

Date: 20090218

Docket: T-1349-06

Citation: 2009 FC 171

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 -

PRIVACY COMMISSIONER OF CANADA

Added Respondent

REASONS FOR ORDER AND ORDER

HAVING ORDERED Ms. McCarthy be struck as an Added Respondent to these proceedings, her motion record and affidavit have not been considered, and costs are awarded to her;

AND UPON CONSIDERING the written submissions of counsel for Mr. Waxer and for Ms. McCarthy with respect to the issue of costs;

AND UPON DIRECTING myself to the factors set out in Rule 400(3) of the *Federal Courts Rules*, SOR/98-106;

AND UPON CONSIDERING the following:

DISCUSSION

[1] In my Order of November 23, 2008, removing Ms. McCarthy as an Added Respondent to the main proceeding, I provided that Martha McCarthy is entitled to costs on the following basis:

Ms. McCarthy is entitled to costs. The quantum of costs for Ms. McCarthy will be settled between counsel for the applicant and counsel for the respondent Ms. McCarthy. If not, those parties may make submissions on costs under Rule 369 in writing to me. Failing that, we will have a hearing on costs.

[2] No agreement has been reached between Mr. Waxer, the Applicant in the main proceeding, and Ms. McCarthy.

[3] Ms. McCarthy seeks an award of costs in the amount of \$5000.00. She submits that this is a modest request having regard to the actual quantum of costs incurred due to Mr. Waxer unnecessarily adding her as an Added Respondent.

[4] Ms. McCarthy is a family law lawyer practicing in Ontario. She represented Mr. Waxer's ex-wife in an acrimonious family law proceeding. As a result of Mr. Waxer's complaint of a breach of his privacy rights pursuant to the *Personal Information and Protection of Electronic Documents Act*, S.C. 2000, c.5 (the "PIPEDA") Ms. McCarthy's brother, Peter McCarthy, and her brother's employer, J.J.Barnicke, were investigated by the Privacy Commissioner who eventually dismissed the complaint. On application to this Court for review of this complaint under *PIPEDA*, Mr. Waxer added Martha McCarthy as an Added Respondent even though she had not been a subject of Mr. Waxer's initial complaint to the Privacy Commissioner. Mr. Waxer had initiated a second complaint against Martha McCarthy which was subsequently dismissed by the Privacy Commissioner as being without merit. Mr. Waxer did not challenge this second decision by an application for review to this Court.

[5] Ms. McCarthy submits that, despite not doing anything wrong, she has been required to exhaust significant resources to oppose the legal harassment initiated by Mr. Waxer. Ms. McCarthy submits that while her total costs in terms of fees and disbursements in relation to this proceeding are \$40,486.05 as of May 21, 2008, she is claiming a modest amount of \$5000.00 in costs.

[6] At the time this proceeding was initiated by Mr. Waxer, he was self-represented. After being informed by the Office of the Privacy Commissioner that he was entitled to seek monetary relief for a breach of his *PIPEDA* rights at the Federal Court, he added all

parties that he felt were proper at that time to allow the Court to fully adjudicate his claim *de novo*. This led him to add Ms. McCarthy as an Added Respondent.

[7] Mr. Waxer highlights that this proceeding flows entirely from an email sent by Ms. McCarthy's brother to the Ontario sales staff of J.J. Barnicke for the purpose of soliciting personal information about Mr. Waxer. Mr. Waxer added Ms. McCarthy as a Respondent on the basis of his suspicion that the email in question was sent out by Peter McCarthy to gather information and share it with Ms. McCarthy.

[8] Mr. Waxer notes that the Privacy Commissioner promptly applied for, and was granted leave, to be added as an Added Respondent with certain prescribed rights to participate in this application. Mr. Waxer is of the view that Ms. McCarthy could also have applied to have her name removed as a Respondent much sooner than she did.

[9] Mr. Waxer notes that at the relevant time he was a self-represented litigant. He emphasizes that Ms. McCarthy knew early in the process that she could remove herself as a party to the proceeding, but, by failing to, Mr. Waxer contends she prolonged and added to the complexity of the proceeding. He submits that further complexity occurred directly as a result of Ms. McCarthy introducing family law materials into this proceeding.

[10] Mr. Waxer urges the Court to consider that litigation under the *PIPEDA* is in its infancy and that there is a public interest in having these matters litigated without undue burden to individual litigants.

[11] Given that the Court has wide discretion over costs, Mr. Waxer requests that this Court exercise its discretion to refuse costs, notwithstanding my earlier Order. In the alternative, Mr. Waxer submits that the amount ordered should be nominal given Ms. McCarthy's full participation in the proceedings.

LEGISLATION

[12] Rule 400 of the *Federal Courts Rules* grants this Court full discretion with respect to the allocation and award of costs:

Discretionary powers of Court

400. (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

Pouvoir discrétionnaire de la Cour

400. (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

[13] Rule 400(3) of the *Federal Courts Rules* sets out the factors that may be considered when exercising discretion to award costs:

Factors in awarding costs

400.(3) In exercising its discretion under subsection (1), the Court may consider

(a) the result of the

Facteurs à prendre en compte

400.(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :

proceeding;	a) le résultat de l'instance;
(b) the amounts claimed and the amounts recovered;	b) les sommes réclamées et les sommes recouvrées;
(c) the importance and complexity of the issues;	c) l'importance et la complexité des questions en litige;
(d) the apportionment of liability;	d) le partage de la responsabilité;
(e) any written offer to settle;	e) toute offre écrite de règlement;
(f) any offer to contribute made under rule 421;	f) toute offre de contribution faite en vertu de la règle 421;
(g) the amount of work;	g) la charge de travail;
(h) whether the public interest in having the proceeding litigated justifies a particular award of costs;	h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;
(i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;	i) la conduite d'une partie qui a eu pour effet d'abrèger ou de prolonger inutilement la durée de l'instance;
(j) the failure by a party to admit anything that should have been admitted or to serve a request to admit;	j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;
(k) whether any step in the proceeding was	k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :
(i) improper, vexatious or unnecessary, or	(i) était inappropriée, vexatoire ou inutile,
(ii) taken through negligence, mistake or excessive caution;	(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;
(l) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence	l) la question de savoir si plus d'un mémoire de dépens

unnecessarily;

(*m*) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;

(*n*) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299; and

(*o*) any other matter that it considers relevant.

devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;

m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;

n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;

o) toute autre question qu'elle juge pertinente.

ANALYSIS

[14] While the Applicant is correct in stating that the Ms. McCarthy was aware at an earlier stage of the option to seek leave to remove herself as an Added Respondent to the proceeding, this does not take away from the fact that she was added to the proceeding by the Applicant. Having been added to the proceeding, it was incumbent on her to present a full response. For this she should not be penalized.

[15] Mr. Waxer, in the motion before me on November 14, 2007, agreed that Ms. McCarthy should not have been added as an added party from the outset. This, together with two facts: that Ms. McCarthy was not the object of the initial complaint to the

Privacy Commissioner (now before this Court) and that the second complaint to the Privacy concerning Ms. McCarthy was dismissed and is unchallenged, are sufficient reason for costs being awarded to Ms. McCarthy.

[16] The Applicant has argued that if costs are to be awarded, they should be nominal. Ms. McCarthy contends that although her costs, including fees and disbursements, total over \$40,000.00, she is requesting only \$5000.00 in costs. I note that all of her legal expenses were incurred after Mr. Waxer added her as an Added Party to this proceeding.

[17] As submitted by Mr. Waxer, *PIPEDA* litigation is in its infancy and litigants should not be dissuaded from exercising their rights for fear of cost awards. However, in the case at bar, awarding costs against Mr. Waxer will not, in my view, discourage litigants from exercising their privacy rights. Rather, it will encourage litigants not to use *PIPEDA* litigation as a surrogate forum for what is an entirely different legal dispute.

[18] I consider \$5,000.00 to be an appropriate award for costs to Ms. McCarthy.

ORDER

THIS COURT ORDERS that

1. Costs, in the amount of \$5000.00, are awarded to Ms. McCarthy.

“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

DATE OF HEARING: August 25, 2008

**REASONS FOR ORDER
AND ORDER:** Mandamin, J.

DATED: February 18, 2009

APPEARANCES:

Mr. Christopher Edward
Mr. Brian Abrams FOR THE APPLICANT

Mr. Milton Davis FOR THE RESPONDENTS, J.J. Barnicke and
Peter McCarthy

Mr. Steven Welchner
Ms. Megan Brady FOR THE ADDED RESPONDENT, Privacy
Commissioner of Canada

SOLICITORS OF RECORD:

Templeman Mennigna LLP
Barristers & Solicitors FOR THE APPLICANT

Davis Moldaver LLP
Barristers & Solicitors FOR THE RESPONDENTS

Welchner Law Office
Professional Corporation FOR THE ADDED RESPONDENT, Privacy
Commissioner of Canada

Office of the Privacy
Commissioner of Canada FOR THE ADDED RESPONDENT, Privacy
Commissioner of Canada