this is a matter better left to Parliament if it sees fit to intervene.

[16] The Applicant not having met the second criteria of the *Hennelly* test, his motion to extend the time to file his Notice of Application must therefore be dismissed. That being the case, there is no need to consider the second and third issues raised in his motion.

ORDER

THIS COURT ORDERS that the motion is dismissed, without costs.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	11-T-7
STYLE OF CAUSE:	ROBERT LAVIGNE v CANADIAN HUMAN RIGHTS COMMISSION
PLACE OF HEARING:	Montréal (Quebec)
DATE OF HEARING:	March 7, 2011
REASONS FOR ORDER:	de MONTIGNY J.
DATED:	March 10, 2011

APPEARANCES:

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