Federal Court Cour fédérale

Date: 20150616

Docket: T-2065-09

Citation: 2015 FC 753

Ottawa, Ontario, June 16, 2015

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

SHELDON BLANK

Applicant

and

THE MINISTER OF JUSTICE

Respondent

JUDGMENT AND REASONS

[1] This is an application by Sheldon Blank [the Applicant] under section 41 of the *Access to Information Act*, RSC 1985, c A-1 [*Access to Information Act* or the *Act*] for judicial review of the Department of Justice's decision to deny the Applicant access to portions of the records requested by the Applicant by access request dated November 30, 2006 and subsequent complaint dated March 16, 2007.

[2] This application should be dismissed for the following reasons.

I. Facts

[3] In 1992, The Applicant and his company, Gateway Industries Ltd., were investigated and in 1995 they were charged with 13 violations of the *Fisheries Act*, RSC 1985, c F-14 [*Fisheries Act*]. Five counts alleged pollution of the Red River by a paper mill owned by the Applicant contrary to the *Fisheries Act*, and eight alleged breaches of statutory reporting requirements contrary to regulations made pursuant to the *Fisheries Act*. In February 1996, officers of the Attorney General of Canada [the Crown], who have jurisdiction to prosecute violations of the *Fisheries Act* and regulations thereunder, elected to prosecute by way of summary conviction proceedings.

[4] On April 4, 1997, the Manitoba Provincial Court quashed eight of the thirteen charges, finding them to be nullities in that they failed to allege the place at which the offences allegedly occurred: *R v Gateway Industries Ltd*, [1997] MJ No 185. These eight charges had been brought under the regulations.

[5] On April 10, 2001, Justice Kennedy of the Manitoba Court of Queen’s Bench held that the remaining five summary conviction proceedings brought under the *Fisheries Act* were nullities in that they had been brought out of time in the absence of a certificate establishing when the Minister became aware of the alleged violations: *R v Gateway Industries Ltd*, 2001 MBQB 106. Thereafter, the Crown chose to continue with the five remaining counts by way of indictment, the Applicant being so informed on May 9, 2001. The Crown laid new charges by way of indictment in July, 2002.

[6] In the interim, in May, 2002, the Applicant and Gateway Industries Ltd. commenced a civil action against several individuals and entities of the Federal Government, alleging fraud, conspiracy, perjury, abuse and intent to injure in relation to the thirteen charges laid against them. The civil action is still ongoing in the Manitoba Court of Queen's Bench and at the date of hearing had not yet been decided. The Applicant's request concerns certain documents from the Department of Justice dealing with this lawsuit, which is still in progress.

[7] On February 4, 2004, the Crown determined that public interest was no longer served by carrying out the prosecution, and therefore directed a stay of proceedings in relation to the five remaining counts. By that time, the Applicant was no longer involved with Gateway Industries Ltd., and the pulp and paper mill had ceased operations.

[8] On November 30, 2006, the Applicant made an access request under the *Act* for:

> All records and communications dealing with or referring to the civil litigation involving Sheldon Blank and Gateway Industries Ltd. (Manitoba Court of Queen's Bench File CI 02-01-28295) from Rod Garson to anyone, or from anyone to Rod Garson. This request includes Rod Garson's notes made on this subject.

[9] This access request concerns documents relating to the Applicant's current civil action in the Manitoba Court of Queen's Bench. That action is defended now by the Department of Justice and or its agent, the law firm Filmore Riley.

[10] On March 14, 2007, the Department of Justice wrote to the Applicant and enclosed 194 pages which formed the deemed releasable documents relevant to his access request. In the same letter, the Department of Justice denied the Applicant access to portions of the requested records,

claiming exemptions under subsection 19(1) (personal information), paragraphs 21(1)(a) (advice or recommendations) and 21(1)(b) (consultations or deliberations), as well as section 23 (solicitor-client privilege) of the *Act*.

[11] On March 16, 2007, the Applicant complained to the Information Commissioner, pursuant to the *Act*, alleging that the Department of Justice had improperly severed the records and improperly applied exemptions provided by the *Act*.

[12] On June 16, 2009, the Department of Justice's Access to Information and Privacy [ATIP] Office released additional documents (27 pages) in response to the Applicant's request and subsequent complaint.

[13] On July 27, 2009, in response to the Applicant's complaint and after discussions with the Office of the Information Commissioner [OIC], the Department of Justice's ATIP Office reconsidered the exemptions and released additional documents (15 pages).

[14] The OIC reported the result of its investigation to the Applicant on November 10, 2009. The Information Commissioner was satisfied that the Department of Justice had properly applied exemptions, exercised its discretion and severed the applicable records. The Information Commissioner's report dealt with the documents originally sent to the Applicant, plus the additional sets of 27 and 15 pages.

[15] On December 9, 2009, the Applicant applied to this Court for judicial review under section 41 of the *Act* of the Department of Justice's decision to deny him access to portions of the requested records. In his application, the Applicant requested a review of records not released in whole or in part. His application also alleges that severability under section 25 of the *Act* was not properly applied, and that there are missing records, noting one attachment in particular.

[16] On February 22, 2010, the Department of Justice disclosed to the Applicant and this Court that certain documents (111 pages) had come to its attention which should have been processed in the Applicant's access request but were inadvertently omitted. The relevant documents were attachments to documents that had already been processed.

[17] On August 30, 2010, the Department of Justice wrote to the Applicant and enclosed the 111 pages of documents inadvertently omitted. It claimed exemptions under subsection 19(1) (personal information), paragraphs 21(1)(a) (advice or recommendations) and 21(1)(b) (consultations or deliberations), as well as section 23 (solicitor-client privilege) of the *Act*. A new disclosure book was forwarded to the Applicant, containing all documents released to him, both those in respect of which he had made a complaint to the Information Commissioner, and the 111 pages in respect of which there was neither a complaint to nor a review by the Information Commissioner, but which the Department of Justice had subsequently disclosed. I should note that 27 of these pages were released in their entirety to the Applicant hence no review or report would be expected.

[18] Section 41 of the *Act* permits an application to this Court "if a complaint has been made to the Information Commissioner in respect of the refusal". The Applicant has not made a complaint to the Information Commissioner respecting these additional 111 pages of documents.

[19] Given this situation, the Respondent suggested to the Applicant that if he wished to have the newly released pages reviewed by this Court at the same time as material previously reviewed by the Information Commissioner, he should either: 1) stay the current judicial review application pending a complaint to the Information Commissioner and the issuance of a report so that there would be the requisite jurisdiction to amend the application to include all the Applicant's concerns relating to his request; or 2) discontinue the current judicial review and make a new application for judicial review after a complaint to, and report by, the Information Commissioner in respect of all material now disclosed to him.

[20] The Applicant (who was at times represented and at other times unrepresented, and who may or may not have had legal assistance in this application, although he appeared before me in person), elected not to make a complaint to the Information Commissioner regarding the additional documents. Instead, the Applicant decided to proceed with his application. He unilaterally included in his Application Record the 111 pages of documents previously referred to, including the 27 pages that had been released to him in their entirety. These had been assembled by the Respondent in a separate release book.

[21] I should note that the Applicant has a great deal of experience with federal access matters, having filed 96 such requests to the Department of Justice as of January 2010, in respect

of which the Department's ATIP Officer has reviewed 61,312 documents. Both the Departments of the Environment and Fisheries have also been the subject of numerous access requests by this Applicant. He has filed many applications for judicial review and appeals to the Federal Court of Appeal, and indeed he represented himself before the Supreme Court of Canada in one of the leading cases on the subject of access to information at the Government of Canada level.

[22] As a result of the Applicant making no complaint, the Information Commissioner did not review and made no report respecting the 84 pages (111 minus 27 pages) that were released to the Applicant by the Department of Justice.

[23] The issue of this Court's jurisdiction to review disclosure in respect of which no complaint had been made to the Information Commissioner was raised before the case management judge. The Respondent again took the position that failure to make a complaint respecting the newly released pages gave rise to a jurisdictional issue. On August 30, 2010, case management judge Milczynski directed that the jurisdictional issue be deferred to the application judge such that it is now before this Court.

[24] The material being the subject of the Applicant's complaint to the Information Commissioner and which was subsequently reviewed and reported on by the OIC, is attached to the Affidavit of Ms. Rhéaume as Exhibit "I". The material that was not the subject of complaint, review and report to and by the Information Commissioner is found as Exhibit "B" to the Affidavit of Ms. Projean. As noted, pages 2 to 28 of Exhibit "B" were released to the Applicant

in their entirety, such that 84 pages remain in respect of which there was neither a complaint, review, nor a report.

II. Issues

[25] This matter raises the following issues:

A. Whether two affidavits filed by the Applicant in support of interlocutory motions before a prothonotary should be considered in support of his application for judicial review, namely: Applicant's affidavits of July 11, 2011 and February 28, 2013;

B. Whether the application for judicial review of the additional August 30, 2010 disclosure of 84 pages of documents by the Department of Justice is premature;

C. Whether the Department of Justice erred in its application of a discretionary exemption pursuant to the *Access to Information Act*; and

D. Whether the Department of Justice erred in severing the records pursuant to section 25 of the *Access to Information Act*.

III. Standard of Review

[26] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question".

[27] I agree with the Respondent that a challenge to the application of a discretionary exemption pursuant to the *Act* involves the examination of two decisions: 1) the determination that a record falls within the exemption; and 2) the decision not to disclose that material. The correctness standard of review applies with respect to the decision that the withheld information falls within the statutory exemptions, and the reasonableness standard of review applies to the discretionary decision to refuse to release exempted information: *Blank v Canada (Minister of Justice)*, 2009 FC 1221 at para 31 [*Blank 2009 FC 1221*].

[28] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[29] In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required of a court reviewing on the correctness standard of review:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[30] The following general guidelines are important to keep in mind on dealing with judicial review under the *Act*, and are summarized by Justice de Montigny in *Blank 2009 FC 1221* at paras 23-26:

> [23] The purpose of the Act is to provide the public with a right of access to information contained in records held by the government. This right of access, however, is not absolute. It is subject to exceptions set out in the Act. Any exceptions to this right should be limited and specific: the Act, s. 2(1).
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> [24] When an individual has been refused access to requested information and has made a complaint to the OICC in respect of the refusal, he or she may apply to the Court under s. 41 of the Act for judicial review of that refusal. Public access to government information ought not to be frustrated by the courts, except in the clearest of circumstances: *Reyes v. Canada (Secretary of State)*, [1984] F.C.J. No. 1135, 9 Admin. L.R. 296, at para. 3 (F.C.)
>
> [25] On an application pursuant to s. 41 of the Act, the burden rests on the government institution to establish that the information at issue was properly exempted from disclosure: see s. 48 of the Act.
>
> [26] When an applicant seeks judicial review of a refusal to disclose a record, the Court has the benefit of the OICC's investigation and report. The OICC's opinion is a factor to be considered on judicial review, as he has more expertise than this Court with respect to access to information: *Canada (Attorney General) v. Canada (Information Commissioner)*, 2004 FC 431 , 2004 FC 431, [2004] F.C.J. No. 524 at para. 84, rev'd on other grounds 2005 FCA 199 , 2005 FCA 199; *Gordon v. Canada (Minister of Health)*, 2008 FC 258 , 2008 FC 258, at para. 20; [2008] F.C.J. No. 331, *Blank v. Canada (Minister of Justice)*, 2005 FCA 405, 2005 FCA 405, [2005] F.C.J. No. 2040, at para. 12. That being said, it is the refusal of the head of a government institution that the Court is charged to review, not the Commissioner's recommendations.

[31] With respect to severance pursuant to section 25 of the *Act*, the role of this Court is to review the disclosure decision of the institutional head and determine whether that decision was in accordance with the *Act*: *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at para

232 [*Merck Frosst*]. I am required to consider whether the Department of Justice properly applied section 25.

IV. Analysis

A. *Whether two affidavits filed by the Applicant in support of interlocutory motions before a prothonotary should be considered in support of his application for judicial review, namely: Applicant's affidavits of July 11, 2011 and February 28, 2013*

[32] The short answer to this issue is that these affidavits should not be considered in support of this application for judicial review. The Applicant filed affidavit material in support of this application for judicial review which was instituted more than five years ago. There followed extensive cross-examinations and numerous other interlocutory proceedings before various case management judges and prothonotaries. Two such interlocutory proceedings were motions brought by the Applicant, in respect of which motions the Applicant filed the two affidavits referred to (dated July 11, 2011 and February 28, 2013). The motions were disposed of. It wasn't until the third day of the hearing before this Court that the Applicant requested leave to file these two additional affidavits in support of the application for judicial review itself.

[33] In my view, the affidavits filed by the Applicant in support of interlocutory motions became spent when those motions were decided. They do not form part of his record on this application for judicial review for several reasons. First, the Applicant did not file them for that purpose; instead they were filed for the purpose of obtaining interlocutory relief rather than in support of the application itself. Secondly, while the Court may allow the filing of supplementary affidavits on judicial review, such filing may only be done on specific request, on proper notice

and with argument and material in support. No such proper request has ever been made. Needless to say, any such application would also have had to be made on a timely basis. Here, instead of moving with proper notice and material in support and moving well in advance of the hearing, and certainly before his Record was prepared, the Applicant only asked for leave to file these two affidavits on the last day of a two and a half day hearing in Winnipeg on April 9, 2015. The Applicant's request came over five years after the Applicant served and filed this proceeding in the first place. Even then, the Applicant only made that request upon being asked by the Court for his position. The Applicant's request is procedurally irregular and fatally so, and is made far too late in the day.

[34] The Respondent was entitled to proceed on the basis that the Applicant's case was made on the material the Applicant identified for that purpose and filed in support of his application, responding material filed by the Respondent, and cross-examinations and productions related and subsequent thereto. The Respondent was entitled to know the case he had to respond to. To allow the filing of these documents at this time constitutes a serious unfairness and injustice to the Respondent who had no notice of the Applicant's intent to file these two affidavits until they appeared in his Record, no opportunity to cross-examine on these two affidavits for the purposes of the application (as opposed to the motions in respect of which they were filed), and no opportunity to file responding material.

[35] I disagree with the Applicant's argument that he had a right to file these two affidavits and that if the Respondent wished to object to the filing, he should have done so by filing a separate motion to strike. This line of thought turns the *Federal Courts Rules*, SOR/98-106

[*Federal Courts Rules*] upside down. It was the Applicant who was obliged to seek leave of this Court to file additional material, which he did not do. The Respondent rightly objected to these filings both in his factum and at the hearing. I see no reason to find that the Respondent should have gone to the expense and delay of yet a further motion as a result of the Applicant's improper inclusion of these two affidavits in his Record. The Applicant proceeded unilaterally and faced the risk that these documents would be refused. That risk has now materialized.

[36] The Applicant also asserts a right to file these two affidavits, which right he says flows from the Prothonotary's case management Orders. There is no merit in this argument. I was shown no order or direction giving the Applicant a right, explicitly or implicitly, to re-file his spent motion material in support of the application for judicial review itself.

[37] The Applicant asserts that these affidavits are important to his case. There is no merit to this argument. Their importance is all the more reason he should have asked for leave, and done so well in advance of the hearing. Instead the Applicant waited until the last day of the hearing itself. If they are important to him, they are important to the Respondent as well. The Respondent had every right to know well in advance the case he had to answer.

[38] In this connection, the Respondent correctly relied upon the combined effect of Rules 84(2), 306 and 309 of the *Federal Courts Rules*. Rule 309(2)(d) of the *Federal Courts Rules* provides that the Applicant's Record "shall contain […] (d) each supporting affidavit and documentary exhibit". Rule 306 requires that such "affidavits and documentary exhibits" be filed "[w]ithin 30 days after issuance of a notice of application". The two impugned affidavits were

not filed with or within 30 days of the notice of application therefore they support the Respondent's position. Rule 312 provides additional steps a party may choose to follow with leave of the Court in order to file affidavits in addition to those provided under Rule 306 (Applicant's affidavit), none of which steps the Applicant took:

Additional steps	Dossier complémentaire
312. With leave of the Court, a party may	312. Une partie peut, avec l'autorisation de la Cour :
(a) file affidavits additional to those provided for in rules 306 and 307;	a) déposer des affidavits complémentaires en plus de ceux visés aux règles 306 et 307;
(b) conduct cross-examinations on affidavits additional to those provided for in rule 308; or	b) effectuer des contre-interrogatoires au sujet des affidavits en plus de ceux visés à la règle 308;
(c) file a supplementary record.	c) déposer un dossier complémentaire.

[39] I also note that Rule 363 provides: "[a] party to a motion shall set out in an affidavit any facts to be relied on by that party <u>in the motion</u> that do not appear on the Court file" [emphasis added], which confirms that affidavits filed on a motion are to be relied on in the motion, not the underlying proceeding which in this case is the application.

[40] As noted, the Applicant himself deposed in each of the two impugned affidavits that they were filed in support of the related motion, and made no mention of this application. The Applicant's affidavit dated July 11, 2011 states that he "make[s] this Affidavit in support of the Motion herein and for no improper purpose". The Applicant's Affidavit dated February 28, 2013 states that he "make[s] this Affidavit Bona Fides and in support of the Notion [sic] herin [sic]

and for no improper purpose". The Applicant nowhere stated they were made in support of the application.

[41] Therefore, the Court will not consider the affidavits filed previously in support of the Applicant's interlocutory motions, dated July 11, 2011 and February 28, 2013.

B. *Whether the application for judicial review of the additional August 30, 2010 disclosure of 84 pages of documents by the Department of Justice is premature*

[42] The facts relevant to this aspect of the case are recited above in paragraphs 16 to 23. Basically, the Applicant was not satisfied with the Department of Justice's response to his access request and therefore applied to the Information Commissioner for review and report. The Information Commissioner succeeded in obtaining additional material which was disclosed to the Applicant. Still unsatisfied, the Applicant filed an application for judicial review in this Court. Thereafter, the Respondent discovered and disclosed an additional 84 pages of material, much of which was redacted or withheld. As noted, 27 additional pages were disclosed by the Department of Justice without redaction.

[43] The Applicant did not ask the Information Commissioner to review or report on the redactions in the 84 pages. Instead, the Applicant placed these directly before this Court and asked this Court to proceed under section 41 in the absence of any review or report of the Information Commissioner. He was advised by the Respondent that this was contrary to section 41, which requires the Information Commissioner to review and report on documents before they may be the subject of judicial review. Notwithstanding every opportunity to do so, with his eyes

open and fully warned of the consequences, the Applicant himself chose not to avail himself of his right to file a complaint to the Information Commissioner. Hence, these 84 pages of documents come to this Court directly from the Department of Justice and without complaint by the Applicant to, and without review and report by the Information Commissioner.

[44] The Applicant is under no obligation to file a complaint with the Information Commissioner at any time or in respect of any matter. However, the failure to file such a complaint in this case in relation to these 84 pages has the effect of barring him from seeking this Court's review of those documents because his application is premature in that respect.

[45] I agree with the Respondent that without a complaint to and a review and report by the Information Commissioner regarding the Department of Justice's disclosure, this Court lacks jurisdiction to engage in judicial review of the relevant records by virtue of section 41 of the *Act*, which provides:

Review by Federal Court	Révision par la Cour fédérale
41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the	41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la

expiration of those forty-five days, fix or allow [emphasis added].	prorogation [je souligne].

[46] In my view, the words "if a complaint has been made to the Information Commissioner in respect of the refusal" in section 41 constitute a jurisdictional condition precedent that must be satisfied by an applicant before this Court may undertake the judicial review provided for in that section. The failure of an applicant to make a complaint deprives this Court of jurisdiction to undertake that applicant's request for judicial review in relation to those documents.

[47] I am supported in this conclusion by the Federal Court of Appeal which held in *Canada (Information Commissioner of Canada) v Canada (Minister of National Defence)* (1999), 240 NR 244 at para 27 (FCA):

> 27 The investigation the Commissioner must conduct is the cornerstone of the access to information system. It represents an informal method of resolving disputes in which the Commissioner is vested not with the power to make decisions, but instead with the power to make recommendations to the institution involved. The importance of this investigation is reinforced by the fact that it constitutes a condition precedent to the exercise of the power of review, as provided in sections 41 and 42 of the Act [emphasis added].

[48] In *Statham v Canadian Broadcasting Corporation*, 2010 FCA 315 at para 55 [*Statham*], the Federal Court of Appeal held to the same effect:

> Where there is a complaint of a deemed refusal to provide access, the complainant may apply for judicial review within 45 days of receiving the Commissioner's report made under subsection 37(2) of the Act. The relevance of the procedure chosen by the Commissioner is that in an application under section 41 of the Act the Court cannot rule upon the application of any exemption or exclusion claimed under the Act if the Commissioner has not

> investigated and reported upon the claim to the exemption or exclusion [emphasis added].

[49] The Federal Court of Appeal confirmed this point recently in *Whitty v Canada (AG)*, 2014 FCA 30 at paras 8-9 [*Whitty*]:

> [8] […] the Federal Court relied on section 41 of the Act and concluded that the application for judicial review was premature. Section 41 of the Act provides that a judicial review can be brought only after the Office has investigated and reported on the relevant complaint: see, e.g., *Statham v. Canadian Broadcasting Corporation*, 2009 FC 1028 at paragraph 18, aff'd 2012 FCA 315. At the time the application for judicial review was brought, the Office had not even appointed an investigator to examine Environment Canada's assertion of exemptions and redactions to the documents. Section 41 is of the Act is a statutory expression of the common law doctrine that, absent exceptional circumstances, all adequate and alternative remedies must be pursued before resorting to an application for judicial review. Since the Office had not completed its investigation and had not issued its report, in the Federal Court's view an application for judicial review did not lie.
>
> [9] We see no grounds to interfere with the Federal Court's interpretation and application of section 41 to the facts of this case [emphasis added].

[50] There are further reasons why this Court should not judicially review documents that have never been the subject of complaint, review or report. The *Act* is a statutory scheme containing checks and balances in opening government records to public access. The independent review of complaints is conducted by the Information Commissioner, an Officer of Parliament who reports to Parliament and no one else. The Information Commissioner is therefore independent of departments and entities of the Government of Canada. His or her review is an essential element of the balanced statutory scheme enacted by Parliament. The scheme of the Act entitles this Court to the views of the Information Commissioner on the

adequacy of disclosure. This is an important input given the Information Commissioner's considerable expertise and knowledge about access to information issues, which this Court does not possess.

[51] Requestors may not unilaterally ignore one of the keystones of our access to information regime (independent review and consideration by the Information Commissioner) by asserting a positive right to come directly to this Court seeking disclosure of documents in respect of which they have not first sought the assistance of the Information Commissioner.

[52] This jurisdictional issue was properly brought to the Applicant's attention by the Respondent in August 2010. The Respondent also brought this issue to the attention of the Court at a case management meeting in August 2010. The Respondent, to his credit, suggested solutions to enable all aspects of this request to be decided at the same time as the other records and request.

[53] The Applicant complains that failure to consider this additional material on judicial review in this Court would cause delay. To the extent there is any delay, it is caused entirely by the Applicant's decision not to take his complaint to the Information Commissioner as he was required to do. Despite these affidavits being filed some four and a half years ago, the Applicant neither then, nor since, has sought to regularize the status of these documents as he could and should have. The Court cannot cure the Applicant's disregard of the statutory requirements.

[54] During the hearing, and as further justification for his decision not to comply with the statutory scheme, the Applicant alleged he was treated unfairly by the OIC. Even if this was the case, any such treatment could not excuse a failure to follow the legal regime established by section 41 of the *Act*. I should note that the Applicant is prone to hyperbole in oral argument, and frequently embellished his submissions with sweeping and serious denunciations of various officers and entities including, as noted, the OIC. Nor were his attacks reserved for government and Parliamentary officials. He also alleged "bias" in favour of the Crown by the courts. While he repeated that particular allegation, as is the case of his criticism of the OIC, the Applicant offered no evidence in support. These objections have no merit.

[55] In sum, the Applicant's request is premature in respect of these additional 84 pages. The Applicant's failure to respect a statutory precondition of judicial review results in the Court lacking jurisdiction to review the documents at pages 248-258, 261 to 326, 342 to 343 and 345 to 349 of Exhibit "B" to the Affidavit of Ms. Projean. As noted, pages 2 to 28 of Exhibit "B" were released in their entirety such that there is no need to review those either. Therefore, the Court will only review the documents found in Exhibit "I" to the Affidavit of Ms. Rhéaume.

C. *Whether the Department of Justice erred in its application of a discretionary exemption pursuant to the Access to Information Act*

[56] In a proceeding such as this, the Court reviews the Department of Justice's decision to deny the Applicant access to portions of the disclosed records, not the Information Commissioner's non-binding report or recommendations: *Canadian Council of Christian Charities v Canada (Minister of Finance)*, [1999] 4 FC 245 (FC); *Blank 2009 FC 1221* at

para 26. However, given his or her expertise with respect to access to information, the Information Commissioner's findings are owed considerable deference and significant weight: *Blank v Canada (Minister of Justice)*, 2005 FCA 405 at para 12; *Blank v Canada (Minister of Justice)*, 2010 FCA 183 at para 35 [*Blank 2010 FCA 183*]; *Blank 2009 FC 1221* at para 26.

(1) Subsection 19(1) of the *Access to Information Act* (personal information)

[57] Subsection 19(1) of the *Access to Information Act* provides an exemption for personal information in the following way:

Personal information	Renseignements personnels
19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.	19. (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la *Loi sur la protection des renseignements personnels.*
Where disclosure authorized	Cas où la divulgation est autorisée
(2) The head of a government institution may disclose any record requested under this Act that contains personal information if	(2) Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où :
(a) the individual to whom it relates consents to the disclosure;	a) l'individu qu'ils concernent y consent;
(b) the information is publicly available; or	b) le public y a accès;
(c) the disclosure is in accordance with section 8 of	c) la communication est conforme à l'article 8 de la *Loi*

the *Privacy Act*.	*sur la protection des renseignements personnels*.

[58] Regarding the Department of Justice's reliance on subsection 19(1) of the *Act* to withhold personal information about identifiable individuals, the Information Commissioner's review satisfied him that the withheld information met the definition of "personal information" provided by section 3 of the *Privacy Act*, RSC 1985, c P-21, which is incorporated into the *Access to Information Act* per its paragraph 19(1). The Information Commissioner further noted that none of the conditions allowing for the disclosure of personal information contained in subsection 19(2) of the *Act* applied because the information was not public, there was no consent to disclose, and section 8 of the same *Act* did not apply.

[59] While raised in the Notice of Application, the section 19 issues were not seriously pursued by the Applicant. In any event, having reviewed the withheld and redacted documents, I find no basis on which I should order disclosure of material exempted on the basis of subsection 19(1) of the *Act*. I agree with the Information Commissioner in this respect. The Department of Justice's determination that the record fell within the exemption claimed was correct, and its decision not to disclose that material was reasonable.

(2) Section 23 of the *Access to Information Act* (solicitor-client privilege)

[60] Section 23 of the *Act* provides an exemption for solicitor-client privilege as follows:

Solicitor-client privilege	Secret professionnel des avocats
23. The head of a government institution may refuse to	23. Le responsable d'une institution fédérale peut refuser

disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.	la communication de documents contenant des renseignements protégés par le secret professionnel qui lie un avocat à son client.

[61] This was the main subject of argument at the hearing of the application.

[62] The Information Commissioner's review was completed some two and a half years after the Applicant's complaint. The OIC stated it was "convinced" that the remaining records (after the Department of Justice reconsidered the exemptions and disclosed additional documents on July 27, 2009) met the class test and were accounts of privileged solicitor-client communications. The OIC further found that officials at the Department of Justice had properly exercised their discretion albeit not to waive the privilege.

[63] In my view, after reviewing the confidential non-redacted record filed under seal by the Respondent, the exemptions under section 23 of the *Act* were correctly claimed, and the Department of Justice reasonably exercised its discretion.

[64] In this connection, I note that solicitor-client privilege has two variants: legal advice privilege and litigation privilege. Each may be relied upon by the Respondent. Legal advice has no expiry date while litigation privilege generally expires with the litigation: *Blank v Canada (Minister of Justice)*, 2006 SCC 39 [*Blank 2006 SCC 39*]. In the case at bar, the litigation privilege is alive because this particular access request concerns records relating to the very lawsuit that the Applicant is currently litigating before the Manitoba Court of Queen's Bench against the Government of Canada, its employees and agents.

[65] Given that the Applicant is asking the Department of Justice for documents concerning a current and ongoing lawsuit defended by the said department and its agents, it comes as no surprise that the Respondent claimed both legal advice and litigation privileges over many of the requested records.

[66] The Applicant asserts that in relation to the criminal proceedings against him, he was treated in bad faith, that decisions were made improperly, that there had been cover ups of wrongdoing, that the courts were misled, and variants on the same. He submits that these actions against him caused him damage and constitute actionable abuse of process. I understand that these same or similar allegations of abuse of process are made by the Applicant in his civil action now before the Manitoba Court of Queen’s Bench.

[67] The Applicant is seeking material through the *Act* to establish or reinforce his claim for damages in his civil action. Many of the Applicant’s arguments in this application attempt to draw this Court into assessing claims he raises in his civil action. He refers to numerous proceedings over a lengthy period of time, before and involving many different judges of both Manitoba’s provincial criminal court and its Court of Queen’s Bench. What he seeks is disclosure of documents for use in the litigation, in addition to whatever documents he may be entitled to under the applicable rules of Manitoba’s Court of Queen’s Bench. He sees little if any distinction between the legal regime governing his civil action and the current judicial review under the *Act*.

[68] I mention the foregoing as factual background because, whatever his rights are under Manitoba's civil action rules, the Applicant has the right to request documents under the *Act*, to seek review by the Information Commissioner, and if unsatisfied, to seek judicial review by this Court of non-disclosure of documents under properly framed proceedings brought in accordance with the legislation. The civil action neither expands nor contracts the Applicant's rights under the *Act*. He has access to any civil remedy to which he might be entitled in Manitoba's Court of Queen's Bench, and he has his rights under the *Act*. In this Court, he is seeking a statutory remedy prescribed by a statutory regime enacted by Parliament. He must make his case on the record, on the evidence and on the law and relevant jurisprudence.

[69] In this connection, and before going into detail with respect to solicitor-client privilege, I wish to decide additional preliminary points raised by the Applicant.

[70] First, he complains that documents may be missing. He made that allegation to the Information Commissioner who succeeded in having the Respondent produce the one attachment the Applicant specifically mentioned. However, this Court has no jurisdiction to order "a more thorough search and disclosure": *Blank v Canada (Minister of the Environment)* (2000), 100 ACWS (3d) 377. This same point was made in *Blank 2004 FCA 287* by the Federal Court of Appeal:

> 76 However, Mr. Blank wants this Court to examine documents that, the record indicates, were either incorporated by reference into the existing records or were attached to documents in these records, but are no longer there. An earlier request of the appellant to the same effect, based on an assumption that the minister's files were somehow incomplete, has been rejected because there was no factual foundation for it: see *Sheldon Blank & Gateway Industries Ltd. v. The Minister of the Environment*,

> *supra*, at paragraphs 7 and 8. The Commissioner had investigated the matter and concluded that all the records had been identified and either disclosed or withheld on the basis of an exemption. This would be sufficient to dispose of demand.
>
> 77 However, I would like to re-emphasize that Mr. Blank's right is a right of access to the records as they exist in the hands of the head of a government institution. What he is asking this Court and, previously the motions judge, to do, is in fact to assert a power to order the reconstitution of these records. In the absence of evidence that would give this Court reasonable grounds to believe that the integrity of the records has been tampered with, this Court's power to review is limited to a review of the records that are in evidence before it. No evidence of tampering has been adduced and the motions judge was right to limit his review to the material that was in evidence before him.

In the present case, I found no grounds to believe that the integrity of the records has been tampered with.

[71] Another issue concerns the legal test applicable to determine when the Court may set aside or pierce solicitor-client privilege, be it legal advice privilege or litigation privilege. I propose to review the record in accordance with what the Supreme Court of Canada said in *Blank 2006 SCC 39* at paras 44-45:

> 44 The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.
>
> 45 Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.

[72] I appreciate that the Supreme Court of Canada speaks of actionable misconduct as a category of documents to be reviewed, but only in relation to the proceedings with respect to which litigation privilege is claimed, i.e., the Applicant's ongoing civil action. I also note that litigation privilege in respect of the criminal proceedings terminated with the staying of the remaining charges in 2004.

[73] After the Supreme Court of Canada issued its decision in *Blank 2006 SCC 39*, it gave judgment in *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 [*Blood Tribe*]. In *Blood Tribe* at para 10 the Supreme Court of Canada appears to narrow the exceptions to solicitor-client privilege to communications that are criminal in themselves or intended to further criminal purposes:

> [10] At the time the employer in this case consulted its lawyer, litigation may or may not have been in contemplation. It does not matter. While the solicitor-client privilege may have started life as a rule of evidence, it is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity: *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at pp. 885-87; R. v. Gruenke, [1991] 3 S.C.R. 263; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.,* [2004] 1 S.C.R. 456, 2004 SCC 18, at paras. 40-47; *McClure*, at paras. 23-27; B*lank v. Canada (Minister of Justice),* [2006] 2 S.C.R. 319, 2006 SCC 39, at para. 26; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31; *Celanese Canada Inc. v. Murray Demolition Corp*., [2006] 2 S.C.R. 189, 2006 SCC 36; *Juman v. Doucette*, [2008] 1 S.C.R. 157, 2008 SCC 8. A rare exception, which has no application here, is that no privilege attaches to communications criminal in themselves or intended to further criminal purposes: *Descôteaux*, at p. 881; *R. v. Campbell*, [1999] 1 S.C.R. 565. The extremely limited nature of the exception emphasizes, rather than dilutes, the paramountcy of the general rule whereby solicitor-client privilege

> is created and maintained "as close to absolute as possible to ensure public confidence and retain relevance" (*McClure*, at para. 35) [emphasis added].

[74] I am not convinced that the Supreme Court's intention in *Blood Tribe* was to narrow the exception to solicitor-client privilege previously stated in *Blank 2006 SCC 39*. The Supreme Court's reasons contain no discussion to that effect. I recognize the growing importance the Supreme Court has given to solicitor-client privilege. However, I will apply the test stated in *Blank 2006 SCC 39*, which dealt with this same Applicant.

[75] With these points in mind, I have reviewed the exempted or redacted portions of Exhibit "I" to the Affidavit of Ms. Rhéaume.

[76] The Court finds that the Respondent's determination that records fell within the solicitor-client exemption was correct, and also finds that its decision not to disclose privileged material to the Applicant was reasonable.

[77] My review disclosed no evidence of abuse of process or similar blameworthy conduct. Neither did my review disclose any evidence that *prima facie* shows actionable misconduct by the Crown in relation to the civil proceedings, or for that matter, evidence that *prima facie* shows actionable misconduct in relation to the now completed criminal proceedings, being the tests referred to by the Supreme Court of Canada in *Blank 2006 SCC 39*. To answer the Applicant's specific and oft-repeated allegations, the Court found no evidence of a cover up. Further, I found no evidence of wrongdoing.

[78] I should add, out of an abundance of caution, that I found no evidence of "communications criminal in themselves or intended to further criminal purposes", as referred to in *Blood Tribe*.

[79] I was unable to find evidence of improper conduct in any of the documents reviewed. Even if I had, which I did not, the Federal Court of Appeal expressly rejected misconduct, by itself, as a recognized exception to solicitor-client privilege in *Blank 2010 FCA 183* at para 20. I found no evidence of communications to perpetuate a tort, as referred to in the same paragraph of the Court of Appeal reasons, to the extent that tortuous conduct is in any way different from the exception sustaining conduct referred to by the Supreme Court of Canada in *Blank 2006 SCC 39*.

[80] It is worth noting that this same conclusion was arrived at by this Court and by the Court of Appeal on other occasions where the Applicant advanced the same or similar arguments: *Blank v Canada (Department of Justice)*, 2003 FCT 462 at para 8 (FC); *Blank 2004 FCA 287* at para 64; *Blank v Canada (Minister of Justice)*, 2006 FC 841 at para 35; *Blank v Canada (Minister of the Environment)*, 2006 FC 1253 at para 33; *Blank v Canada (Minister of Justice)*, 2007 FCA 147 at paras 18-19; *Blank v Canada (Minister of the Environment)*, 2007 FCA 289 at paras 9-10 [*Blank 2007 FCA 289*]; *Blank 2010 FCA 183* at paras 19-20.

[81] In my view, the Court of Appeal's conclusion in *Blank 2007 FCA 289* at para 10 is applicable in the case at bar: "The onus is upon Mr. Blank to demonstrate a basis for his allegation of wrongdoing. To date, he has failed to do so."

[82] The Court finds that the Department of Justice's determination that the record fell within the exemption claimed was correct, and further finds that its decision not to disclose that material was reasonable. Therefore, with respect to the solicitor-client privilege exemption provided for by section 23 of the *Act*, the Court finds no merit in and dismisses the Applicant's claims.

(3) Paragraphs 21(1)(a) (advice or recommendations) and 21(1)(b) (consultations or deliberations) of the *Access to Information Act*

[83] Paragraphs 21(1)(a) and 21(1)(b) of the *Act* provide exemptions for advice or recommendations and consultations or deliberations in the following way:

Advice, etc.	Avis, etc.
21. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains	21. (1) Le responsable d'une institution fédérale peut refuser la communication de documents datés de moins de vingt ans lors de la demande et contenant :
(a) advice or recommendations developed by or for a government institution or a minister of the Crown,	a) des avis ou recommandations élaborés par ou pour une institution fédérale ou un ministre;
(b) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate,	b) des comptes rendus de consultations ou délibérations auxquelles ont participé des administrateurs, dirigeants ou employés d'une institution fédérale, un ministre ou son personnel;

[84] Since the Information Commissioner found that section 23 of the *Act* had been properly applied to the disclosed records by the Department of Justice, it found that there was no need to consider the applications of paragraphs 21(1)(a) and 21(1)(b) of the same *Act*. I agree with the

OIC's assessment because, in my view, section 23 of the *Act* had been properly applied by the Department of Justice.

[85] In any event, upon review of the material I am satisfied that the Department of Justice's determination that the record fell within the exemption claimed was correct, and that its decision not to disclose was reasonable.

D. *Whether the Department of Justice erred in severing the records pursuant to section 25 of the Access to Information Act*

[86] Section 25 of the *Act* deals with the severability of the records and reads as follows:

Severability	Prélèvements
25. Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.	25. Le responsable d'une institution fédérale, dans les cas où il pourrait, vu la nature des renseignements contenus dans le document demandé, s'autoriser de la présente loi pour refuser la communication du document, est cependant tenu, nonobstant les autres dispositions de la présente loi, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.

[87] The Information Commissioner was satisfied that the records were severed in accordance with section 25 of the *Act*, and considered the complaint resolved. Given the limited exceptions

to the solicitor-client privilege, I am unable to find any reason to disagree, and likewise conclude that severance was in accordance with the *Act* and was properly applied.

[88] The Federal Court of Appeal has stated the following regarding section 25 in *Blank 2007 FCA 289* at paras 6 and 7:

> [6] Section 25 is designed to avoid the possible non-disclosure of an entire record on the ground that a part of the record contains exempt information. All that section 25 requires is that the exempt information be severed from the record and that the balance of the record be disclosed. This Court has specified that where the exemption is challenged, the requester must be given sufficient identifying information with respect to the document to be able to identify it and to challenge the claimed exemption: see *Blank v. Canada (Minister of the Environment)*, 2001 FCA 374 , 2001 FCA 374, [2001] F.C.J. No. 1844. This does not include information which would disclose the subject matter of the privileged communication: see *Blank v. Canada (Minister of Justice)*, 2007 FCA 147, 2007 FCA 147, [2007] F.C.J. No. 523, at para. 7.
>
> [7] None of this supports the view that section 25 somehow reduces the scope to be given to the exemptions provided for in the Act. Once the reviewing authority concludes that a record contains exempt information, it must then address its mind to the possibility of excising the exempt information from the record and disclosing the balance of the document, subject to the requirement that the remaining parts retain some coherence: see *Blank v. Canada (Minister of Justice)*, 2005 FC 1551, 2005 FC 1551, [2005] F.C.J. No. 1927, at para. 36.

[89] In *Blank v Canada (Minister of Justice)*, 2007 FCA 87 at para 13, the Federal Court of Appeal stated:

> However, section 25 must be applied to solicitor-client communications in a manner that recognizes the full extent of the privilege. It is not Parliament's intention to require the severance of material that forms a part of the privileged communication by, for example, requiring the disclosure of material that would reveal the precise subject of the communication or the factual assumptions of the legal advice given or sought.

[90] Given the above, and noting the tension between the Applicant's rights on the one hand, the general purposes of the *Act*, and the scope and extent of solicitor-client privilege, which in this case entails both legal advice and litigation privileges, I have reviewed the redacted and withheld material. I have also reviewed the cross-examination conducted by the Applicant in this regard. Upon review, I have concluded that section 25 was properly applied. Additional material could not be severed without revealing the nature of the litigation privileged material, or impairing the solicitor-client privilege by providing clues to the content of the exempted portions or resulting in the release of meaningless out of context words and phrases.

[91] Given my findings above, the application must be dismissed.

V. Costs

[92] On the matter of costs, I asked both parties for their submissions. The Respondent presented a Bill of Costs based on the default tariff which involved a claim for 3 units under several headings in an amount totalling $20,790 exclusive of disbursements.

[93] Included in the claim by the Respondent is 30.5 hours attending on cross-examinations, and 15 hours of counsel fees for two and a half days, plus standard amounts for preparation of record and hearing.

[94] The Applicant did not present a Bill of Costs at the hearing. He verbally stated he did not seek costs, and when I questioned further he stated that he wished to recover the printing costs for 5 copies of his Application Record at $.15 to $.20 per page.

[95] The Applicant also argued that the points raised were novel such that even if unsuccessful, costs should not be awarded against him. I disagree and note in particular that the Applicant makes the same core unsuccessful argument here – that solicitor-client privilege is being used to cover up wrongdoing – as he made before as noted at paragraph 81. In my view, there is no basis for an award of costs to the Applicant despite the result, because the Applicant raised no important new principle.

[96] In my view, costs should follow the event as required by subsection 53(1) of the *Act* (see also *Blank 2009 FC 1221* at para 57).

[97] Given the Respondent's overall success, the seriousness of the allegations made by the Applicant and their rejection by this Court, the time and complexity of this matter, and having regard to all the circumstances, I fix and award costs payable forthwith by the Applicant to the Respondent in the amount of $7,000 all inclusive.

VI. Conclusion

[98] The application for judicial review must be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed with costs payable forthwith by the Applicant to the Respondent in the amount of $7,000 all inclusive.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2065-09
STYLE OF CAUSE:	SHELDON BLANK v THE MINISTER OF JUSTICE
PLACE OF HEARING:	WINNIPEG, MANITOBA
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APPEARANCES:

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