

Federal Court



Cour fédérale

**Date: 20101112**

**Docket: T-24-10**

**Citation: 2010 FC 1137**

**Ottawa, Ontario, November 12, 2010**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**CURTIS HAROLD STEVENS**

**Applicant**

**and**

**SNF MARITIME METAL INC.**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. INTRODUCTION**

[1] The Applicant applied for an order for damages pursuant to s. 14 of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5 (PIPEDA) on the grounds that the Respondent disclosed his personal information to his employer Alscott Air Systems Limited (Alscott) which then led to the termination of his employment. The termination was based upon

suspicion, said to be confirmed by the disclosure of that information, that Stevens had defrauded his employer.

## II. FACTUAL BACKGROUND

[2] The Respondent (SNF) collects and recycles scrap metal. The metal comes from third parties who are reimbursed for the scrap metal in cash.

[3] Alscott produces scrap metal from its manufacturing process. It was a supplier to SNF and had an account with SNF for some period of time. Some of the scrap it sold to SNF was a specialty stainless steel “type 316”, which is a relatively scarce commodity.

[4] Stevens was employed at Alscott as a welder and fitter from May 31, 1999 to September 15, 2008. Among his responsibilities was to deliver scrap metal to SNF on behalf of his employer. He was to remit to his foreman the cash proceeds generated by those sales.

[5] In 2004 Stevens opened a personal account with SNF in his own name without the knowledge of Alscott. He proceeded to deliver scrap metal which he had credited to his own account. The type of steel he sold for his own account was the same rare “type 316” stainless steel sold by his employer.

[6] Alscott became concerned that its scrap metal sales to SNF were low and SNF also found the situation unusual as there were no sales from Alscott. As a result of conversations between the

two companies, SNF reviewed a list of Alscott employees delivering scrap and identified Stevens as the one who had opened a personal account with SNF.

[7] After Alscott indicated that it would be going to the police to lodge a complaint against Stevens, SNF photocopied and provided Alscott with Stevens' personal account statements. These statements established that Stevens had been credited with, and received cash for, large quantities of stainless steel scrap metal.

[8] On September 15, 2008, Stevens was dismissed from his employment.

[9] Stevens commenced an action for wrongful dismissal but withdrew the action on his own accord and not as part of any settlement.

[10] The Applicant then filed a complaint against SNF with the Privacy Commissioner of Canada (Commissioner). The Commissioner held the complaint to be well-founded. In particular, the Commissioner concluded:

In my view, the account was clearly the complainant's personal account – he did not open it in his capacity as an employee of Alscott. Indeed, Alscott had no idea the account existed until SNF disclosed this fact. The statements provide the complainant's personal contact information as well as information about how much money he earned from the sale of the metal.

[11] The Commissioner never answered the question of why Alscott did not know that its employee had opened an account with SNF, its customer. The Commissioner also never knew that,

as the Applicant later admitted, he knew that “some” of the money being credited to him in his personal account properly belonged to his employer and that he took no steps to correct the record.

[12] In the end, the Commissioner noted that SNF had voluntarily implemented a confidentiality policy which she concluded reduced the likelihood of another such disclosure without consent. The matter was noted as “well-founded and resolved”.

[13] The Applicant commenced these proceedings January 8, 2010. His damages claimed are for:

- Loss of wages (until re-employed);
- Shortfall in earnings between his old and next positions;
- Further loss of salary due to being laid off from his new job;
- Legal fees for his discontinued wrongful dismissal suit;
- Loss of equity in his home due to foreclosure resulting from lower income; and
- Loss of equity in his car for the same reason.

He makes a general unspecified claim for mental and physical anxiety due to termination and for humiliation he suffered.

### III. ANALYSIS

[14] This proceeding is governed by ss. 14 and 16 of PIPEDA:

**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

**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

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.

(2) The application must be made within forty-five days after the report is sent or within any further time that the Court may, either before or after the expiry of those forty-five days, allow.

(3) For greater certainty, subsections (1) and (2) apply in the same manner to complaints referred to in subsection 11(2) as to complaints referred to in subsection 11(1).

**16.** The Court may, in addition to any other remedies it may give,

(a) order an organization to correct its practices in order to comply with sections 5 to 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

(c) award damages to the complainant, including damages for any humiliation that the complainant has

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.

(2) La demande est faite dans les quarante-cinq jours suivant la transmission du rapport ou dans le délai supérieur que la Cour autorise avant ou après l'expiration des quarante-cinq jours.

(3) Il est entendu que les paragraphes (1) et (2) s'appliquent de la même façon aux plaintes visées au paragraphe 11(2) qu'à celles visées au paragraphe 11(1).

**16.** La Cour peut, en sus de toute autre réparation qu'elle accorde :

a) ordonner à l'organisation de revoir ses pratiques de façon à se conformer aux articles 5 à 10;

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) accorder au plaignant des dommages-intérêts, notamment en réparation de l'humiliation subie.

suffered.

[15] A standard of review analysis is not required. This proceeding is not a judicial review of the Commissioner's report and recommendations. Justice Décarý of the Federal Court of Appeal in *Englander v. Telus Communications Inc.*, 2004 FCA 387, at paragraphs 47-48, summarized the proceeding succinctly as:

**47** Similar issues were recently examined by this Court in the context of the *Official Languages Act* (see *Canadian Food Inspection Agency v. Forum des maires de la péninsule acadienne et al.*, [2004] F.C.J. No. 1235, 2004 FCA 263 (*Forum des maires*)). While the case dealt with a different statute, the provisions in the *Official Languages Act* with respect to the proceedings that may be commenced in the Federal Court are so similar to those found in the *Personal Information Protection and Electronic Documents Act* that the same reasoning can apply (see, also, *Eastmond v. Canadian Pacific Railway*, [2004] F.C.J. No. 1043, 2004 FC 852, Lemieux J., at paras. 118-120). I find no difference on a procedural point of view between an application "for a remedy" ("former un recours") under subsection 77(1) of the *Official Languages Act* and an application "for a hearing" ("que la Cour entende") under subsection 14(1) of the Act. The investigations carried out pursuant to a complaint by the Official Languages Commissioner and the Privacy Commissioner basically follow the same pattern. The application to the Federal Court in both cases may be made by a complainant and is to be heard in a summary way. 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. And the remedial power of the Court in the PIPED Act, even though not drafted in Charter language, is remarkably broad.

**48** As found in *Forum des maires*, therefore, 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 in evidence, may be challenged or contradicted like any other document adduced in evidence. I may add a further argument in support of this finding: according to section 15 of the Act, the Commissioner may appear as a "party" at the hearing. To 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. The *Official Languages Act* contains a similar provision, subsection 77(1).

[Emphasis added]

[16] There are three points that the Court must decide:

- (1) Did the Respondent breach the provisions of PIPEDA?
- (2) Does the equitable principle of “clean hands” (*ex turpi causa*) apply in this situation?
- (3) Should the Applicant be awarded any damages for breach of PIPEDA?

[17] As a preliminary matter, I have concerns that the Applicant does not have the legal capacity to bring this action due to his filing for personal bankruptcy. The Respondent raised the matter with the Learned Prothonotary but the matter was allowed to continue. As the matter was not appealed, the Court must accept that there is no impediment to the proceeding but I reiterate my serious reservations.

A. *Breach*

[18] On the first issue, there is no doubt that SNF breached PIPEDA in disclosing Stevens’ account information. Even though there was good and logical reason to do so, it would be a violation of privacy rights to lift the protection of those rights even on reasonable suspicion without some method of establishing justification. SNF disclosed personal information without Stevens’ consent or legal process.

[19] However, this case is complicated by the fact that at least some of the information disclosed had a dual quality. The Applicant admitted, subsequent to the Commissioner’s report, that his account included moneys that belonged to his employer, that he knew it, and that he did nothing to ensure that his account contained only information about what was properly his. Therefore, some of the information disclosed was that of his employer.



[20] The present case is similar to that of *Randall v. Nubodys Fitness Centres*, 2010 FC 681, where the employer obtained information about the number of times an employee had used a corporate fitness membership. While a breach of PIPEDA was found, it was at the low end of sensitivity of personal information.

[21] Had it been possible to segregate the information in this case between that which truly belonged to Stevens and that which was information about the employer's money, I would have found that such latter information was not personal to Stevens and even if it was, consent to its disclosure would have been implied.

[22] The difficulty is that mere suspicion is not a basis upon which to exonerate a breach of PIPEDA or to read in a consent to disclosure. However it does, along with the type of information and the dual nature of it in this case, go to the issue of the nature of the remedy.

#### B. *Equity*

[23] On the second issue, the Federal Court is a court of law and equity. Equitable principles are applicable. The doctrine of "clean hands" would be applicable if there had been clear evidence of wrongful taking and conversion (see *Watts v. Klaemt*, 2007 BCSC 662).

[24] This case lacks the evidentiary record to make this finding even on a balance of probabilities test. There is, however, significant evidence that Stevens' own actions contributed to his problems. He took no steps to correct SNF's records; a clear act of misconduct.

[25] However, the words of Justice Bruce in *Watts*, above, at paragraph 53 are applicable:

**53** Based upon these findings of fact, can it be said that this case is one of those rare circumstances where *ex turpi causa* should preclude any recovery for the loss claimed by the plaintiff? As discussed above, Ms. Watts' actions were highly immoral, if not proven to be criminal. There is also a clear causal connection between the loss of her employment and the immoral conduct. Further, the breach of trust committed by Ms. Watts is sufficiently reprehensible to warrant condemnation by the court. I am not satisfied, however, that Ms. Watts' claim is essentially designed to obtain a reward for her wrongdoing. Ms. Watts' claim is for compensatory damages arising out of the defendant's breach of privacy. She is not seeking damages that would amount to profiting from her own wrongdoing. In other words, the Court would not be rewarding her, or giving her a windfall, for criminal or immoral conduct. This is clearly a pre-condition to the application of the doctrine as described in *Hall*.

[26] Therefore, I will not dismiss this matter on the grounds of the equitable doctrine of “*ex turpi causa*” but equity does play a role in the broad discretion of the Court to fashion an appropriate remedy.

C. *Damages/Remedy*

[27] PIPEDA's s. 14 right and s. 16 remedy is not a substitute for matters which are truly claims for wrongful dismissal. The Court must examine the real nature of the remedy claimed. Such claims as humiliation, loss of community support, diminution of standings and loss of income flowing therefrom (to name but a few) caused by breach of the Act fall within the statutory cause of action created by the Act. Claims for loss of income and similar loss due to termination of employment not caused by breach of the Act, do not.

[28] The source of the Applicant's complaint is the loss of his employment. He even claims for loss due to loss of a second job. But all of his loss claimed is tied directly to his termination for cause. While the termination might not have occurred if there had not been disclosure, the nexus to the claimed loss is termination of employment for which Stevens had, but gave up, the right to claim was unlawful.

[29] The PIPEDA right of action is not an end run on existing rights to damages. It is a right to a different type of damages claim – breach of the right to privacy.

[30] The Applicant's claim, in excess of \$148,000, is out of proportion to the privacy invaded. The information disclosed was not deeply personal or intimate. It was commercial and the type of information frequently spoken about in a social context.

[31] Therefore, I find that the damages claimed are not those for breach of the Act but for wrongful termination. To the extent (if any) that privacy is involved, it is minimal and the Applicant has put forward no other evidence of impact on his standing or community perception or similar features of a breach of privacy claim.

[32] There is no evidence that the Respondent proceeded maliciously or with intent to harm Stevens. Steps have been taken by implementation of a confidentiality regime to ensure that circumstances such as these do not arise again. The Commissioner even noted that the complaint was resolved by virtue of SNF's voluntary actions.

[33] Therefore, the Court will make no award of damages nor will it order costs against the Applicant, in part because to do so would be fruitless.

IV. CONCLUSION

[34] Therefore, this application is dismissed without costs.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application is dismissed without costs.

“Michael L. Phelan”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-24-10

**STYLE OF CAUSE:** CURTIS HAROLD STEVENS  
and  
SNF MARITIME METAL INC.

**PLACE OF HEARING:** Halifax, Nova Scotia

**DATE OF HEARING:** September 14, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT:** Phelan J.

**DATED:** November 12, 2010

**APPEARANCES:**

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