Federal Court Cour fédérale

Date: 20130117

Docket: T-272-12

Citation: 2013 FC 44

Toronto, Ontario, January 17, 2013

PRESENT: Kevin R. Aalto, Esquire, Prothonotary

BETWEEN:

ANTON OLEINIK

Applicant

and

THE PRIVACY COMMISSIONER OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This motion to strike engages the processes and procedures mandated in the *Privacy Act* RSC 1985 c P-21 (the *Act*). The case arises from a number of complaints made to the Office of the Privacy Commissioner (OPC) and related legal proceedings commenced by the Applicant, Dr. Oleinik.

[2] The Notice of Application that OPC seeks to strike seeks two substantive forms of relief, as follows:

1. An order in the nature of certiorari quashing the Report of findings issued by the OPC with regard to Dr. Anton Oleinik's complaint against the Social Sciences and Humanities Council of Canada under the *Privacy Act* (OPC's File No. 7100-011365);

2. An order directing the OPC to give Dr. Anton Oleinik access to his personal information in the OPC's custody and control as per his two access to personal information requests (OPC's File Nos. P-2011-00012/AR and P-2011-00011/TL).

[3] The Privacy Commissioner (OPC) argues that this Application is bereft of any chance of success and should be struck. To that end, OPC relies upon the standard adopted in the well known case of *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (CA), wherein the Federal Court of Appeal noted as follows:

> 15 For these reasons we are satisfied that the Trial Judge properly declined to make an order striking out, under Rule 419 or by means of the "gap" rule, as if this were an action. This is not to say that there is no jurisdiction in this Court either inherent or through Rule 5 by analogy to other rules, to dismiss in summary manner a notice of motion which is so clearly improper as to be **bereft of any possibility of success** (See e.g. *Cyanamid Agricultural de Puerto Rico, Inc. v. Commissioner of Patents et al.* (1983), 74 C.P.R. (2d) 133 (F.C.T.D.); and the discussion in *Vancouver Island Peace Society v. Canada*, 1993 CanLII 2977 (FC), [1994] 1 F.C. 102 (T.D.), at pp. 120-121). Such cases must be very exceptional and cannot include cases such as the present where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion.
> [emphasis added]

[4] For the reasons that follow, I agree that this Application is "bereft of any possibility of success" and must be struck.

Quashing OPC's Report on the Applicant's complaint against SSHRC

[5] As excerpted above, in the first of two heads of relief, Dr. Oleinik seeks by this Application to quash the OPC's non-binding report of findings regarding his complaint against the Social Sciences and Humanities Council of Canada {SSHRC). This relief cannot be granted; moreover, it is a patent abuse of process given the history of Mr. Oleinik's proceedings on this issue in this Court.

[6] Only a brief background is necessary. Dr. Oleinik is an Associate Professor at Memorial University in Newfoundland and Labrador. Apparently, in 2007 he applied unsuccessfully for a research grant from the SSHRC. He then sought access to his personal information maintained by SSHRC. Subsequently, because he was not satisfied with the responses received from SSHRC, he initiated complaints to the OPC. As a result of the complaint to the OPC, a non-binding report of findings was issued by the OPC. The ultimate conclusion of that non-binding report was that the complaint was not "well-founded." That non-binding report of the OPC was the subject of judicial review proceedings in this Court and by Order made November 7, 2011, by the Honourable Mr. Justice Rennie the application was dismissed: *Oleinik v Canada (Privacy Commissioner)*, 2011 FC 1266 [*Oleinik 1*]. A subsequent appeal to the Federal Court of Appeal was dismissed from the bench on September 4, 2012: *Oleinik v Canada (Privacy Commissioner)*, 2012 FCA 229.

[7] In *Oleinik 1*, Justice Rennie dismissed Dr. Oleinik's application for judicial review with the following strong words:

> 7. As Justice Tremblay-Lamer stated in *Keïta c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2004 FC 626 (F.C.) at para 20: 'The validity of the [Privacy] Commissioner's recommendations is not subject to the Court's powers of review. The

> precedents on this point are clear and ample." In reaching this conclusion Justice Tremblay-Lamer relied on the decision of the Federal Court of Appeal, in *Canada (Attorney General) v. Bellemare*, [2000] F.C.J. No. 2077 (Fed. C.A.) at paras 11-13, which involved allegations lodged against the Information Commissioner similar to those lodged by the applicant herein against the Privacy Commissioner. Noël J.A. held:
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> Section 41 does not provide for a recourse against the Information Commissioner (*Wells v. Canada (Minister of Transport*), T-1729-92, April 19, 1993 [(1993), 48 C.P.R. (3d) 312 (Fed. T.D.)].
>
> ...
>
> In short, the Court has no jurisdiction, pursuant to section 41, to conduct a judicial review of the Information Commissioner's findings and recommendations. It was therefore not open to the motions Judge to allow the application for judicial review to continue.
>
> 8. The applicant's proper recourse was to bring an application pursuant to section 41 of the *Privacy Act*, naming the SSHRC as the respondent. At a minimum, this application should be supported by some objective evidence to support the inference that personal information was being withheld. In this case, despite being advised clearly by the OPC in its letter of March 30, 2010 that his right of recourse lay in section 41 and the *de novo* review of the SHRCC response, and after subsequently being advised to the same effect by counsel for the OPC, the applicant persisted in pursuit of recourse under section 18.1 of the *Federal Courts Act* challenging the OPC recommendations. In consequence, the applicant runs squarely up against the jurisprudence of the Court of Appeal and of this Court.
>
> 9. The applicant cannot seek judicial review of the OPC's non-binding report to, in essence, challenge the SSHRC. He must address the decision making body itself, not collaterally or indirectly through the OPC. This is the procedure contemplated by Parliament.
>
> [emphasis added]

[8] Despite this caution, Dr. Oleinik persists in his challenge in this Court against the OPC's non-binding report. This part of the Application is an abuse of process, will never succeed, and must be struck. It will also have an impact on the cost consequences of this motion.

Mandating the OPC to Disclose

[9] OPC argues that the second head of relief sought in this Application also cannot be granted because of the jurisprudence in administrative law which requires that an applicant pursue all available administrative remedies before seeking judicial review. OPC relies upon the articulation of this principle in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*], in which the Federal Court of Appeal noted at paragraph 31:

> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[10] Based on the record before me, I agree that Dr. Oleinik has not pursued the administrative remedies provided by the *Act* and for that reason the remainder of this Application would not succeed and must also be struck.

[11] Some further background is necessary to understand how Dr. Oleinik has not exhausted the administrative remedies available to him. While the earlier proceedings before this Court were ongoing, Dr. Oleinik made an Access to Information Request under the *Act* for all documents in the custody and control of the OPC containing his name, including information stored on the OPC's

backup email server. That request was received by OPC on December 2, 2011 (the December 2011 Complaint).

[12] A second Access to Information Request was made by Dr. Oleinik for all documents created by the OPC in the course of the investigation into his complaint against SSHRC (the January 2012 Complaint).

[13] In response to the December 2011 Complaint, the OPC disclosed a number of documents to Dr. Oleinik but withheld certain information pursuant to sections 22.1, 26 and 27 of the *Act*. In addition, certain information was withheld pursuant to sections 3 and 12(1) of the *Act* as not being the "personal information" of Dr. Oleinik. OPC also indicated that it did not conduct a search of its backup email servers as it did not consider this information "reasonably retrievable" within the meaning of section 12(1)(b) of the *Act*.

[14] In order to give context to this response by the OPC it is useful to set out certain of those specific provisions of the *Act*:

Right of access	Droit d'accès
12. (1) Subject to this Act, every individual who is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act has a right to and shall, on request, be given access to	12. (1) Sous réserve des autres dispositions de la présente loi, tout citoyen canadien et tout résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés ont le droit de se faire communiquer sur demande :
(a) any personal information about the	a) les renseignements personnels le concernant

individual contained in a personal information bank; and

(b) any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution.

et versés dans un fichier de renseignements personnels;

b) les autres renseignements personnels le concernant et relevant d'une institution fédérale, dans la mesure où il peut fournir sur leur localisation des indications suffisamment précises pour que l'institution fédérale puisse les retrouver sans problèmes sérieux.

[…]

[…]

Information obtained by Privacy Commissioner

Renseignements obtenus par le Commissaire à la protection de la vie privée

22.1 (1) The Privacy Commissioner shall refuse to disclose any personal information requested under this Act that was obtained or created by the Commissioner or on the Commissioner's behalf in the course of an investigation conducted by, or under the authority of, the Commissioner.

22.1 (1) Le Commissaire à la protection de la vie privée est tenu de refuser de communiquer les renseignements personnels demandés en vertu de la présente loi qui ont été créés ou obtenus par lui ou pour son compte dans le cadre de toute enquête faite par lui ou sous son autorité.

Exception

Exception

(2) However, the Commissioner shall not refuse under subsection (1) to disclose any personal information that was created by the Commissioner or on the Commissioner's behalf in the course of an investigation conducted by, or under the

(2) Toutefois, il ne peut s'autoriser du paragraphe (1) pour refuser de communiquer les renseignements personnels créés par lui ou pour son compte dans le cadre de toute enquête faite par lui ou sous son autorité une fois que l'enquête

authority of, the Commissioner once the investigation and all related proceedings, if any, are finally concluded.	et toute instance afférente sont terminées.
[…]	[…]
Information about another individual	Renseignements concernant un autre individu
26. The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) about an individual other than the individual who made the request, and shall refuse to disclose such information where the disclosure is prohibited under section 8.	26. Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) qui portent sur un autre individu que celui qui fait la demande et il est tenu de refuser cette communication dans les cas où elle est interdite en vertu de l'article 8.
Solicitor-client privilege	Secret professionnel des avocats
27. The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) that is subject to solicitor-client privilege.	27. Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) qui sont protégés par le secret professionnel qui lie un avocat à son client.

[15] In response to the January 2012 Complaint, the OPC replied on January 6, 2012, noting that it could not disclose any of the information requested by virtue of the provisions of section 22.1 of the *Act*. That provision provides that the OPC cannot produce the information created by the OPC in the course of its investigation until the investigation and "all related proceedings, if any, are finally concluded." It was one of the OPC's positions that as the time period for bringing an Application to review the complaint against SSHRC had not yet expired, the information requested

could not be released. Pursuant to the provisions of the *Act* they took the position that they were justified in withholding the information and maintaining the position and that it was a matter to be determined first by another process involving the "Privacy Commissioner *Ad Hoc*". The responses from OPC to Dr. Oleinik's December 2011 and the January 2012 Complaints noted that Dr. Oleinik was entitled to file a complaint concerning the processing of his requests with the "Privacy Commissioner *Ad Hoc*" and provided contact information for doing so.

[16] It is useful at this juncture to describe the role of the Privacy Commissioner *Ad Hoc*. Pursuant to section 59 of the *Act* the duties and responsibilities of the Privacy Commissioner can be delegated to a third party to allow for, in the words of counsel for OPC, "independent and impartial investigations into complaints against the Commissioner under the *Act*." Apparently, the current Privacy Commissioner *Ad Hoc* is Mr. John H. Simms who has been delegated a majority of the Commissioner's powers, duties and functions as set out in section 29 to 35 and section 42 of the *Act* in order to carryout this review function. Section 59 reads as follows:

Delegation by Privacy Commissioner	Pouvoir de délégation
59. (1) Subject to subsection (2), the Privacy Commissioner may authorize any person to exercise or perform, subject to such restrictions or limitations as the Commissioner may specify, any of the powers, duties or functions of the Commissioner under this Act except	59. (1) Sous réserve du paragraphe (2), le Commissaire à la protection de la vie privée peut, dans les limites qu'il fixe, déléguer les pouvoirs et fonctions que lui confèrent la présente loi ou une autre loi fédérale, sauf :
(a) in any case other than a delegation to an Assistant Privacy Commissioner, the power	a) le pouvoir même de délégation, qui ne peut être délégué qu'à un commissaire adjoint;

to delegate under this section; and

(b) in any case, the powers, duties or functions set out in sections 38 and 39.

b) les pouvoirs et fonctions énoncés aux articles 38 et 39, qui ne peuvent être délégués à quiconque.

Affaires internationales et défense

Delegations of investigations relating to international affairs and defence

(2) The Privacy Commissioner may not, nor may an Assistant Privacy Commissioner, delegate

(2) Le Commissaire à la protection de la vie privée ou un commissaire adjoint ne peuvent déléguer qu'à un de leurs collaborateurs choisis parmi quatre des cadres ou employés du commissariat et que le Commissaire désigne spécialement à cette fin la tenue des enquêtes suivantes :

(a) the investigation of any complaint resulting from a refusal by the head of a government institution to disclose personal information by reason of paragraph 19(1)(a) or (b) or section 21, or

a) les enquêtes portant sur les cas où le refus de communication de renseignements personnels est lié aux alinéas 19(1)a) ou b) ou à l'article 21;

(b) the investigation under section 36 of files contained in a personal information bank designated under section 18 as an exempt bank on the basis of personal information described in section 21 except to one of a maximum of four officers or employees of the Commissioner specifically designated by the Commissioner for the purpose of conducting those investigations.

b) les enquêtes prévues à l'article 36 et portant sur les dossiers versés dans les fichiers inconsultables classés comme tels en vertu de l'article 18 et contenant des renseignements personnels visés à l'article 21.

Delegation by Assistant Privacy Commissioner	Pouvoir de subdélégation de l'adjoint
(3) An Assistant Privacy Commissioner may authorize any person to exercise or perform, subject to such restrictions or limitations as the Assistant Privacy Commissioner may specify, any of the powers, duties or functions of the Privacy Commissioner under this Act that the Assistant Privacy Commissioner is authorized by the Privacy Commissioner to exercise or perform.	(3) Un commissaire adjoint à la protection de la vie privée peut, dans les limites qu'il fixe, subdéléguer les pouvoirs et fonctions que lui délègue le Commissaire en vertu de la présente loi ou d'une autre loi fédérale.

[17] The delegation document is set out in the motion record. The purpose of establishing a Privacy Commissioner *Ad Hoc* is intended to provide a mechanism for the independent and impartial investigations into complaints which may be made against the Commissioner.

[18] Pursuant to paragraph 29(1)(b) of the *Act* and the above-mentioned delegation of responsibilities, the Privacy Commissioner *Ad Hoc* "shall receive and investigate complaints . . . from individuals who have been refused access to personal information requested under subsection 12(1)." Because the OPC is itself listed as a "government institution" to which the provisions of the *Act* apply, the Privacy Commissioner *Ad Hoc*'s mandate includes receiving and investigating complaints from individuals who have been refused access to personal information held by the OPC.

[19] Thus, OPC takes the position that if Dr. Oleinik was dissatisfied with the results or the responses to his December 2011 Complaint and January 2012 Complaint there was an available administrative remedy of which he could avail himself in these circumstances.

[20] I also note that the clear wording of section 41 of the *Act* similarly provides that an "individual who has been refused access to personal information requested under subsection 12(1) may, if a complaint has been made to the Privacy Commissioner in respect of the refusal, apply to the Court for a review of the matter" [emphasis added]. Rather than pursue a complaint to be dealt with by the Privacy Commissioner *Ad Hoc*, Dr. Oleinik has pursued this judicial review application, contrary to the *Act* and administrative law jurisprudence.

[21] Dr. Oleinik raises a number of issues apart from opposing this motion generally. In particular, Dr. Oleinik argues that this motion should not be considered because it was filed outside the timeline for completing cross-examinations. Dr. Oleinik had sent written interrogatories to the OPC. This motion was brought after the interrogatories were sent.

[22] The simple answer to this argument is that under Rule 221 (1) the Court may "at any time" order that a pleading be struck. However, OPC argues that apart from this provision in the Rules the OPC has tried to avoid unnecessary expense by responding to the interrogatories. Further, OPC argues that it was not appropriate to bring the motion earlier because the appeal from Dr. Oleinik's appeal upholding Justice Rennie's decision was only released on September 4, 2012. Issues raised in that proceeding overlap with issues in this proceeding so finality in that proceeding was required before moving to strike this proceeding. There is also some issue raised about the ability to serve

Dr. Oleinik because of travel commitments relating to his teaching duties. However, it is not necessary to consider all of this as it is open to the Court on the motion of a party at any time to strike.

[23] On the substance of the alternative remedy issue, Dr. Oleinik argues that he should not have to first pursue the available recourse to the Privacy Commissioner *Ad Hoc* because the Privacy Commissioner *Ad Hoc* is just that – *ad hoc*. Dr. Oleinik refers to a report to Parliament of the Privacy Commissioner which refers to the lacunae in the statute that there is no independent oversight of production of documents under the *Act* which may be in the possession of the Privacy Commissioner. Thus, the Privacy Commissioner created the position of Privacy Commissioner *Ad Hoc* to fill this void. Dr. Oleinik argues that such an *ad hoc* process cannot be independent and therefore he has not pursued the administrative remedy of a complaint to the Privacy Commissioner *Ad Hoc*.

[24] While Dr. Oleinik makes a valid point that the Privacy Commissioner *Ad Hoc* is not a legislated position and may not be completely independent as the Privacy Commissioner *Ad Hoc* is appointed by the Privacy Commissioner not Parliament, nonetheless there is no evidence that the Privacy Commissioner *Ad Hoc* has not acted independently and carried out the delegated duties impartially. While *CB Powell*, above, at paragraph 33, recognizes that an alternative remedy plagued with bias would be reason to allow an application for judicial review despite that alternative remedy, it is trite to say that an allegation of bias is serious and must be proven with convincing evidence. To reiterate, there is simply no convincing evidence of bias, whether institutional or personal on the record on this motion.

[25] In all of the circumstances, given the discussion above, the decision of Justice Rennie and the Federal Court of Appeal, this application is bereft of any chance of success and must be struck without leave to amend. The Respondent is entitled to costs.

[26] However, this does not mean that Dr. Oleinik is without a remedy for any of the complaints he makes, as discussed above, there is a right of complaint to the Privacy Commissioner *Ad Hoc* for the OPC's refusal to disclose the information requested by him. From there, if necessary, there may be recourse to this Court.

ORDER

THIS COURT ORDERS that:

1. This application is struck out without leave to amend.

2. The Respondent is entitled to costs fixed and payable forthwith in the amount of $3000.

"Kevin R. Aalto"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-272-12
STYLE OF CAUSE:	ANTON OLEINIK v. THE PRIVACY COMMISSIONER OF CANADA
PLACE OF HEARING:	St. John's, Newfoundland and Labrador
DATE OF HEARING:	December 6, 2012
REASONS FOR ORDER:	AALTO P.
DATED:	January 17, 2013

APPEARANCES:

Dr. Anton Oleinik	FOR THE APPLICANT
Mr. Regan Morris Ms. Louisa Garib	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dr. Anton Oleinik Self-Represented	FOR THE APPLICANT
Legal Services Privacy Commissioner of Canada	FOR THE RESPONDENT