COURT FILE NO.: 03-BN-6556
DATE: 20040908

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
GRAYDON RODGERS in his personal capacity and on behalf of the PEEL TRAP CLUB, an unincorporated activity group of THE PEEL COUNTY GAME AND FISH PROTECTIVE ASSOCIATION	)	Mr. S.M. Law, for the Applicants
Applicants	)	
- and -	)	
BOB CALVERT, JOHN STIGGE, BOB MODELAND and THE PEEL COUNTY GAME AND FISH PROTECTIVE ASSOCIATION	)	Mr. J.L. O'Kane, for the Respondents
Respondents	)	
	)	**HEARD:** March 31, 2004

REASONS FOR JUDGMENT

MacKENZIE J.

The Nature of the Proceeding

[1] The applicants, Graydon Rodgers, (Rodgers) and the Peel Trap Club (an unincorporated entity, being an activity group of the respondent The Peel County Game and Fish Protective Association), bring a motion in the context of an application commenced by Notice of Application dated June 24, 2003.

[2] Briefly stated, the applicants seek: declaratory relief under various heads for alleged breach of fiduciary duty; injunctive relief restraining The Peel County Game and Fish Protective Association (the Association) from expelling Rodgers or any other member of the Peel Trap Club (the Trap section) as a member of the Association and from disbursing of more than 43% of the proceeds of sale of the Association's real property; in the alternative, that the Association be wound up and that 50% of the proceeds of winding-up to be paid in trust to the Trap section.

[3] The applicants move now for an order compelling the Association to provide a list of the members of the Association to Rodgers. The Association previously refused to provide such list to Rodgers.

[4] The basis for the refusal by the Association to provide such list is that Rodgers' request fails to meet the requirements of s.306 or 307 of the *Corporations Act (Ontario)* (the *Act*) but even if those requirements are met, the

P*ersonal Information Protection and Electronic Documents Act* (PIPEDA) operates to "trump" or override the provisions of the *Act* in that regard.

Issues on the Motion

(1) Whether Rodgers is entitled to an order for production of the membership list of the Association pursuant to s.307 of the *Act*;

(2) Whether PIPEDA applies to Rodgers' request for the Association's membership list to override s. 307 of the *Act*.

Analysis

[5] In 1948, the Association was incorporated as a non-share corporation pursuant to the *Act.* Its letters patent stipulate as its primary purpose the promotion and maintenance of safe recreational shooting for its members. The record establishes that: the Association does not carry on any active business; has no employees, relying on members volunteering to discharge administrative tasks; and, in accordance with its charter, does not carry on its activities for purposes of gain for the members.

[6] The Association currently comprises five activity groups, the two material groups being the Trap section and the Handgun section. Rodgers is a member

of the Trap section and the respondents, Calvert, Stigge and Modeland, are members of the Handgun section.

[7] For some time, Rodgers has been concerned about the individual respondents acting in breach of their duties as officers and directors of the Association by preferring the interests of the Handgun section to which they belong over the interests of the Association as a whole. This concern arises over the sale of the Association's lands and premises and the proposed use of the proceeds of that sale to acquire other lands and premises. Rodgers' concern is that the individual respondents will take into account only the interests of the Handguns section in deciding what will be the appropriate replacement lands and premises to the exclusion of the interests of the other sections of the Association, including the Trap section.

[8] To this end, Rodgers made an informal request of the officers of the Association for the Association's membership list at a Board of Directors' meeting on March 12, 2002. Subsequently on or about September 10, 2002, he made a formal request for the membership list by filing the sworn affidavit prescribed by s.307(2) of the *Act*.

[9] By memorandum dated September 18, 2002 by the respondent Calvert to the directors of the Association, the directors were advised that they were obliged

to supply Rodgers with the list of members of the Association on the basis of legal advice obtained from the Association's counsel. By an undated memorandum (received sometime in October 2002) addressed to Rodgers, the respondent Calvert, on behalf of the Board of Directors, informed the applicant that the Board was "unable to comply with your request at this time as certain parts of [PIPEDA] came into effect January 1, 2001 and January 1, 2002 and this *Act* appears to deal directly with requests such as that made above [for the membership list] and we need a legal clarification".

[10] On October 10, 2003, counsel for Rodgers wrote to counsel for the Association making a further request pursuant to s.307 of the *Act* for the membership list.

[11] On October 14, 2003, counsel for the Association responded to Rodgers' counsel, denying the request for the membership list and stating that the Association "a gun club, is an undertaking that is outside the exclusive legislative authority of the Province of Ontario and accordingly it is governed by the requirements of PIPEDA and the release of any membership information cannot be made without the consent of the individual members."

[12] I turn now to the first issue, whether the applicant is entitled to an order for production of the Association's membership list pursuant to s.307 of the *Act*.

[13] Section 307 of the *Corporation's Act* (the Act) provides as follows:

> 307(1) Any person, upon payment of a reasonable charge therefor and upon filing with the Corporation or its agent the affidavit referred to in ss.(2), may require a corporation, other than a private company, or its transfer agent, to furnish within ten days from the filing of such affidavit, a list setting out the names alphabetically arranged of all persons who are shareholders or members of the corporation, the number of shares owned by each such person and the address of each such person as shown on the books of the corporation made up to a date not more than ten days prior to the date of filing the affidavit.
>
> ...
>
> Ss.2 sets out the form of the affidavit, the material paragraphs being:
>
> (2) I require the list of shareholders (or members) only for purposes connected with the above-named corporation.
>
> (3) The list of shareholders (or members) and the information contained therein will be used only for purposes connected with the above-named corporation.]
>
> ...
>
> (4) Every person who uses a list of shareholders or members of a corporation contained under this section,
>
> (a) for the purpose of delivering or sending to all or any of such shareholders or members advertising or other printed matter relating to shares of securities other than the shares or securities of the corporation; or
>
> (b) for any purpose not connected with the corporation,
>
> is guilty of an offence and on conviction is liable to a fine of not more than $1,000.00.
>
> (5) [This subsection creates an offence where directors or officers of the corporation fail to furnish the list in accordance with ss.1.]
>
> (6) Purposes connected with the corporation include any effort to influence the voting of shareholders or members at any meeting of the corporation, any offer to acquire shares in the corporation or any effort to effect an amalgamation or reorganization or any other purpose approved by the minister.

[14] Rodger's position is that he has complied with the requirements of s.307(2), has paid a fee for the membership list in question and is seeking the

membership list in order that he may communicate with other members of the Association respecting his concerns about the management of the Association, with particular reference to the proposed sale of the Association's property.

[15] In response, the Association contends that there is no evidence that Rodgers intends to use the membership list for purposes connected with the Association, as required under s.307(6). As well, the Association submits that it would be open to Rodgers or any other person to present a blatantly false affidavit in support of a request for the membership list; accordingly, the Association contends that it has an obligation with respect to the safety and privacy rights of its members. In this situation, the directors in discharging their fiduciary obligations to the members would be obliged to conduct due diligence in investigating any request for a list of members, including cross-examination of an applicant on any affidavit under s.307(2) filed in support of that request.

[16] Counsel for the respondents refers to s.332 of the *Act*, which, it contends, gives the court discretion to make orders deemed fit to give a remedy to a member of a corporation who is aggrieved by the failure of the corporation or its directors and officers to perform any duty imposed on the corporation and/or its directors and officers. In this case, the applicant submits that the court in the exercise of its discretion could make an order that would permit the applicant to

have communication with the members and at the same time protecting their privacy.

[17] I reject the submissions of the respondents and accept the submissions on behalf of Rodgers on the right to production of the membership list of the Association.

[18] The contention that the applicant is not using or will not be using the membership list for “purposes connected with the corporation” i.e. Association is not tenable. It is undisputed that the Board of Directors of the Association have signed a relocation agreement with the City of Brampton that requires the sale of the Association’s real property. There is no question that the relocation of the Association will entail decisions as to the suitability of the proposed replacement lands and premises for the Association’s activities. As noted, Rodgers has concerns about the proposed replacement lands and premises and wishes to communicate those concerns to other members of the Association.

[19] Counsel for the Association submits that the words “or any other purpose approved by the minister” are words of limitation. The contention is that the concerns expressed by Rodgers are not within the stipulated purposes of s. 307(b) nor are they the subject of “any other purpose approved by the minister.”

[20] I reject this submission. The proposition that the description of “purposes connected with the corporation” in ss.(6) of s.307 is exhaustive runs counter to the principle of democracy inherent in shareholders’ rights. Corporate governance by the directors is subject to review and audit by the shareholders, pursuant to corporate enabling legislation. To give subsection (6) the restrictive interpretation sought by the Association would diminish shareholders’ abilities to communicate concerns about corporate governance to each other and thereby detract from their rights of audit and review of directors’ acts and conduct in properly constituted meetings of shareholders.

[21] For these reasons, I interpret the word “include” in subsection (6) to be illustrative rather than exclusive in effect. If the legislator had intended the examples of “purposes connected with the corporation” to be exclusive, the word “means” instead of “include” would have been apt.

[22] Accordingly, I find that Rodgers’ purpose in seeking the membership list is a purpose connected with the corporation.

[23] I also reject the submission of the Association that its directors were required in the proper discharge of their fiduciary obligations, to conduct due diligence investigations of Rodgers’ request including cross-examination of any affidavit filed in support of the request.

[24] In these circumstances there is no basis on which the Association can reasonably claim the affidavit filed by Rodgers under s.307(2) is false and required investigation by the Association. The record is incontrovertible that on several occasions, both formally and informally, Rodgers made it known to the officers and/or the Board of Directors that he wished the membership list.

[25] As noted above, on the 18th of September 2002 Calvert sent a memorandum to the Board of Directors wherein, among other things, he noted that Rodgers "has submitted a duly signed affidavit" and that the Association's counsel had advised the Board that it must comply with the request. There may indeed be situations in which a corporation's transfer agent might have valid concerns as to the truth of the prescribed form of affidavit filed in support of obtaining a membership list; this is not one of them. I similarly reject the contention that giving the applicant that the membership list of the Association would violate the privacy of its members. This concern is addressed by the provisions of s. 307(4) of the *Act*. In this regard, the *Act* restricts the purposes for which the membership can be used and makes it an offence to use the list for any restricted objective.

[26] In the result, I find Rodgers is entitled to production of the membership list of the Association in accordance with the provisions of s. 307. However, his right

to production of the list engages the issue as to whether PIPEDA operates to disentitle Rodgers to his rights under s. 307 of the *Act.*

[27] PIPEDA was given royal assent on April 13, 2001, being implemented in three phrases over a three-year period that began on January 1, 2001.

[28] Section 4(1) of PIPEDA provides as follows:

> 4(1) This part applied to every organization in respect of personal information that
>
> (a) the organization collects, uses or discloses in the course of commercial activities; or
>
> (b) is about an employee of the organization and that the organization collects or uses or discloses in connection with the operation of a federal work undertaken or business.

[29] The three stages of PIPEDA'S implementation are:

1. Stage One: January 1, 2001

   PIPEDA applied only to an organization in respect of personal information, other than "personal health information", that (a) the organization collects or uses or discloses in connection with the operation of a federal work, undertaking or business, or (b) it discloses outside the province for a consideration;

Stage Two: January 1, 2002

PIPEDA applied to organizations covered in stage one in respect of personal health information that they collect, use or disclose;

2. Stage Three: January 1, 2004

PIPEDA applied to all organizations in Canada that collect, disclose or use personal information in the course of commercial activities, subject to exemptions granted or Provinces that have by that date enacted their own privacy legislation. It is not in dispute that Ontario has not enacted its own privacy legislation as of the 1st of January, 2004.

[30] It may be seen from the foregoing timelines that the relevant time for considering the application of the *Act* herein was stage two, i.e. the application of the *Act* on or after January 1, 2002. In the circumstances, s. 4(1)(a) of PIPEDA is the operative section inasmuch that there is no question that the members of the Association are not "employee[s] of the organization" as described in sub (b) of s. 4(1).

[31] It should be noted that there is no issue between the parties that the names and addresses of members of the Association constitutes "personal

information" within the definition of s. 2(1) of PIPEDA; the Association is an "organization" as defined in the interpretation section; and the Association is a "federal work, undertaking, or a business" as defined in the interpretation section of PIPEDA.

[32] I take issue with the joint submission that the Association is within the definition of a federal work undertaking or business. In the PIPEDA interpretation section 2(1), the pertinent part reads as follows:

> 2(1) The definitions in this subsection apply in this Part
>
> ...
>
> "Federal work, undertaking or business means any work, undertaking or business that is within the legislative authority of Parliament. It includes
>
> ...
>
> (i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the Provinces
>
> ...

[33] The Association was incorporated under the laws of Ontario and its activities are conducted solely within the Province of Ontario. The legislative jurisdiction of the Province respecting the *Act* is founded upon s. 92(13) (property and civil rights) and matters of a local or private nature within the Province (s. 92(16), both of the *Constitution Act*, 1867).

[34] The position of the respondents is that having regard to the recreational shooting activities (the Handgun section and the Trap section, among other sections) of the Association, the *Firearms Act and Regulations* enacted by the Federal Parliament under its criminal law power pursuant to s. 91 of the *Constitution Act 1867* take the Association's activities or "undertaking" outside the exclusive legislative authority of the Provinces.

[35] In order to determine whether the Association is a federal work or undertaking within the meaning of PIPEDA, an examination of the nature of the Association's activities and undertaking is required. It is a given that the mere fact the Association has been incorporated in the Province of Ontario and conducts its activities and undertaking within the Province of Ontario is not determinative of whether it is a federal work or undertaking within the meaning of PIPEDA.

[36] The examination of the Association's activities and undertaking indicates that it is not outside the exclusive legislative authority of the Province of Ontario nor is it a work or undertaking expressly enumerated in s.91 of the *Constitution Act*. The question then becomes whether the pith and substance of the activity and undertaking is a matter of property and civil rights and of purely local concern. If this question is answered in the affirmative, it does not come under

the exercise of s.91 of the *Constitution Act 1867* to enact criminal law, i.e. the *Firearms Act*, simply because the recreational shooting aspects of the Association's activity and undertaking is impacted by the *Firearm's Act*.

[37] In *Barry's Ltd. v. Fisherman, Food and Allied Workers Union* [1993] N.J. No. 34 (NFLD. C.A.), (leave to appeal to S.C.C. dismissed), one of the issues was whether the business operated by the appellant was subject to federal legislation and regulations, specifically, the *Fish Inspection Act*. The issue before the Court was whether the appellant's business of fishing came within the definition of a federal undertaking under the *Canada Labour Code*. In this regard, the case is pertinent because the definition of federal work or undertaking in the *Canada Labour Code* is similar in substance to the same definition contained in PIPEDA: "a work, undertaking or business outside the exclusive legislative authority of the legislation of the Province".

[38] In the course of its reasons, the court observed that the Federal Parliament had authority to legislate with respect to the regulation of trade and commerce and there was no doubt that the Federal Parliament had authority to enact the *Fish Inspection Act*. However, the court further observed that such authority did not make a company engaged in trade and commerce and bound by some federal enactment in relation thereto a federal work or undertaking.

[39] The court gives an example of this principle in noting that s.7 of the *Federal Food and Drugs Act* provides that no person shall manufacture, prepare, preserve, package or store for sale any food under unsanitary conditions. The court concludes that this provision does not constitute every corner grocery store a federal work or undertaking within the meaning of the *Canada Labour Code*.

[40] I find this reasoning to be apt in the present circumstances. The fact that the *Criminal Code of Canada* applies to every aspect of personal, institutional or corporate activity in Canada does not thereby constitute in law those activities as federal works or undertakings.

[41] Despite my finding that the Association is not a federal work or undertaking contrary to the joint submission of the parties, I turn to the question of whether the personal information that the Association collects, uses or discloses was done in the course of commercial activities.

[42] Rodgers submits that the court is entitled to give significant weight to the interpretation of PIPEDA by the office of the Privacy Commissioner of Canada, being the administrative agency under PIPEDA: see *Nowegegijick v. R.* [1983], 1 S.C.R 29 at p.37. Counsel cites various dicta from the website of the Privacy Commissioner. The pertinent parts of such dicta are as follows:

> Whether or not an organization operates on a non-profit basis is not conclusive in determining the application of [PIPEDA]. The term non-profit or not-for-profit is a technical term that is not found in PIPEDA. The bottom line is that non-profit status does not automatically exempt an organization from the application of [PIPEDA].
>
> Most non-profits are not subject to [PIPEDA] because they do not engage in commercial activities. This is typically the case with most charities, minor hockey associations, clubs, community groups and advocacy organizations. Collecting membership fees, organizing club activities, compiling a list of members' names and addresses and mailing out newsletters are not considered commercial activities. Similarly, fundraising is not a commercial activity. However, some clubs, for example, many golf clubs and athletic clubs, may be engaged in commercial activities which are subject to [PIPEDA].
>
> As the definition of commercial activity makes clear, selling, bartering or leasing a membership list or list of donors would be considered a commercial activity.

[43] It is not in issue that the Association, at the time of the applicant's request for the membership list, was not selling, bartering or leasing its membership list or list of donors. The record establishes the following facts about the Association, its activities and undertaking.

(1) Its charter objects are "to promote and maintain safe recreational shooting and to promote and maintain sportsmanship, fellowship and conservation."

(2) It is carried on without the object of gain for the members;

(3) There is no profit margin in the membership fees nor is there an objective to make a profit but rather to meet expenses.

(4) It has no employees, volunteers perform necessary services with the exception of the recording secretary (minutes of meetings) the monthly bookkeeping service and ground maintenance personnel, who receive a small honorarium.

(5) The general public does not have access to the Association's facilities in the ordinary course; when there are competitions, non-members must pay entrance fees.

[44] The question remains whether the activities and undertaking are commercial activities within the meaning of PIPEDA.

[45] Section 2(1) defines commercial activity as:

> Any transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering of donor membership or fundraising lists.

[46] As noted above, there is no evidence to support a finding that the Association was "selling, bartering or leasing its 'donor, membership or other fundraising lists'." The question then becomes whether producing a membership list under s.307 of the *Act*, is of a commercial character so as to come within the s. 2(1) definition of commercial activity.

[47] Rodgers submits that in interpreting the words "commercial activity" in the statutory definition, the court should apply the preponderant purpose test, set out in *Ontario (R.A.C.) v. Caisse Populaire de Hearst Ltee.*, [1983] 1 S.C.R. 57. The test simply stated is that if, upon analysis, the preponderant purpose of the activity is the making of a profit, then the activity may be classified as a business. However, if there is another preponderant purpose to which any profit earned is merely incidental, then it will not be classified as a business.

[48] The respondents contend, however, that since the primary purpose of PIPEDA is to protect personal information, the term “commercial activity” should be interpreted primarily as it relates to “the collection, use or disclosure” of personal information rather than as it relates to the Association engaged in the “collection, use or disclosure”. Counsel submits that if the collection of personal information in a membership list arises in a transaction that is of a non-commercial character, but the use or disclosure of that personal information is in a transaction or act that is of a commercial character then the personal information is entitled to the protection of PIPEDA. Counsel further submits that if the collection of the personal information arose in a transaction that is of a commercial character, then that personal information is entitled to the protection of PIPEDA regardless of whether disclosure itself was in the course of commercial activity. In sum, the Association submits that the collection of personal information in making up the membership lists was in the context of a “commercial activity”.

[49] Counsel argues as follows:

> (1) The personal information that the applicant seeks to obtain from the Association’s list of members was collected by the Association in the course of the membership transaction.

(2) The membership transaction involves the member submitting among other information his or her name, address and phone number, together with the prescribed membership fee.

(3) In return, the member is entitled to receive the services and benefits that members of the Association enjoy.

(4) That exchange of consideration is a transaction that is clearly commercial in character.

[50] I deal first with the preponderant purpose submissions. I am persuaded that the question of whether any organization is a business for purposes of taxation under the *Assessment Act* is not determinative or applicable to the interpretation of the term “commercial activity” under PIPEDA, having regard to the different objectives of the two statutes. However, I am not persuaded that the interpretation submitted by the Association as to the breadth of the words commercial activity as defined in PIPEDA is apt.

[51] The “exchange of consideration” involved in supplying personal information and a prescribed membership fee in exchange for the services and benefits of membership in the Association may constitute consideration under the law of contract. However, consideration in contract does not in itself lead to the finding of commercial activity in the PIPEDA context. In my view, there must be something more than a mere “exchange of consideration”, as described by counsel, to be within the definition of “commercial activity”.

[52] Counsel for the Association has in his written submissions referred to a dictionary definition of the words “commerce” and “commercial”, in aid of interpreting the meaning of the phrase “commercial activity”.

[53] In that dictionary, the word “commerce” is defined as:

> exchange between men of the products of nature and art; buying and selling together; exchange of merchandise
>
> ...
>
> The word “commercial” is defined as:
>
> engaged in commerce; trading; of or relating to commerce or trade.
>
> (See Shorter Oxford English Dictionary page 349 - Appendix B.)

[54] The same words are defined in the Oxford English Reference Dictionary, Oxford University Press, Second Edition, 1996, as follows:

> “commerce”: financial transactions, especially the buying and selling of merchandise, on a large scale;
>
> “commercial”: of, engaged in or concerned with commerce; having profit as a primary aim rather than artistic, etc. value.
>
> (See page 290).

The difficulty in dictionary definitions can be readily seen by the absence of the word or notion of profit or gain in the source quoted by counsel for the Association and the presence of the notion of profit or gain in the definition found in the Oxford Reference Dictionary.

[55] Although the dictionary definitions assist somewhat in interpreting the term “commercial activity” in s. 2(1) of PIPEDA, I rely more heavily on the interpretation from the Privacy Commissioner’s website noted above wherein it is stated that “collecting membership fees, organizing club activities, compiling a list of members’ names and addresses and mailing out newsletters are not considered commercial activities.”

[56] On the record before me, it is not feasible to set out criteria or facts as to what constitutes a commercial activity for a not-for-profit organization. I am nonetheless persuaded there is nothing in the record that indicates that the activities of the Association at large and the production of the membership list in particular in this case would be considered a commercial activity for purposes of PIPEDA. In light of these findings I do not find it necessary to address to address the contention of the Association that the words “required by law” in s.7(3)(i) of PIPEDA do not apply to s.307 of the *Corporation’s Act* but only to case law. In similar fashion I find it unnecessary to give effect to concerns expressed on behalf of the Association that if the list of members were to get into “the wrong hands” it could result in dangerous consequences since the members own firearms and ammunition. The applicant in receiving the membership list for the Association is governed by the provisions restricting the use to which the

membership list can be put and will be subject to the sanctions contained in the *Act* for any non-compliance with those restrictions.

Disposition

[57] An order shall go directing the Association through its proper officers to produce and deliver forthwith to the applicant a list of the members of the Association in accordance with the provisions of s.307 of the *Act*.

Costs

[58] The motion raises a novel point of law. Both parties through their counsel have attempted to address the issues and have done so in a thorough manner. In the circumstances, I am of the view that each party should bear his/their own costs.

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MacKENZIE J.

Released: September 8, 2004

COURT FILE NO.: 03-BN-6556
DATE: 20040908

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

GRAYDON RODGERS in his personal capacity and on behalf of the PEEL TRAP CLUB, an unincorporated activity group of THE PEEL COUNTY GAME AND FISH PROTECTIVE ASSOCIATION

Applicants

- and –

BOB CALVERT, JOHN STIGGE, BOB MODELAND and THE PEEL COUNTY GAME AND FISH PROTECTIVE ASSOCIATION

Respondents

REASONS FOR JUDGMENT

MacKENZIE J.

Released: September 8, 2004