Federal Court Cour fédérale

Date: 20230731

Docket: T-824-22

Citation: 2023 FC 1051

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 31, 2023

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

OLIVIER PERREAULT

Applicant

and

MINISTER OF FOREIGN AFFAIRS

Respondent

PUBLIC JUDGMENT AND REASONS
(Public version released on July 31, 2023)

I. Overview

[1] This is an application for review of the refusal of Global Affairs Canada [Global Affairs or the Department] to produce certain information sought in an access to information request made on December 18, 2017, by the applicant, Olivier Perreault, under section 6 of the *Access to Information Act*, RSC 1985, c A-1 [Act]. Specifically, in a disclosure of records on January 12, 2021, Global Affairs refused to disclose information regarding a request for legal assistance that

Mr. Perreault had submitted to Global Affairs on April 20, 2015, under the Government of Canada's *Policy on Legal Assistance and Indemnification* [Policy]. Mr. Perreault was seeking to be represented by the Crown in a dispute with his former domestic employee [Employee] that arose while he was on assignment as an anti-fraud liaison officer at the Embassy of Canada to Colombia.

[2] After making this request for representation, Mr. Perreault waited a number of months but received no reply from Global Affairs. Mr. Perreault therefore made an access to information request in an effort to find out the Department's official decision. Unhappy with the way in which Global Affairs had applied the exemptions set out in the Act to withhold certain information in the records disclosed, Mr. Perreault made a series of complaints to the Information Commissioner [Commissioner]. The Commissioner's final report concluded that Global Affairs' refusal to disclose was in compliance with the Act and, in response, Mr. Perreault applied for a review under subsection 41(1) of the Act. Specifically, Mr. Perreault submits that Global Affairs unfairly applied the exemptions set out in subsection 19(1) and section 23 of the Act to withhold a part of the information he believes should have been disclosed. He is asking this Court to allow his application, with costs, and to order Global Affairs to give him access to the requested records.

[3] For the reasons that follow, I conclude that Global Affairs incorrectly applied the exemption set out in section 23 of the Act to some of the information requested by Mr. Perreault. I also conclude that there is insufficient evidence to establish that the Minister of Foreign Affairs [Minister], on whom the burden of proof rests, properly exercised his discretion to refuse access

to the information he was properly withholding under that section. Mr. Perreault's application should therefore be allowed in part, as discussed in the reasons that follow.

I. Facts and proceedings

[4] From October 2012 to July 2015, Mr. Perreault worked as an anti-fraud liaison officer for the Canada Border Services Agency at the Embassy of Canada to Colombia. His substantive position was Senior Immigration Officer, Citizenship and Immigration Canada. During his posting in Colombia, the embassy's human resources unit, composed of Global Affairs staff and managers, managed the various administrative and legal aspects of hiring domestic employees. This was part of a broader framework in which the Department managed the logistics of relocating officers on assignment.

[5] The Employee was working for Mr. Perreault at the time of the events that ultimately led to this application. Officially, Mr. Perreault was her employer and was therefore responsible for paying her wages and related contributions; however, Global Affairs calculated the amounts payable and informed the officers, including Mr. Perreault, and provided employee wage information to the various Colombian authorities.

[6] In January 2014, while preparing her retirement file, the Employee was informed by her pension fund that contributions from her employers, including Mr. Perreault, had been made on a minimum-wage basis for many years, whereas her actual salary had generally been higher. As a result, the mandatory contribution amount had not been met. The evidence shows that this situation occurred because the embassy administration had decided to inform all federal public

servants employing domestic staff of the contribution amount required on the basis of minimum wage, rather than calculating the amount for each employee on the basis of their actual salary.

[7] On February 10, 2014, the first of a series of meetings involving Mr. Perreault, the Employee, embassy human resources advisers, the pension fund representative and Global Affairs legal counsel was held to sort things out. The Employee was not satisfied with the situation and took legal action against Mr. Perreault and the embassy to claim the unpaid contributions through letters of demand and threats of a civil suit.

[8] Given the situation, Mr. Perreault submitted a request for legal assistance on April 20, 2015, in accordance with the Policy, to be represented in the dispute between him and his former employee. On June 1, 2015, he explained his situation in a telephone conversation with Justice Canada counsel Kathleen McGrath, after which she allegedly stated that she would issue a favourable recommendation for his application. However, despite Global Affairs' responsibility under the Policy to make a decision regarding Mr. Perreault's request and provide him with a timely response, and despite Mr. Perreault's repeated attempts to obtain a response, he ultimately would not receive Global Affairs' negative decision until November 2022, mere months before the hearing of this application.

[9] On December 18, 2017, Mr. Perreault made a request to Global Affairs, under section 6 of the Act, for access to records relating to its decision regarding his request for legal assistance. On August 29, 2018, Global Affairs provided Mr. Perreault with 52 pages of records; however, information that was exempt under the Act had been redacted. On September 10, 2018,

Mr. Perreault made two complaints to the Commissioner, one concerning the application of exemptions in the disclosure of August 29, 2018 [complaint no. 3218-01044], and the other concerning the scope of the documents disclosed on August 29, 2018, which he believed was incomplete [complaint no. 3218-01045].

[10] In the months following receipt of complaint no. 3218-01045, Global Affairs made further inquiries within the branches involved in order to locate additional records relating to the request for information. In response to the inquiries, the Department received an additional 47 pages on September 17, 2019. In addition, the exemptions applied in the disclosure of August 29, 2018, were reviewed in response to complaint no. 3218-01044. On May 21, 2021, Global Affairs provided Mr. Perreault with 99 pages of records, consisting of the 52 newly reviewed pages and the 47 additional pages received and processed.

[11] On July 19, 2021, Mr. Perreault made a new complaint to the Commissioner [complaint no. 5821-01172], regarding the exemptions applied to pages 53 to 99 (the 47 additional pages) in the disclosure of May 21, 2021. On September 1, 2021, Mr. Perreault withdrew complaint no. 3218-01045.

[12] In dealing with complaint nos. 3218-01044 and 5821-01172, Global Affairs reviewed the application of certain exemptions in the disclosure of May 21, 2021. Following this review, the Department made a new 99-page disclosure on January 12, 2022. The pages of this disclosure that contained information withheld under the Act’s exemptions were produced in their entirety

in support of the confidential affidavit of the consultant in the Access to Information and Privacy Division, Global Affairs, who carried out the analysis for this disclosure.

[13] In accordance with subsection 37(2) of the Act, the Commissioner provided a final report on March 3, 2022, concluding that Global Affairs had applied the exemptions set out in subsection 19(1), paragraphs 20(1)(c) and 21(1)(b), and section 23 in a manner consistent with the Act and that, where such application was discretionary, Global Affairs had exercised its discretion reasonably.

[14] On April 21, 2022, Mr. Perreault made this application for review against the Minister, the respondent in this case, under subsection 41(1) of the Act. The application concerns only the exemptions under subsection 19(1) of the Act for pages 76, 79 to 82, 90 and 91 of the disclosure of January 12, 2022, and under section 23 of the Act for pages 76 to 83 and 89 to 94 of the same disclosure.

II. <u>Issues</u>

[15] The parties have identified the following issues that I must decide in this case:

A. Which standard of review applies to issues in an application for review under section 41 of the Act?

B. Was Global Affairs correct in refusing to disclose personal information under subsection 19(1) of the Act and in identifying certain information as subject to solicitor-client privilege or the professional secrecy of advocates and notaries under section 23 of the Act?

C. Did Global Affairs exercise its discretion reasonably under section 23 of the Act?

D. If Global Affairs incorrectly withheld the information requested, what action should be taken?

III. Discussion

A. *Which standard of review applies to issues in an application for review under section 41 of the Act?*

[16] The relevant legislation is reproduced in the Appendix.

[17] In this case, the relevant categories of information are personal information and information subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege, as set out in sections 19 and 23 of the Act, respectively. To apply the exemptions from disclosure set out in the Act, a government institution must first examine the information contained in the requested records and identify any information that falls under a category of information set out in the Act. The Act sets out the discretion the federal institution has to then disclose the information identified. For example, under subsection 19(1) of the Act, a government institution must refuse to disclose records containing personal information; however, subsection 19(2) gives it the discretion to disclose such information in the cases set out in paragraphs (a) to (c). Similarly, section 23 of the Act provides that a government institution may refuse to disclose any record requested that contains information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege.

[18] Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*, received Royal Assent and came into force on June 21, 2019. In particular, the amendments to the Act included changes to the Information Commissioner's powers, including the introduction of the power to order the disclosure of records under section 36.1, and the introduction of section 44.1:

***De novo* review**	**Révision *de novo***
44.1 For greater certainty, an application under section 41 or 44 is to be heard and determined as a new proceeding.	44.1 Il est entendu que les recours prévus aux articles 41 et 44 sont entendus et jugés comme une nouvelle affaire.

[19] Section 44.1 applies to applications made under section 41 or 44 of the Act. The main difference between the two types of applications is that applications are made under section 41 where a government institution has decided to refuse access to a record and the Commissioner has provided a report under subsection 37(2) in respect of the complaint regarding the refusal, and under section 44 where a government institution has decided to disclose, in response to a request under section 6 of the Act, records to which section 20 of the Act applies. The applicant in a section 44 application is a third party seeking a review of the decision, without the Commissioner having provided a report under subsection 37(2). In addition, no discretionary decisions by the institutional head are at issue in an application under section 44 of the Act.

[20] The parties are in agreement that, under section 44.1 of the Act and the relevant case law, in a review under section 41 of the Act, the judge "steps into the shoes" of the government institution whose decision is impugned and conducts a *de novo* review of the issues in the decision (*Suncor Energy Inc v Canada-Newfoundland and Labrador Offshore Petroleum Board*,

2021 FC 138 at para 64 [*Suncor*]; *John Howard Society of Canada v Canada (Public Safety)*, 2022 FC 1459 at para 31 [*John Howard Society*]). The applicable standard of review will depend on the provision of the Act relied upon to refuse access. In determining whether information is exempt from disclosure, judges are to reach their own conclusion as to whether the mandatory exemption has been applied correctly. In effect, this type of review is treated *de novo*, as a new proceeding, and the standard of correctness applies (*Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3, [2012] 1 SCR 23 at para 53 [*Merck Frosst*]; *Canada (Information Commissioner) v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1279 (CanLII) at para 40 [*Public Safety*]; *Cain v Canada (Health)*, 2023 FC 55 at para 31 [*Cain*]; *Canada (Office of the Information Commissioner) v Canada (Prime Minister)*, 2019 FCA 95 at para 30 [*Prime Minister*]). However, where an exemption provides for the discretion to either disclose or refuse to disclose exempted information, the standard of reasonableness applies (*3430901 Canada Inc v Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 FC 421 [*Telezone*]; *Prime Minister* at para 31; *Public Safety* at para 41; *Lukács v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1142 at paras 8, 44; *Savoie v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 333 at para 34; *Cain* at para 32).

[21] I am of the view that a more nuanced approach is needed. I do not think that "step[ping] into the shoes" of the government institution is appropriate in the circumstances. Moreover, as for whether the information is exempted from disclosure, I do not think that we can continue to consider correctness to be the standard of review.

[22] The expression “steps into the shoes” in the context of a *de novo* review under the Act was first used by Justice Rothstein (as he then was) in *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)* (FCA), 2006 FCA 31 (CanLII), [2006] 3 FCR 610 at paragraph 14, with respect to the standard that applies when an appellate court is reviewing a decision of a subordinate court which itself was conducting a judicial review. In *Merck Frosst* at paragraph 247, Justice Deschamps, dissenting, referred to an example of a “classic appeal” and not an appeal from a decision on an application under the Act; she quoted Justice Rothstein and stated that “appellate review consists in verifying whether the court at the first level of review has correctly applied the standard in reviewing the *administrative* decision. What this means in practice is that in ‘step[ping] into the shoes’ of the lower court, an appellate court’s focus is, in effect, on the administrative decision.” Recently, in *Bhamra v Canada (Attorney General)*, 2023 FCA 121, Justice MacTavish of the Federal Court of Appeal noted that the Court’s role in an appeal from a decision of the Federal Court on judicial review of an administrative decision is to determine whether the Federal Court identified the correct standard of review, which requires the Federal Court of Appeal to “step into the shoes” of the Federal Court, focusing on the administrative decision below (see also *Société du Vieux-Port de Montréal Inc c Montréal (Ville)*, 2023 FCA 126 at para 16). The appellant essentially gets a “do-over”—a fresh review of the administrative decision (*Haynes v Canada (Attorney General)*, 2023 FCA 158 at para 16).

[23] However, as I will discuss below, in this case, the Court is not reviewing the government institution’s decision—it may, in fact, consider evidence different from that considered by the government institution—but rather making its own determination as to whether the exemptions from disclosure set out in sections 19 and 23 of the Act apply. I am therefore not persuaded that

the expression "step into the shoes" is appropriate with respect to an application under section 44.1 of the Act (see Justice Webb's remarks in *Canada (Health) v Elanco Canada Limited*, 2021 FCA 191 at para 30 [*Elanco*]; *Prime Minister* at para 28; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559 at paras 46, 47; *Canada (Attorney General) v Lawlor*, 2023 FCA 73 at para 8; *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 at paras 10–12; *Stuckless v Canada (Attorney General)*, 2023 FCA 69 at para 3; *Northern Inter-Tribal Health Authority Inc v Yang*, 2023 FCA 47 at para 46; *Alliance for Equality of Blind Canadians v Canada (Attorney General)*, 2023 FCA 31 at para 5).

[24] Regarding the standard of correctness, because of the *de novo* nature of the review provided for in section 44.1 of the Act, issues raised in an application under section 41 of the Act appear to be exempt from the presumption of reasonableness review set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 69 [*Vavilov*], because Parliament clearly provided for a different standard of review (*Vavilov* at paras 32, 34, 69; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 20; *Canada (Attorney General) v National Police Federation*, 2023 FCA 75 at paras 33, 35).

[25] In addition, there is an ambiguity, namely, the semantic shift that seems to have occurred between "*de novo* review" and "correctness review" in the interpretation of section 44.1 of the Act, such that the presence of a *de novo* review has been interpreted as meaning that the correctness standard of review applies. Indeed, even before the adoption of section 44.1 of the Act, this shift had been identified by the Supreme Court in *Merck Frosst* at paragraph 53, in the

context of an application under section 44 of the Act. Both concepts have the effect of not deferring to the original decision maker, but for different reasons that stem from the inherent distinctions between them.

[26] In *Vavilov*, the Supreme Court considered the differences between correctness review and *de novo* review (*Vavilov* at paras 83, 116, 124). *De novo* review under section 44.1 of the Act rejects the notion of deference because it involves starting anew with an analysis of the facts and law specific to the case, necessarily ignoring the entire process followed in earlier proceedings. Correctness review is more limited in scope. This distinction was articulated clearly by Justice Heneghan in *Suncor*: in a *de novo* hearing, the judge does not necessarily determine whether the government institution was correct, whereas, on correctness review, the Court is asking whether the original decision maker made the right decision (*Suncor* at paras 64, 65; *John Howard Society* at para 31).

[27] The nuanced difference between *de novo* and correctness review was pointed out by Justice McVeigh in *John Howard Society* at paragraph 36: she stated that the analysis in *de novo* review under subsection 19(1) of the Act was “akin to a correctness review”. This remark is also consistent with the observations of the Federal Court of Appeal in *Canada (Health) v Preventous Collaborative Health*, 2022 FCA 153 [*Preventous*]: an application under section 44 of the Act—and under section 41, which is similarly worded—is not a judicial review of an administrative decision, but rather, in the words of sections 41 and 44, a fresh review of the matter. Justice Grammond stated:

> [12] <u>But to reiterate, the application under section 44 is not a judicial review of an administrative decision but rather, in the</u>

words of section 44, a fresh "review of the matter". The "matter" is whether the information requested should be disclosed. In many cases, a significant issue in deciding that matter will be whether the exemptions under the Act apply: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 at paras. 53 and 250.

[13] Section 44.1 of the Act, a recent amendment to the Act, supports this interpretation. Section 44.1 provides that the application made to the Federal Court is "to be heard and determined as a new proceeding". The proceeding does not concern what the holder of the information requested, here the Minister, did or did not do, or should do or should have done. That is the normal subject-matter of an application for judicial review, not a section 44 application. Rather, under section 44 the issue is whether the information requested should be disclosed to the requester. See *Merck Frosst*, above.

[14] Section 44.1 requires the Federal Court to receive evidence in a "new proceeding"; in other words, the evidentiary record must be built afresh. It is not limited to what was before the Minister or the Information Commissioner. As well, the parties in the Federal Court are not limited to submissions based on what was before the Minister or the Information Commissioner, as they would be in a judicial review. Rather, they are free to make submissions on whether disclosure must be made under the Act. After receiving submissions, the Federal Court is to make its own findings of fact on the basis of the fresh evidentiary record filed before it, apply the provisions of the Act and the existing jurisprudence to that evidentiary record, and ultimately decide whether the information should be disclosed. In short, as many cases suggest, in this way the Federal Court is acting *de novo*: see, e.g., *Merck Frosst* at paras. 53 and 250-251 and cases cited therein.

[15] This interpretation of section 44.1 is supported not only by the plain text of the Act and *Merck Frosst*, but also by the express statement of purpose in the Act that "the disclosure of government information should be reviewed independently of government": para. 2(2)(*a*). Vesting the independent and impartial Federal Court with the power to review, *de novo*, the disclosure of government information furthers that statutory purpose.

[Emphasis added.]

[28] The principle that there is no standard of review in a *de novo* proceeding was noted by Justice Gauthier in *Huruglica v Canada (Citizenship and Immigration)*, 2016 FCA 93 (CanLII), [2016] 4 FCR 157 at paragraph 79, where, in discussing whether an appeal to the Refugee Appeal Division of the Immigration and Refugee Board was a *de novo* appeal, she stated:

> I also conclude that an appeal before the RAD is not a true *de novo* proceeding. Recognizing that there may be different views and definitions, I need to clarify what I mean by "true *de novo* proceeding". It is a proceeding where the second decision maker starts anew: the record below is not before the appeal body and the original decision is ignored in all respects. When the appeal is a true *de novo* proceeding, standard of review is not an issue. This is clearly not what is contemplated where the RAD proceeds without a hearing.
>
> [Emphasis added.]

[29] In this case, in a *de novo* proceeding, the Court is not reviewing a government institution's decision but rather making its own determination as to whether the exemptions from disclosure set out in sections 19 and 23 of the Act apply. Section 44.1 provides for the Court to simply ask what decision it would have made (*Vavilov* at para 83).

[30] Moreover, it cannot be said that, in a proceeding under section 41 of the Act, the Court is reviewing the Commissioner's report pursuant to subsection 37(2) of the Act, regardless of whether that report contains a disclosure order pursuant to subsection 31.1(6) of the Act (*Lukács v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1142 at paras 8, 44). As Justice Stratas stated in *Preventous* at paragraph 14, the Court's decision is not limited to what was before the Minister or the Commissioner, as it would be in a judicial review; the parties are free to make submissions on whether disclosure must be made under the Act. After receiving submissions, the Federal Court is to make its own findings of fact on the basis of the fresh

evidentiary record filed before it, including any issues dealt with in the order contained in the Commissioner's report, apply the provisions of the Act and the existing jurisprudence to that evidentiary record, and ultimately decide whether the information should be disclosed. It seems to me that this is independent of whether or not the Commissioner made an order under subsection 36.1(1) of the Act. Although these new powers of the Commissioner mean that the Court may no longer be a first-instance decision maker on the facts and the law (see *Preventous* at para 20), I do not see how section 44.1 can be interpreted differently depending on whether the application is made under section 41 or section 44 of the Act.

[31] Therefore, the Court's *de novo* review has no bearing on which standard of review applies to the disputed elements of the government institution's decision or to an order contained in the Commissioner's report. It is therefore incorrect to assert that Parliament's intention in enacting section 44.1 of the Act is to confirm, by means of an express statutory provision, that the correctness standard applies to all or part of the Court's analysis of whether the head of a government institution is authorized to refuse disclosure. It should be recalled that the courts have always decided to apply the standard of correctness, especially on review under former section 41 of the Act, on the basis of analyzing the degree of deference owed to the government institution when its discretion was not at issue (*Prime Minister* at para 30).

[32] That said, the notion that the judge is not concerned with the decision of the Minister or the Commissioner in a *de novo* proceeding applies where there is no discretion involved (see *Merck Frosst* at para 53; *Preventous*; *Elanco*). However, the situation is less clear when the Act

provides that the Minister has discretion to decide whether to disclose information (*Merck Frosst* at para 251).

[33] Before section 44.1 of the Act came into force—and before *Vavilov*—the decisions of government institutions to refuse access to information were recognized as consisting, on the one hand, of legal interpretations and their application to the facts of the case and, on the other hand, of an exercise of their discretionary power, reviewable on the standard of correctness and the standard of reasonableness, respectively (*Prime Minister* at paras 30–31). The use of a *de novo* proceeding was tied to the wording of section 49 of the Act, which refers to exemptions set out in the Act on the basis of category of information and not prejudice, and was restricted to cases where the Court was assessing whether the head of a government institution was authorized to refuse disclosure. As the Supreme Court of Canada stated in *Dagg v Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 SCR 403 [*Dagg*]:

> [107] Section 49 directs the reviewing court to determine whether or not the head of the government institution who has refused disclosure was in fact "authorized" to do so. As I have discussed, the *Access to Information Act* provides a general right of access to government-held information, subject to certain exceptions. <u>If the information does not fall within one of these exceptions, the head of the institution is not "authorized" to refuse disclosure, and the court may order that the record be released pursuant to s. 49 of the Act. It is clear that in making this determination, the reviewing court may substitute its opinion for that of the head of the government institution. The situation changes, however, once it is determined that the head of the institution **is** authorized to refuse disclosure</u>. Section 19(1) of the *Access to Information Act* states that, subject to s. 19(2), the head of the institution **shall** refuse to disclose personal information. Section 49 of the *Access to Information Act*, then, only permits the court to overturn the decision of the head of the institution where that person is "not authorized" to withhold a record. Where, as in the present case, the requested record constitutes personal information, the head of the

> institution is authorized to refuse and the *de novo* review power set out in s. 49 is exhausted.
>
> [Emphasis added.]

[34] Following the reasoning in *Dagg*, once it was concluded on *de novo* review that the head of the government institution was authorized to refuse disclosure, the *de novo* review ended, and any further discretion authorized by the Act was assessed on a standard of reasonableness; such further discretion was not exempt from the presumption of reasonableness review.

[35] This distinction is not made in the wording of section 44.1 of the Act, which seems to cover all the matters that are subject to an application for review under section 41 of the Act. However, to assess the exercise of discretion *de novo* would be to substitute the discretion of the reviewing judge for that of the institutional head under the Act—a jurisdiction that belongs solely to the Minister. To my knowledge, this is not authorized by the Act. The Court's powers under section 44.1 are not as extensive as, for example, the statutory treatment of new evidence in an appeal under the *Trademarks Act*, RSC 1985, c T-13 [TMA], where a judge, on an appeal from a decision of the Registrar of Trademarks, may specifically exercise any discretion vested in the Registrar where evidence is adduced that is in addition to the evidence that was adduced before the Registrar (TMA, s 56(5)). It is also clear that a *de novo* review under section 44.1 of the Act necessarily omits the perspective of the government institution (*Vavilov* at para 307).

[36] The Minister submits that the first part of the test—for example, whether the section 23 privilege applies—is a *de novo* review of a binary question: either the privilege applies or it does not. The second part of the test—whether to disclose privileged information—is a discretionary decision, so I must consider the reasonableness of the decision. Although section 44.1 of the Act

does not make this distinction, the Minister submits that reference should be made to section 49 of the Act, which states that *de novo* review is restricted to the first part of the test, that is, to cases where refusal is not authorized. The Minister refers to *Dagg* at paragraph 110, although it predates section 44.1 of the Act, and to *Kelly v Canada (Solicitor General)* (1992), 53 FTR 147 [*Kelly*] at paragraph 7, and submits that it is the reasonableness test set out in *Vavilov* that applies to the second part of the test.

[37] Indeed, a discretionary decision of the government institution, for example based on subsection 19(2) of the Act, is not to be reviewed on a *de novo* standard of review (*Dagg* at para 16; *John Howard Society* at para 42); moreover, the Supreme Court stated clearly in *Vavilov* that analyzing the exercise of discretion by a government institution is inconsistent with *de novo* review (*Vavilov* at paras 83, 116, 124). Justice McVeigh also noted the dilemma in *John Howard Society* at paragraph 42, where she stated that it was illogical to apply a *de novo* review to an exercise of discretion. That said, sections 41 and 44.1 of the Act are also clear; they state that an "[application for] review of the matter that is the subject of the complaint" "is to be heard and determined as a new proceeding". This means all applications and matters, not some of them.

[38] Although problematic, section 44.1 of the Act must be interpreted in the context of a review of a discretionary decision by the head of a government institution. *Vavilov* teaches that, in such cases, "[a] court interpreting a statutory provision does so by applying the 'modern principle' of statutory interpretation, that is, that the words of a statute must be read 'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'" (*Vavilov* at para 117; *John Howard*

Society at para 39). To gain a better understanding of Parliament's intent, it is worth reproducing here the exchange between the Honourable Frances Lankin, Senator, and Nancy Othmer, Assistant Deputy Minister, Public Law and Legislative Services Sector, at the meeting of the Standing Senate Committee on Legal and Constitutional Affairs held on February 27, 2019, during the second reading of the bill by the Senate:

[Original]	[Translation]
Senator Lankin: If I may, the bill, as it amends the act, replaces current provisions with a *de novo* review. In my past experience on administrative law tribunals, the principle of judicial review and respecting the expertise of the body that has looked at this is well established, and there's good reason for it. If there was a judicial review, we would have **the findings of the commissioner** based on the evidence and the information that was brought forward.	**La sénatrice Lankin :** Si vous me le permettez, le projet de loi, tel qu'il modifie la loi, remplace les dispositions actuelles par une révision *de novo*. D'après mon expérience des tribunaux de droit administratif, le principe du contrôle judiciaire et du respect de l'expertise de l'organisme qui s'est penché sur la question est bien établi, et il y a de bonnes raisons à cela. S'il y avait un contrôle judiciaire, nous aurions **les conclusions de la commissaire** en fonction de la preuve et des renseignements qui ont été présentés.
I'm a bit concerned about moving to a *de novo* situation where new evidence can be presented and evidence that wasn't considered. It feels to me like there's a very significant opportunity to undermine the role of the commissioner. . . .	Je m'inquiète un peu de l'idée de passer à une situation *de novo* où de nouveaux éléments de preuve peuvent être présentés et d'autres qui n'ont pas été pris en considération. J'ai l'impression qu'il y a une occasion très importante de miner le rôle de la commissaire. . . .
. . .	. . .

Ms. Othmer: The first way I would like to answer your question is to reinforce the idea that a *de novo* review for the *Access to Information Act* recommendations that currently exist is the case at the Federal Court right now. So we're not changing what currently exists.

What has changed, really, is that there's an order. So instead of a recommendation, there's an order in place that is subject to a *de novo* judicial review.

We had jurisprudence that suggested that the Information Commissioner's recommendations, once they got to court, were really not a question of whether there would be deference to the recommendations. The court held that there would be a *de novo* look at whether the exceptions were applied properly, whether it was out of time, and the rest of the questions the court might face.

So the *de novo* is not new; it's a continuation. What is new is the fact that the commissioner gets to make orders.

. . .

Mme Othmer : La première façon dont j'aimerais répondre à votre question est de renforcer l'idée selon laquelle une révision *de novo* des recommandations de la *Loi sur l'accès à l'information* qui existent actuellement est le cas à la Cour fédérale à l'heure actuelle. Nous ne modifions donc pas ce qui existe actuellement.

Ce qui a vraiment changé, c'est qu'il y a une ordonnance. Donc, au lieu d'une recommandation, il y a une ordonnance en place qui fait l'objet d'une révision judiciaire *de novo*.

Selon la jurisprudence, les recommandations de la commissaire à l'information, une fois soumises aux tribunaux, n'étaient pas vraiment une question de déférence à l'égard des recommandations. La cour a statué qu'il y aurait un nouvel examen *de novo* pour déterminer si les exceptions étaient appliquées correctement, si le temps était écoulé et le reste des questions auxquelles le tribunal pourrait être confronté.

Donc, l'aspect *de novo* n'est pas nouveau; c'est une continuation. Ce qui est nouveau, c'est que la commissaire peut prendre des ordonnances.

. . .

At some point, let's say we end up at a *de novo* hearing. We think the *de novo* hearing is a better opportunity to revisit procedural fairness concerns that may have occurred during the course of the investigation on three levels. Third parties, the actual applicants who are looking for the information and the Information Commissioner can all be before the court.

. . .

("Bill C-58, An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts" 2nd reading, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 42-1, Issue No. 56 (February 27, 2019)) [*Senate Committee Proceedings*]

[Emphasis added.]

À un moment donné, disons que nous nous retrouvons avec une audience *de novo*. Nous pensons que l'audience *de novo* est une meilleure occasion de revenir sur les préoccupations relatives à l'équité procédurale qui ont pu survenir au cours de l'enquête à trois niveaux. Les tierces parties, les demandeurs réels qui cherchent à obtenir l'information et la commissaire à l'information peuvent tous comparaître devant le tribunal.

. . .

(« Projet de loi C-58, Loi modifiant la Loi sur l'accès à l'information, la Loi sur la protection des renseignements personnels et d'autres lois en conséquence », 2e lecture, *Délibérations du Comité sénatorial permanent des Affaires juridiques et constitutionnelles*, 42-1, fascicule nº 56 (27 février 2019)) [*Délibérations du Comité sénatorial*]

[Je souligne.]

[39] First, it is clear from this discussion that the substantial amendments made to the Act by Parliament are the result of Parliament's desire to strengthen the role of the Information Commissioner by replacing the ability to make recommendations, previously provided for in section 37 of the Act, with the power to make orders, now provided for in subsection 36.1(1) of the Act. It is also clear that Parliament, by emphasizing the *de novo* nature of the review by the

Federal Court, was seeking to make it clear that the review mechanism is a "continuation" of the manner in which the Court conducted its review, in this case under section 49 of the Act, prior to the amendment provided for in Bill C-58.

[40] I cannot disregard section 44.1 of the Act. As stated in *Vavilov*, "[a]ny framework rooted in legislative intent must, to the extent possible, respect clear statutory language that prescribes the applicable standard of review" (*Vavilov* at para 34). Moreover, as we have seen, a *de novo* review starts anew the entire decision-making process that is the subject of the review, and it is therefore incompatible with the usual consideration of whether the process and the decision itself are reasonable (*Vavilov* at paras 83, 116, 124). In my opinion, the only way out of this dilemma is to adopt the approach taken by the Supreme Court in *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 (CanLII), [2005] 3 SCR 141 at paragraph 14. It is not necessarily a question of reading down but rather of determining whether, on a fair reading of section 44.1 of the Act, that provision is limited to undertaking a *de novo* review solely with respect to the question of whether the head of the government institution was authorized to refuse disclosure; to that question, I must answer yes.

[41] I am of the opinion that taking into account the nature of the *de novo* review, the fact that section 49 of the Act has not been amended, the discussion that took place at the meeting of the Standing Senate Committee on Legal and Constitutional Affairs (above), and the purpose and context of section 44.1 of the Act, as required by established principles of statutory interpretation, "resolves its ambiguity and enables its scope to be determined" (see also *Apotex Inc v Merck & Co Inc*, 2009 FCA 187 (CanLII), [2010] 2 FCR 389 at paras 88–89). Although no

standard of review is considered in a *de novo* review and section 44.1 of the Act does not limit the scope of such a review, when a judge is to review a matter involving the exercise of discretion by the head of a government institution, I believe the issue is whether the head of the government institution properly exercised his or her discretion. To echo Justice Stayer's comments in *Kelly* at paragraph 7, I am of the opinion that the judge should merely look at the document in question and the surrounding circumstances and simply consider whether the discretion appears to have been exercised in good faith and for some reason which is rationally connected to the purpose for which the discretion was granted (*Dagg* at para 110; *Rubin v Canada (Canada Mortgage and Housing Corp)*, 1988 CanLII 5656 (FCA), [1989] 1 FC 265 at 273–74; *Canada (Information Commissioner) v Canada (Transport)*, 2016 FC 448 [*Transport Canada*]); the only standard that can be applied to the review is reasonableness (*John Howard Society* at para 42).

B. *Was Global Affairs correct in refusing to disclose personal information under subsection 19(1) of the Act and in identifying certain information as subject to solicitor-client privilege or the professional secrecy of advocates and notaries under section 23 of the Act?*

(1) Section 19 of the Act: Personal information

[42] Section 19 of the Act reads as follows:

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 Part that contains personal information.	19 (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant 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 Part 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 the *Privacy Act*.	c) la communication est conforme à l’article 8 de la *Loi sur la protection des renseignements personnels*.

[43] Subsection 19(1) of the Act provides for an objectively necessary exemption to protect personal information within the meaning of section 3 of the *Privacy Act*, RSC 1985, c P-21 [PA]. In addition, in the context of this application for review under subsection 41(1) of the Act, the burden of establishing that the head of the government institution was authorized to refuse to disclose the record requested is on the government institution concerned (Act, s 48(1); *Prime Minister* at para 37; *Cain* at para 31).

[44] With respect to the exemptions under subsection 19(1) of the Act, Mr. Perreault’s application covers all or part of pages 76, 79 to 82, 90 and 91 of the disclosure file that were redacted by Global Affairs. Mr. Perreault submits that his repeated requests for this information clearly imply that he consented to its disclosure; he further submits that any information concerning him must be disclosed to him. Moreover, although he acknowledges that information

belonging purely to third parties must be redacted, Mr. Perreault argues that any information of which he was aware that involved those third parties, such as summaries of meetings he attended and participated in, should have been disclosed to him. Mr. Perreault does not cite any case law in support of this last argument.

[45] The Minister does not deny that Mr. Perreault has the right to obtain information that concerns him personally. However, he submits that in this case, the information that was redacted under subsection 19(1) of the Act does not concern Mr. Perreault but rather third parties. In addition, the Minister states that Mr. Perreault's knowledge of this information at the time, because it had been referred to at meetings he had attended, does not alter the nature of the information which, under section 3 of the PA, is personal information about third parties that Global Affairs had to refuse to disclose.

[46] The analysis carried out by Global Affairs combines the interpretation of the relevant statutory provisions and their application to the information that is the subject of the access to information request. In this case, the provision is section 19 of the Act, which refers to section 8 of the PA, which itself refers to section 3 of the PA and to the definition of "personal information".

[47] I note that Mr. Perreault has not raised the issue of whether Global Affairs acted unreasonably in exercising its discretion under subsection 19(2) of the Act, nor has he argued that the personal information falls within one of the exceptions set out in that subsection

(*Canadian Jewish Congress v Canada (Minister of Employment and Immigration)*, 1995 CanLII 3539 (FC), [1996] 1 FC 268 at 269–270 [*Canadian Jewish Congress*]).

[48] Under section 3 of the PA, "personal information" means "information about an identifiable individual that is recorded in any form", and the names and contact information, salaries, and pensions of individuals who are not employed by a government institution are necessarily personal information under section 3 of the PA. The Minister asserts that the right to privacy is paramount over the right of access to information, citing *HJ Heinz Co of Canada Ltd v Canada (Attorney General)*, 2006 SCC 13 at paragraph 26. I agree and, in any case, the Act does not provide for information already known to the requester to be excluded from personal information. Personal information is highly protected through the introduction of the definition in section 3 of the PA.

[49] In my opinion, Global Affairs correctly identified the information withheld as being personal information concerning third parties within the meaning of section 3 of the PA, and no such information was withheld concerning Mr. Perreault. Moreover, I must agree with the Minister that the mere fact that the personal information concerning the third party originated from Mr. Perreault or was mentioned in Mr. Perreault's presence does not give the Minister the green light to disclose it and make it public. Mr. Perreault did not argue before me either way on whether Global Affairs sought or should have sought the consent of the third party to disclose the information to him under paragraph 19(2)(a) of the Act, and the Minister therefore did not adduce any evidence on this point. In any event, the decision whether or not to seek consent must be considered case by case (*Husky Oil Operations Limited v Canada-Newfoundland and*

Labrador Offshore Petroleum Board, 2018 FCA 10 at para 58). In this case, I can easily understand [redacted], that it was not necessarily unreasonable not to have sought consent.

[50] Having examined the redacted information in light of the definition of "personal information" in section 3, I conclude that the personal information contained in the disclosure file on pages 76, 79 to 82, 90, and 91 that was withheld from Mr. Perreault under the exemption from disclosure under subsection 19(1) of the Act should not be disclosed to him.

(2) Section 23 of the Act: Information subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege

[51] Section 23 of the Act reads as follows:

Protected information — solicitors, advocates and notaries	**Renseignements protégés : avocats et notaires**
23 The head of a government institution may refuse to disclose any record requested under this Part that contains information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege.	**23** Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements protégés par le secret professionnel de l'avocat ou du notaire ou par le privilège relatif au litige.

[52] The party claiming privilege, in this case, solicitor-client privilege, bears the burden of proof (*Prime Minister* at para 50).

[53] Mr. Perreault submits that solicitor-client privilege does not apply to the records that Global Affairs withheld. Although solicitor-client privilege can be waived only in special circumstances, not all communications between lawyers and clients are covered by this privilege. He further argues that the label "Solicitor client privilege" alone is not enough to justify exempting the documents (*Public Safety* at para 28), and this was acknowledged by the Minister at the hearing.

[54] The Federal Court has affirmed its doctrine that common-law principles of solicitor-client privilege apply to decisions made under the Act, and it refers to the criteria in *Solosky v The Queen*, [1980] 1 SCR 821 [*Solosky*], which, as the Court noted in *Public Safety*, must all be met to establish that a given record is subject to solicitor-client privilege:

> [39] The applicable principles for determining whether a document falls under solicitor-client privilege are those that are developed for that purpose by *common law* (*Blank* SCC, above, at par. 26**;** Canadian Jewish Congress, above), namely:
>
> - it must be a consultation or exchange <u>with a client</u>;
> - the consultation or exchange must have been intended to be confidential;
> - the solicitor's contribution must be sought out due to <u>having the description of a solicitor</u>;
> - The consultation or exchange must not be for the purpose of achieving illegal goals.
>
> (See also *Solosky* at 837; *Fontaine v Canada (Royal Mounted Police)*, 2007 FC 1022 (appeal dismissed *Fontaine v Canada (Royal Canadian Mounted Police)*, 2009 FCA 150) at para 39; *Descoteaux et al v Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 SCR 860 at 873.)

[55] Mr. Perreault submits that the information withheld on pages 76 to 83 and 89 to 94 of the disclosure file does not meet the criteria in *Solosky*.

[56] First, I note that pages 76 to 81 contain correspondence between Department of Justice counsel Kathleen McGrath and Carlos Mauricio Cerratto Peña, local counsel who had been retained to assist and advise the Canadian embassy with respect to the legal proceedings initiated by the Employee against Mr. Perreault and the embassy to claim unpaid contributions. It is clear that Global Affairs, and not Mr. Perreault, is the client of local counsel in this case. I am of the opinion that this information meets the criteria in *Solosky* and is therefore subject to solicitor-client privilege. Regarding page 82, the Minister points out that the information withheld under section 23 of the Act is found only at paragraphs 7, 14, 15 and 16, the rest being covered by section 19 of the Act. These paragraphs concern discussions among lawyers or among embassy staff about a legal situation, namely, the threat of legal action against the embassy to Colombia, and summarize the legal advice that Global Affairs received from its local counsel. They are exchanges of information required to provide legal services and are therefore subject to solicitor-client privilege.

[57] Pages 83, 84 and 89 are in Spanish and are therefore not covered by this application for review; similarly, pages 85 to 88 and the information at the top of page 89 are not covered by these proceedings. The information at the bottom of pages 89 to 91 is a repeat of the information on pages 80 and 82 and is therefore also covered.

[58] However, Mr. Perreault is particularly interested in pages 92 to 94, a memorandum from Ms. McGrath to the then Deputy Minister of Global Affairs, Daniel Jean. Four blocks of text are redacted in the memorandum: block 1 is the subject of the memorandum; block 2 is the remarks section, which occupies a full page and two half pages of the memorandum; block 3 is the section below the words “I DO NOT CONCUR”; block 4, located to the left of block 3, are annotations from the then Deputy Minister of Global Affairs.

[59] Mr. Perreault believes that, in block 3, Mr. Jean had to make a decision, as the options “I concur” and “I do not concur” suggest. Mr. Perreault points out that the Deputy Minister signed the document on June 30, 2015, showing that it clearly contained a decision on his request for legal assistance. He also submits that the Commissioner confirmed that the Deputy Minister’s decision was one of the documents withheld.

[60] Mr. Perreault submits that, under sections 6.1.1 and 6.1.2 of the Policy, Global Affairs was required to respond to his request for representation within a reasonable time—he was therefore entitled to receive a response to his request for legal assistance—and thus the Deputy Minister’s decision is not subject to solicitor-client privilege. He argues that this decision is also not subject to solicitor-client privilege simply because it is written on the same page as counsel’s opinion and that, if the Court concludes that Ms. McGrath’s memorandum is confidential, it can always sever the Deputy Minister’s statements (*Slansky v Canada (Attorney General)*, 2013 FCA 199 at para 266 [*Slansky*], cited in *Right to Life Association of Toronto and Area v Canada (Employment, Workforce and Labour)*, 2019 CanLII 9189 (FC) at para 84 [*Right to Life Association*]).

[61] Moreover, Mr. Perreault submits that Ms. McGrath's contribution was not sought in her capacity as a lawyer. In this regard, he notes that a lawyer is sought on the basis of professional qualifications and that, even if an opinion is given by a lawyer, solicitor-client privilege does not necessarily apply (*Slansky* at para 79; *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 (CanLII), [2004] 1 SCR 809 [*Pritchard*] at para 15). He submits that, when a lawyer provides policy or administrative advice, strategic advice or management advice, those communications are not subject to solicitor-client privilege (*Right to Life Association* at para 71; *Pritchard* at para 19).

[62] Mr. Perreault submits that the mere fact that Ms. McGrath is a lawyer does not make her recommendations confidential, and that her role under the Policy was rather similar to the role of workplace investigators who prepare reports and submit them to employers, who are their clients. Investigators are tasked with determining whether workplace behaviour meets definitions in policies. He states that, even though these people are lawyers, their reports are not necessarily covered by solicitor-client privilege (*Howard v London (City)*, 2015 ONSC 156 at para 70; *De Francesca v Centric Investigation Services Inc*, 2017 HRTO 798 at para 20).

[63] In this regard, Mr. Perreault submits that the correspondence exchanged with Ms. McGrath, including the memorandum, is not subject to solicitor-client privilege because Ms. McGrath's mandate was under the Policy. He submits that the parameters used to decide whether a request for legal assistance is eligible are set out explicitly in section 6.1.3 of the Policy and do not require any legal expertise.

[64] It is clear that this memorandum is the crux of this case; Mr. Perreault made his access to information request precisely because he was seeking an official response to his request for legal assistance, a response that he was owed but never received. Global Affairs acknowledges that Mr. Perreault was entitled to receive a response to his request but argues that this is not the issue in this case; rather, the issue is whether the exemptions from disclosure in this case were correctly applied. I must agree with Global Affairs.

[65] First, I would point out that the Minister stated clearly that the Deputy Minister's annotations to the memorandum—the handwritten note under block 4—were instructions from the Deputy Minister to Ms. McGrath. [redacted]

[redacted]

[redacted]. I have no doubt that the Deputy Minister's handwritten note—the contents of block 4—is subject to solicitor-client privilege. However, I am not satisfied that the memorandum itself is protected.

[66] Regarding the memorandum itself, that is, block 2, I accept that, under section 6.1.3 of the Policy, the approval authority may seek legal advice before it approves or denies a request for legal assistance or indemnification from a Crown servant. However, there is no evidence in the record that such advice was sought by the Deputy Minister in relation to applying the Policy. The memorandum contains the words [redacted]

[redacted]

[redacted].

[67] However, in the very first redacted line of the memorandum—block 2— [redacted]. Moreover, although Mr. Brault states in his public affidavit that the Deputy Minister retained counsel to obtain advice on the potentially litigious situation in Colombia, he makes no mention of the fact that the Deputy Minister also retained counsel, as permitted by the Policy, to obtain advice on the requirements of the Policy itself. I agree that Ms. McGrath may have been wearing her counsel hat and giving legal advice to the Deputy Minister when she was considering the prospect of litigation in Colombia; however, there is no evidence that she was acting in any capacity other than an administrative one when she prepared the memorandum seeking the Deputy Minister's approval of Mr. Perreault's request for legal assistance. Otherwise, it would be too easy for the federal public administration to conceal information that could otherwise be disclosed, simply by asking counsel to prepare documents for use in making administrative decisions. In this case, there is no indication that Ms. McGrath's preparation of the memorandum—at the stage of its preparation—fell within her duties as a lawyer. The preparation of this memorandum was necessary to enable a decision to be made under the Policy, a decision that Global Affairs acknowledges was owed to Mr. Perreault.

[68] That said, I believe that the words [redacted] in block 2 should remain redacted. Although, as I have mentioned, there is no evidence that the Deputy Minister sought legal advice regarding the application of the Policy, I would have expected such advice regarding [redacted] normally to appear in

the memorandum, regardless of who wrote it. In this case, there is nothing to indicate that it was Ms. McGrath who produced such an opinion or that the opinion came from someone else at the Department of Justice.

[69] In this case, I am unable to conclude that Global Affairs has shown that the memorandum "was communicated to or by a government lawyer in order to provide senior department officials with advice on the legal ramifications of proposed departmental actions" (*Canadian Jewish Congress* at 295). For these reasons, apart from block 4 and the words in block 2 that I noted in the previous paragraph, I find that Global Affairs incorrectly applied section 23 of the Act in concluding that the memorandum (pages 92 to 94) was subject to solicitor-client privilege.

[70] I must also ensure compliance with section 25 of the Act, which provides that partial disclosure is not possible where the information to be disclosed cannot be severed from the information that must remain redacted, as it is necessary in order to understand the meaning of the information. In any event, I conclude that, apart from block 4 and the words in block 2 that I have identified above, no part of the memorandum is subject to solicitor-client privilege, and its disclosure does not reveal the information in the Deputy Minister's handwritten note or the words that I have identified above.

C. *Did Global Affairs properly exercise its discretion under section 23 of the Act?*

[71] Mr. Perreault submits that Global Affairs exercised its discretion unreasonably with respect to the information it correctly identified as being subject to solicitor-client privilege.

[72] In *Transport Canada*, Justice Noel stated the following:

> [64] Thus, from this corpus, I take away the following essential points: when assessing the reasonableness of the decision-maker's exercise of discretion for the purposes of judicial review of a decision made under the aegis of the ATIA, <u>the Court must consider the grounds for justification invoked by the decision-maker, as well as the transparency and the intelligibility of the decisional path with regard to the facts in evidence</u>. In addition, when the Commissioner is a party to the proceedings, the Court must consider her arguments and suggestions and analyze how the decision-maker discusses them and takes them into consideration. In making his decision, the decision-maker must show that he understands the access requests, that he understands the arguments in favour of disclosure and that he has carefully considered these arguments, all while taking into account the objectives of the ATIA.
>
> [65] Furthermore, the Court must take into consideration all of the interests at play, including the public interest in the information held by the federal government (*Ontario Criminal Lawyers*, above, at paragraphs 66, 211):
>
>> … the [Minister] must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made.
>
> [66] That being said, I must reiterate that the decision-maker cannot simply state that he has considered all of the relevant factors; he must concretely demonstrate how he has considered them. To this end, the Court of Appeal explains this important distinction very well at paragraph 36 of [*Attaran v. Canada (Foreign Affairs)*, 2011 FCA 182]:
>
>> … just as the absence of express evidence about the exercise of discretion is not determinative, the existence of a statement in a record that a discretion was exercised will not necessarily be determinative. To find such a statement to be conclusive of the inquiry would be to elevate form over substance, and encourage the recital of boilerplate statements in the record of the decision-maker. In every case involving the discretionary aspect of section 15 of the Act, <u>the reviewing court must examine the totality of the evidence to determine whether it is satisfied, on a balance of probabilities, that the decision-maker understood that there was a</u>

> discretion to disclose and then exercised that discretion. This may well require the reviewing court to infer from the content of the record that the decision-maker recognized the discretion and then balanced the competing interests for and against disclosure, as discussed by the Court in *Telezone*, at paragraph 116.

> [67] Under such circumstances, the decision-maker must show that he has considered not only non-disclosure, but also disclosure, having considered the arguments in favour of disclosure in a complete and transparent fashion. He must weigh these arguments against the objectives of the ATIA. This requires a serious intellectual effort that allows the observer to conclude that the arguments in favour of disclosure were truly considered.
>
> [Emphasis added.]

[73] Mr. Perreault submits that paragraph 42 of Mr. Brault's public affidavit shows that Global Affairs failed to consider the reasons that would favour disclosure of the requested information, particularly in light of the purpose of the Act as set out in section 2. He points out that the Commissioner's report, dated March 3, 2022, does not provide any additional information on this. At the hearing, counsel for the Minister confirmed that the only explanations in the record were those identified by Mr. Perreault. However, the Minister submits that the Commissioner's report supports the conclusion that Global Affairs did consider the public interest in disclosure and argues that the decision maker's analysis must be considered in light of the nature of the privilege at issue, namely the near-absolute nature of solicitor-client privilege, citing *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 [*Criminal Lawyers*] at paragraph 54:

> [54] Given the near-absolute nature of solicitor-client privilege, it is difficult to see how the s. 23 public interest override could ever operate to require disclosure of a protected document. This is particularly so given that the use of the word "may" would permit and, if relevant, require the head to consider the overwhelming

> public interest in disclosure. Once again, the public interest override in s. 23 would add little to the decision-making process.

[74] Paragraph 42 of Mr. Brault's public affidavit reads as follows:

> [TRANSLATION]
>
> [Global Affairs] exercised its discretion not to waive privilege with respect to the privileged information because of the public interest in maintaining the confidentiality of the solicitor-client relationship and its value and importance to [Global Affairs]. Solicitor-client privilege and the confidentiality of communications protect the candid nature of communications between lawyers and their clients. Not claiming privilege would deter [Global Affairs] from seeking, offering and receiving legal advice.

[75] In his report, the Commissioner concluded as follows:

> [TRANSLATION]
>
> Under section 23 of the Act, Global Affairs was required to exercise its discretion reasonably when processing the request and deciding whether to disclose the information. To that end, Global Affairs had to consider all the pros and cons of disclosure.
>
> <u>The observations obtained by Global Affairs during the investigation show that the institutional head exercised his discretion reasonably, taking into account relevant factors such as the importance of being able to seek or receive legal advice, which outweighs the public interest in disclosure.</u>
>
> The Commissioner is of the view that Global Affairs <u>considered all relevant factors</u> and concludes that Global Affairs exercised its discretion reasonably when it processed the request and decided not to disclose the information.
>
> [Emphasis added.]

[76] Given my determination regarding most of the memorandum, the issue of whether discretion was properly exercised is limited to block 4, containing the Deputy Minister's handwritten instructions [redacted] and the words in block 2 that I identified above.

Although I appreciate that the Commissioner's report deserves significant weight and room to manoeuvre (*Blank v Canada (Minister of Justice)*, 2005 FCA 405, 344 NR 184 at para 12; *Blank v Canada (Justice)*, 2010 FCA 183 at para 35), I disagree with the Minister's argument that the Commissioner's statement—that Global Affairs made its decision on the basis of relevant factors and concluded that the importance of being able to seek or receive legal advice outweighed the public interest in disclosure—is sufficient to demonstrate that Global Affairs seriously considered the arguments in favour of disclosure.

[77] Leaving aside for the moment the fact that *Criminal Lawyers*, cited by the Minister, was decided in the context of Ontario's freedom of information legislation—the section 23 referred to is not section 23 of the Act—and that the Ontario legislation does not require that an additional public interest review be conducted for documents subject to solicitor-client privilege, I cannot conclude, on the basis of the evidence in the record, the memorandum and the circumstances surrounding it, that the head of the government institution exercised his discretion properly with respect to the information in block 4, the Deputy Minister's handwritten note, as well as the words in block 2 that I identified above. I accept the principle established in *Criminal Lawyers* regarding the importance of solicitor-client privilege; however, this does not justify circumventing the requirement to adequately assess whether the discretion of the head of a government institution has been exercised properly.

[78] The Minister bears the burden of demonstrating that his discretion was properly exercised when the decision to refuse to disclose the information was made (Act, s 48; *John Howard Society* at para 51). In my opinion, Global Affairs' evidence is insufficient to conclude that it

fully and transparently considered the arguments in favour of disclosing the information subject to solicitor-client privilege or weighed those arguments against the objectives of the Act, in accordance with the principles set out in *Transport Canada*.

D. *If Global Affairs incorrectly withheld the information requested, what action should be taken?*

[79] Except for the Deputy Minister's handwritten note in block 4 and the words in block 2 that I identified above, the memorandum (pages 92 to 94) should be disclosed to Mr. Perreault. In addition, I am of the opinion that the decision should be referred back to a different decision maker for an analysis of the Deputy Minister's handwritten note in block 4 and the words in block 2 that I identified above, taking into account arguments in favour of disclosing the information that has been correctly identified as being subject to solicitor-client privilege, in accordance with the approach developed at paragraphs 62 to 67 of *Transport Canada*.

[80] Lastly, regarding costs, I note that subsection 53(1) of the Act provides as follows: subject to subsection (2), the costs of and incidental to all proceedings in the Court under the Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise. However, under subsection 53(2), if the Court is of the opinion that an application for review under section 41 has raised an important new principle in relation to that Part, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result. Since this is clearly the case here, and even though Mr. Perreault's application is allowed only in part, I find that he is entitled to the costs incurred in this application.

JUDGMENT in T-824-22

THIS COURT'S JUDGMENT is as follows:

1. The application for review is allowed in part.

2. Pages 92 to 94 referred to in this application are to be disclosed to Mr. Perreault, with the exception of block 4 and the words in block 2 on page 94 of the disclosure that I identified above, which must remain redacted.

3. The matter is referred back to a different decision maker to exercise anew the discretion provided for, according to the instructions herein, namely, to carry out an analysis of block 4 and the words in block 2 on page 94 of the disclosure that I identified above, and to consider the arguments in favour of disclosing the information.

4. The remainder of the application is dismissed.

5. With costs to Mr. Perreault, against the respondent.

"Peter G. Pamel"

Judge

APPENDIX

Access to Information Act, RSC 1985, c. A-1

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 Part that contains personal information.	19 (1) Sous réserve du paragraphe (2), le responsable d’une institution fédérale est tenu de refuser la communication de documents contenant 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 Part 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 the *Privacy Act*.	c) la communication est conforme à l’article 8 de la *Loi sur la protection des renseignements personnels*.
. . .	. . .
Protected information — solicitors, advocates and notaries	**Renseignements protégés : avocats et notaires**
23 The head of a government institution may refuse to disclose any record requested under this Part that contains information that is subject to solicitor-client privilege or the	23 Le responsable d’une institution fédérale peut refuser la communication de documents contenant des renseignements protégés par le secret professionnel de

professional secrecy of advocates and notaries or to litigation privilege.

l'avocat ou du notaire ou par le privilège relatif au litige.

. . .

. . .

Review by Federal Court — complainant

Révision par la Cour fédérale : plaignant

41 (1) A person who makes a complaint described in any of paragraphs 30(1)(a) to (e) and who receives a report under subsection 37(2) in respect of the complaint may, within 30 business days after the day on which the head of the government institution receives the report, apply to the Court for a review of the matter that is the subject of the complaint.

41 (1) Le plaignant dont la plainte est visée à l'un des alinéas 30(1)a) à e) et qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les trente jours ouvrables suivant la réception par le responsable de l'institution fédérale du compte rendu, exercer devant la Cour un recours en révision des questions qui font l'objet de sa plainte.

Review by Federal Court — government institution

Révision par la Cour fédérale : institution fédérale

(2) The head of a government institution who receives a report under subsection 37(2) may, within 30 business days after the day on which they receive it, apply to the Court for a review of any matter that is the subject of an order set out in the report.

(2) Le responsable d'une institution fédérale qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les trente jours ouvrables suivant la réception du compte rendu, exercer devant la Cour un recours en révision de toute question dont traite l'ordonnance contenue dans le compte rendu.

Review by Federal Court — third parties

Révision par la Cour fédérale : tiers

(3) If neither the person who made the complaint nor the head of the government

(3) Si aucun recours n'est exercé en vertu des paragraphes (1) ou (2) dans le

institution makes an application under this section within the period for doing so, a third party who receives a report under subsection 37(2) may, within 10 business days after the expiry of the period referred to in subsection (1), apply to the Court for a review of the application of any exemption provided for under this Part that may apply to a record that might contain information described in subsection 20(1) and that is the subject of the complaint in respect of which the report is made.	délai prévu à ces paragraphes, le tiers qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les dix jours ouvrables suivant l'expiration du délai prévu au paragraphe (1), exercer devant la Cour un recours en révision de l'application des exceptions prévues par la présente partie pouvant s'appliquer aux documents susceptibles de contenir les renseignements visés au paragraphe 20(1) et faisant l'objet de la plainte sur laquelle porte le compte rendu.
Review by Federal Court — Privacy Commissioner	**Révision par la Cour fédérale : Commissaire à la protection de la vie privée**
(4) If neither the person who made the complaint nor the head of the institution makes an application under this section within the period for doing so, the Privacy Commissioner, if he or she receives a report under subsection 37(2), may, within 10 business days after the expiry of the period referred to in subsection (1), apply to the Court for a review of any matter in relation to the disclosure of a record that might contain personal information and that is the subject of the complaint in respect of which the report is made.	(4) Si aucun recours n'est exercé en vertu des paragraphes (1) ou (2) dans le délai prévu à ces paragraphes, le Commissaire à la protection de la vie privée qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les dix jours ouvrables suivant l'expiration du délai prévu au paragraphe (1), exercer devant la Cour un recours en révision de toute question relative à la communication d'un document susceptible de contenir des renseignements personnels et faisant l'objet de la plainte sur laquelle porte le compte rendu.
Respondents	**Défendeur**

(5) The person who applies for a review under subsection (1), (3) or (4) may name only the head of the government institution concerned as the respondent to the proceedings. The head of the government institution who applies for a review under subsection (2) may name only the Information Commissioner as the respondent to the proceedings.

(5) La personne qui exerce un recours au titre des paragraphes (1), (3) ou (4) ne peut désigner, à titre de défendeur, que le responsable de l'institution fédérale concernée; le responsable d'une institution fédérale qui exerce un recours au titre du paragraphe (2) ne peut désigner, à titre de défendeur, que le Commissaire à l'information.

. . .

***De novo* review**

44.1 For greater certainty, an application under section 41 or 44 is to be heard and determined as a new proceeding.

Révision *de novo*

44.1 Il est entendu que les recours prévus aux articles 41 et 44 sont entendus et jugés comme une nouvelle affaire.

. . .

Burden of proof — subsection 41(1) or (2)

48 (1) In any proceedings before the Court arising from an application under subsection 41(1) or (2), the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Part or a part of such a record or to make the decision or take the action that is the subject of the proceedings is on the government institution concerned.

Charge de la preuve : paragraphes 41(1) et (2)

48 (1) Dans les procédures découlant des recours prévus aux paragraphes 41(1) et (2), la charge d'établir le bien-fondé du refus de communication totale ou partielle d'un document ou des actions posées ou des décisions prises qui font l'objet du recours incombe à l'institution fédérale concernée.

. . .

Order of Court where no authorization to refuse disclosure found

49 Where the head of a government institution refuses to disclose a record requested under this Part or a part thereof on the basis of a provision of this Part not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

Ordonnance de la Cour dans les cas où le refus n'est pas autorisé

49 La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou partielle d'un document fondée sur des dispositions de la présente partie autres que celles mentionnées à l'article 50, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; la Cour rend une autre ordonnance si elle l'estime indiqué.

Order of Court where reasonable grounds of injury not found

50 Where the head of a government institution refuses to disclose a record requested under this Part or a part thereof on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested

Ordonnance de la Cour dans les cas où le préjudice n'est pas démontré

50 Dans les cas où le refus de communication totale ou partielle du document s'appuyait sur les articles 14 ou 15 ou sur les alinéas 16(1)c) ou d) ou 18d), la Cour, si elle conclut que le refus n'était pas fondé sur des motifs raisonnables, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner communication totale ou partielle à la personne qui avait fait la demande; la Cour rend une

access to the record, or shall make such other order as the Court deems appropriate.

autre ordonnance si elle l'estime indiqué.

Order of Court if authorization to refuse disclosure found

Ordonnance de la Cour dans les cas où le refus est autorisé

50.1 The Court shall, if it determines that the head of a government institution is authorized to refuse to disclose a record or a part of a record on the basis of a provision of this Part not referred to in section 50 or that the head of the institution has reasonable grounds on which to refuse to disclose a record or a part of a record on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d), make an order declaring that the head of the institution is not required to comply with the provisions of the Information Commissioner's order that relate to the matter that is the subject of the proceedings, or shall make any other order that it considers appropriate.

50.1 La Cour, dans les cas où elle conclut au bon droit du responsable de l'institution fédérale de refuser la communication totale ou partielle d'un document au titre de dispositions de la présente partie autres que celles mentionnées à l'article 50 ou que le refus du responsable de l'institution fédérale est fondé sur des motifs raisonnables lorsque le refus s'appuyait sur les articles 14 ou 15 ou sur les alinéas 16(1)c) ou d) ou 18d), rend une ordonnance où elle déclare que le responsable de l'institution fédérale n'est pas tenu de respecter les dispositions de l'ordonnance du Commissaire à l'information qui traitent des questions qui font l'objet du recours ou rend toute autre ordonnance qu'elle estime indiquée.

Order of Court — other decisions or actions

Ordonnance de la Cour : autres décisions ou actions

50.2 If the subject matter of the proceedings before the Court is the decision or action of the head of a government institution, other than a decision or action referred to

50.2 Dans les cas où les questions qui font l'objet du recours portent sur des décisions ou des actions du responsable de l'institution fédérale autres que celles

in any of sections 49 to 50.1, the Court shall,

(a) if it determines that the head of the institution is not authorized to make that decision or to take that action, make an order declaring that the head of the institution is required to comply with the provisions of the Information Commissioner’s order that relate to that matter, or make any other order that it considers appropriate; or

(b) if it determines that the head of the institution is authorized to make that decision or to take that action, make an order declaring that the head of the institution is not required to comply with the provisions of the Information Commissioner’s order that relate to that matter, or make any other order that it considers appropriate.

. . .

visées à l’un des articles 49 à 50.1, la Cour :

a) si elle conclut que les décisions ou actions n’étaient pas autorisées, rend une ordonnance où elle déclare que le responsable de l’institution fédérale est tenu de respecter les dispositions de l’ordonnance du Commissaire à l’information qui traitent de ces questions ou rend toute autre ordonnance qu’elle estime indiquée;

b) si elle conclut au bien-fondé des décisions ou actions, rend une ordonnance où elle déclare que le responsable de l’institution fédérale n’est pas tenu de respecter les dispositions de l’ordonnance du Commissaire à l’information qui traitent de ces questions ou rend toute autre ordonnance qu’elle estime indiquée.

. . .

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-824-22
STYLE OF CAUSE:	OLIVIER PERRAULT v MINISTER OF FOREIGN AFFAIRS
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 7, 2023
PUBLIC JUDGMENT AND REASONS:	PAMEL J
DATED:	JULY 31, 2023

APPEARANCES:

Kim Patenaude	FOR THE APPLICANT
Stéphanie Dion Maryse Piché Bénard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

RavenLaw LLP Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT