Federal Court Cour fédérale

Date: 20231220

Docket: T-431-23

Citation: 2023 FC 1711

Ottawa, Ontario, December 20, 2023

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

CALVIN SANDIFORD

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Calvin Sandiford, is a former member of the Canadian Armed Forces. He was released on medical grounds in 2004. Mr. Sandiford is self-represented, albeit he is qualified as a barrister in England and Wales.

[2] On April 27, 2020, Mr. Sandiford made a request to the Department of Justice for access to personal information pursuant to subsection 12(1) of the *Privacy Act*, RSC 1985, c P-21 [*Privacy Act*]. The request covered the period from September 2009 to the date of his request. The description of the records sought by Mr. Sandiford included correspondence between several named individuals and various federal departments, along with all documents relating to his medical records.

[3] The following month, an Access to Information and Privacy Office Advisor [ATIP Advisor] at the Department of Justice wrote to Mr. Sandiford that the request would encompass a large volume of records, namely 17,000 pages and 30 boxes. The ATIP Advisor estimated that the time required to process the records could be years and provided suggestions aimed at reducing the processing time. Mr. Sandiford instructed the ATIP Advisor to proceed with processing the request as initially submitted.

[4] On January 9, 2022, Mr. Sandiford submitted a complaint to the Office of the Privacy Commissioner of Canada [OPC], given he had yet to receive a response from the Department of Justice. On February 6, 2023, the Privacy Commissioner concluded that the Department of Justice had not processed Mr. Sandiford's request within the timeframe set out in the *Privacy Act* and the request was therefore deemed to have been refused under subsection 16(3) of the *Privacy Act*. The Privacy Commissioner determined that Mr. Sandiford's complaint was well founded.

[5] Mr. Sandiford commenced the present application pursuant to section 41 of the *Privacy Act*, seeking: (i) the disclosure of the documents contained within the request; (ii) a declaration

that by withholding the documentation the Respondent violated Mr. Sandiford's constitutional rights, specifically under sections 7 and 8 of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; (iii) a declaration that the Respondent abused the administrative process; and (iv) a conversion of the matter into an action pursuant to section 18.4 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*], so the Court may award damages.

[6] It is clear, and the Respondent admits, that the Department of Justice failed to process Mr. Sandiford's request within the applicable statutory timeframe.

[7] On May 24, 2023, the request was answered, albeit all the information sought was exempted from release by virtue of sections 26 and 27 of the *Privacy Act*. Consequently, the Respondent submits that the present matter is now moot. Moreover, the Respondent pleads that the declaratory relief Mr. Sandiford seeks is not available nor is there a basis to convert the present matter into an action.

[8] Mr. Sandiford submits that the Respondent has taken every step possible to avoid releasing his medical records and related information for over 13 years. The Respondent's response to the present request, Mr. Sandiford pleads, is part of a much larger pattern of abuse of the administrative process to avoid disclosure. Mr. Sandiford argues that this matter is not moot, the dispute remains, and it would be unjust to force him to commence yet another process before the OPC regarding the exemptions claimed by the Respondent.

[9] For the reasons that follow, and despite the able submissions of Mr. Sandiford, this application must be dismissed. Given the larger context surrounding this matter, I understand Mr. Sandiford's frustration and I have no doubt that he will find this result extremely disappointing. He has expressed a deep dissatisfaction with the lack of disclosure contained in the Department of Justice's response to the request. His recourse, however, lies with a new complaint to the OPC. Once the Privacy Commissioner has issued a report on such a complaint, Mr. Sandiford will then be in a position to restart his efforts to obtain relief before this Court, assuming he has not already obtained such relief from the Privacy Commissioner. It would be my hope that the OPC would treat any such complaint, if Mr. Sandiford chooses to file one, expeditiously.

II. Issues

[10] Mr. Sandiford and the Respondent raised a number of issues, which I reformulate as follows:

A. Is this application moot?

B. Is Mr. Sandiford entitled to the declaratory relief and damages he seeks in the context of the present application?

C. Should this application be converted into an action?

III. Analysis

A. *Is this application moot?*

[11] Section 41 of the *Privacy Act* provides that any individual who has been refused access to personal information requested under subsection 12(1) may, if a complaint has been made to the Privacy Commissioner, apply to this Court for a review of the refusal. The Federal Court of Appeal has confirmed that in order to apply to this Court pursuant to section 41 of the *Privacy Act*, the applicant must have: (i) been refused access to a requested record; (ii) complained to the Privacy Commissioner; and (iii) received a report from the Privacy Commissioner (*Statham v Canadian Broadcasting Corporation*, 2010 FCA 315 at para 64).

[12] Where a Court determines that the institution was not authorized to refuse to disclose the personal information, the Court may order the head of the institution to disclose the personal information subject to conditions that the Court deems appropriate (section 48 of the *Privacy Act*).

[13] The Court's jurisdiction under section 41 of the *Privacy Act* has, however, been interpreted narrowly so that once the requested information has been provided, "there is no other remedy for the Court to provide" (*Frezza v Canada (National Defense)*, 2014 FC 32, at para 56 [*Frezza*]). In other words, the Court's jurisdiction is limited to ordering the disclosure of information that has been requested (*Frezza* at para 57; *Cumming v Canada (Royal Mounted Police)*, 2020 FC 271 at para 25 [*Cumming*]).

[14] In the present matter, the Privacy Commissioner concluded that Mr. Sandiford's complaint was well founded, considered the matter to be a deemed refusal because the

Department of Justice had not responded, closed the file, and advised that an application to review the refusal to provide access may be made to this Court.

[15] After the application was commenced, the Department of Justice responded to Mr. Sandiford's request for personal information by way of letter to Mr. Sandiford dated May 24, 2023 [DOJ Response]. The DOJ Response confirmed that the request had been processed and that all the information is exempted from release by virtue of sections 26 and 27 of the *Privacy Act*. The DOJ Response advised Mr. Sandiford that he is entitled to complain to the Privacy Commissioner concerning the processing of the request.

[16] While the Privacy Commissioner upheld Mr. Sandiford's complaint that the Department of Justice failed to process his request within the prescribed statutory timeframe, that was the full extent of the Privacy Commissioner's consideration of the matter. At no point has the Privacy Commissioner considered the adequacy of the DOJ Response to Mr. Sandiford's request for access to personal information.

[17] The Federal Court of Appeal recently considered a matter where an application was commenced following the Privacy Commissioner's finding that a government institution had failed to respond within the statutory timeframe (*Canada (Public Safety and Emergency Preparedness) v Gregory*, 2021 FCA 33 [*Gregory*]). After the commencement of the application, the government institution provided a response stating that all the requested information qualified for an exemption (*Gregory* at para 3).

[18] The Federal Court of Appeal concluded that a report from the Privacy Commissioner on the validity of the government institution's exemption claim is a prerequisite to the Federal Court considering the merits of the refusal (*Gregory* at paras 12-13). As the request had been responded to and there was no report from the Privacy Commissioner on the validity of the exemption claim, the Court therefore had no jurisdiction (*Gregory* at paras 8, 11). The Federal Court of Appeal in *Gregory*, citing *Blank v Canada (Justice)*, 2016 FCA 189, underscored the rationale for this approach at paragraph 12:

> […] The independent review of complaints by the Commissioner is a cornerstone of the statutory scheme put in place by Parliament, and the Federal Court is entitled to the considerable expertise and knowledge of that officer of Parliament before reviewing the government's assertions of exemptions and redactions of documents. I agree with the Judge, therefore, that the appellant could not unilaterally ignore this requirement and come directly to the Court.
>
> [32] … It is no excuse to assert that the respondent breached its duty to act in good faith by failing to make a complete and timely response to the appellant's access request, and that the attachments should have been caught by the initial access request made by the appellant. […] Section 41 of the Act makes it clear that the Federal Court may only review a refusal to access personal information after the matter has been investigated by the Privacy Commissioner. Accordingly, the Judge correctly concluded he was without jurisdiction to review the documents disclosed after the Commissioner's report.

[19] Given the DOJ Response, the present application is moot. The Federal Court of Appeal summarized the two-step analysis for mootness in *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 [*Democracy Watch*] as follows:

> [10] As the leading authority on mootness – the Supreme Court's decision in *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342 at 353-363 – makes clear, the mootness analysis proceeds in two stages. The first question is whether the proceeding is indeed moot: whether a live controversy remains that affects or may affect the rights of the parties. If the proceeding is moot, a second question arises: whether the court should nonetheless exercise its discretion to hear and decide it.

[20] Mr. Sandiford's complaint to the OPC was premised on there being no response from the Department of Justice. The refusal to respond has now been remedied. The tangible and concrete dispute between the parties in the context of this matter has disappeared (*Fibrogen, Inc v Akebia Therapeutics, Inc*, 2022 FCA 135 at para 30). No matter how imperfect and incomplete the DOJ Response may appear to Mr. Sandiford, it is not open to the Court to consider the matter now that it is moot (*Sheldon v Canada (Health)*, 2015 FC 1385 at paras 21, 25; *Khan v Canada (Citizenship and Immigration)*, 2021 FC 995 at paras 27-30 [*Khan*]).

[21] As to the second step of the analysis, when the Court considers whether to nonetheless exercise its discretion to hear a matter that is moot, three factors are relevant: (1) the presence of an adversarial relationship between the parties; (2) the concern for judicial economy; and (3) the need for the Court to be sensitive to its role as the adjudicative branch in our political framework (*Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 18; *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at paras 31, 34, 40; *Democracy Watch* at para 13).

[22] In *Cumming*, Justice Patrick Gleeson considered a case that is analogous to the present matter, where the government institution remedied the failure to respond after the application had

been commenced. Despite the applicant's concerns about the response, and Justice Gleeson's concerns about the government institution's "seeming indifference towards its obligations under the *Privacy Act*", Justice Gleeson concluded the matter was moot and there was nothing to indicate that the Court should exercise its discretion to hear the matter in any event (*Cumming* at paras 11, 32).

[23] I find there to be nothing to indicate that the Court should, or would even be able to, exercise its discretion to hear the matter in any event. The jurisprudence of this Court and the Court of Appeal has made it abundantly clear that to consider a matter such as the present without first having a report from the Privacy Commissioner on the validity of the Department of Justice's exemption claim would "usurp the Privacy Commissioner's role in the complaint scheme and deny the Court the benefit of its expertise in applications" (*Cumming* at para 31). Without such a report, this Court simply has no jurisdiction (*Gregory* at para 13; *Khan* at paras 28-30).

B. *Is Mr. Sandiford entitled to the declaratory relief and damages he seeks in the context of the present application?*

[24] As noted above, Mr. Sandiford seeks a number of declarations along with damages arising from the alleged breaches of his *Charter* rights and under common law, notably based on abuse of the administrative process and tort of conversion. Mr. Sandiford submits that the Respondent's refusal to divulge his medical records was not only a violation of the *Privacy Act*, an act that is quasi-constitutional in nature, but also breached his Charter rights giving rise to damages under subsection 24(1) of the *Charter*, along with damages under the common law.

[25] Mr. Sandiford acknowledges, however, that an application under section 41 of the *Privacy Act* has its limits. A party is precluded from recovering damages for a delay in providing the requested documents or a violation of the statutory timeframe for disclosing the documents (*Connolly v Canada Post Corp.*, 2000 CanLII 16590, 197 FTR 161 at paras 10-12; *Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227 at para 75). The jurisprudence is clear that under a section 41 application, the Court has a narrow jurisdiction that is limited to making a disclosure order, and neither damages nor declarations can be awarded (*Cummings* at paras 24-25; *Frezza* at paras 56-59).

[26] Given that the DOJ Response was provided, Mr. Sandiford is without a remedy under section 41 of the *Privacy Act*. The Court is precluded from granting any further or additional relief in the context of the present application.

C. *Should this application be converted into an action?*

[27] Mr. Sandiford, having acknowledged the limits of an application under section 41 of the *Privacy Act*, seeks to cure these limits through a request that the present application be converted to an action pursuant to subsection 18.4(2) of the *Federal Courts Act*. In essence, Mr. Sandiford does not seek any additional procedural steps, such as discovery and examination on discovery or live witness testimony. Rather, his aim is remedial. A conversion to an action will enable Mr. Sandiford, in his view, to access damages for alleged violations of his *Charter* rights and the common law.

[28] The Respondent submits that there is no basis upon which to convert the present application into an action. The Respondent highlights that subsection 18.4(2) of the *Federal Courts Act* applies to judicial reviews brought under section 18, and not applications such as the present brought under section 41 of the *Privacy Act*. Once a decision is rendered, the Respondent pleads, this Court is no longer seized of the matter and cannot then issue a further order regarding conversion.

[29] Neither Mr. Sandiford nor the Respondent were able to refer the Court to an authority where conversion had been sought in the context of a section 41 application.

[30] Section 18.4 of the *Federal Courts Act* provides:

Hearings in summary way	**Procédure sommaire d'audition**
18.4 (1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.	**18.4 (1)** Sous réserve du paragraphe (2), la Cour fédérale statue à bref délai et selon une procédure sommaire sur les demandes et les renvois qui lui sont présentés dans le cadre des articles 18.1 à 18.3.
Exception	**Exception**
(2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.	**(2)** Elle peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.

[31] The general rule under subsection 18.4(1) is that applications for judicial review brought pursuant to section 18.1 or a reference by a federal tribunal or the Attorney General brought pursuant to section 18.3 shall proceed without delay and in a summary way. The Federal Court's discretion to treat an application for judicial review as an action under subsection 18.4(2) is very much an exception to the general rule in subsection 18.4(1) (*Canada (Attorney General) v Slansky*, 2013 FCA 199 at para 56 [*Slansky*]; *Mahoney v Canada*, 2021 FC 399 at para 10 [*Mahoney*]; *Alam v Canada (Attorney General)*, 2023 FC 402 at para 12 [*Alam*]).

[32] A conversion order under subsection 18.4(2) is purely procedural and not substantive (*Canada (Human Rights Commission) v Saddle Lake Cree Nation*, 2018 FCA 228 at para 24 [*Saddle Lake*]). The operative originating document remains the notice of application and the substantive law remains the law of judicial review (*Saddle Lake* at para 24). An order of conversion should specify in what ways an application for judicial review is to be treated as an action, for example, the conducting of discoveries or permitting amendments supporting a public law claim for damages (*Saddle Lake* at para 25; *Alam* at para 10). To be clear, while the term conversion is used in the jurisprudence "nothing at all is converted […] [a]ll that happens is that the Rules relating to actions become available to the parties in prosecuting and defending the application." (*Brake v Canada (Attorney General)*, 2019 FCA 274 at paras 42-43 [*Brake*]).

[33] Both this Court and the Federal Court of Appeal have underscored that situations in which conversion orders were permitted are "exceptional" and "most rare" (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 104; *Slansky* at para 56; *Alam* at para 12; *Mahoney* at para 10).

[34] Having considered sections 18.1 through 18.4 of the *Federal Courts Act*, I do not consider that subsection 18.4(2) applies to applications under section 41 of the *Privacy Act*. A conversion order under subsection 18.4(2) is simply a rare exception to the general rule in subsection 18.4(1) that governs how applications for judicial review under section 18.1 and references under section 18.3 are to proceed. The proceedings under sections 18.1 and 18.3 are distinct from proceedings under section 41 of the *Privacy Act*. I note that in Rule 300 of the *Federal Courts Rules*, SOR /98-106 (Part 5 Applications) [Rules], applications for judicial review of administrative action under section 18.1 are listed separately from "proceedings required or permitted by or under an Act of Parliament to be brought by application":

Application	**Application**
300 This Part applies to	**300** La présente partie s'applique :
(a) applications for judicial review of administrative action, including applications under section 18.1 or 28 of the Act, unless the Court directs under subsection 18.4(2) of the Act that the application be treated and proceeded with as an action;	**a)** aux demandes de contrôle judiciaire de mesures administratives, y compris les demandes présentées en vertu des articles 18.1 ou 28 de la Loi, à moins que la Cour n'ordonne, en vertu du paragraphe 18.4(2) de la Loi, de les instruire comme des actions;
(b) proceedings required or permitted by or under an Act of Parliament to be brought by application, motion, originating notice of motion, originating summons or petition or to be determined in a summary way, other than applications under subsection 33(1) of the Marine Liability Act;	**b)** aux instances engagées sous le régime d'une loi fédérale ou d'un texte d'application de celle-ci qui en prévoit ou en autorise l'introduction par voie de demande, de requête, d'avis de requête introductif d'instance, d'assignation introductive d'instance ou de pétition, ou le règlement par

	procédure sommaire, à l'exception des demandes faites en vertu du paragraphe 33(1) de la Loi sur la responsabilité en matière maritime;

[35] Furthermore, subsection 18.4(2) of the *Federal Courts Act* is specifically referred to as an exception to the application of Part 5 of the Rules under (a) but not under (b).

[36] In *Gregory*, the Federal Court converted an application for judicial review pursuant to section 18.1 of the *Federal Courts Act* into an application under section 41 of the *Privacy Act* (at para 1). The application concerned a government institution's refusal to provide access to information sought by the applicant. At first instance, the Respondent Minister brought a motion seeking the conversion of the proceedings as the application ought to have been brought under section 41 of the *Privacy Act* rather than section 18.1 of the *Federal Courts Act*, which the Court granted (*Gregory v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 667 at para 11). The only dispute at the Court of Appeal was, once the judicial review was converted to an application under section 41, whether the Federal Court had jurisdiction to consider the merits of the government institution's response to the applicant (*supra* at paras 3, 11, 13).

[37] I am also mindful of the wealth of jurisprudence on the limited jurisdiction of this Court in the context of an application under section 41 of the *Privacy Act*, as discussed in Section A of this judgment above. Given the Court's jurisdiction is limited to ordering the disclosure of information that has been requested (*Freeza* at paras 56-57; *Cumming* at para 25), if I were to utilize subsection 18.4(2) of the *Federal Courts Act* to open the door to damages in a section 41

application - I would in effect be doing indirectly what I cannot do directly. As confirmed by Justice David Stratas in *Brake*, even under subsection 18.4(2) of the *Federal Courts Act* there is no "conversion" and the notice of application remains at all times the operative originating document (at para 43). As such, subsection 18.4(2) does not present an avenue for the present application to be "converted" into something fundamentally different.

[38] In my view, therefore, subsection 18.4(2) of the *Federal Courts Act* is not available to "convert" an application under section 41 of the *Privacy Act* into an application or action where damages may be claimed as a result of a government institution's refusal to disclose personal information.

IV. Conclusion

[39] Having found the present proceedings to be moot, this application under section 41 of the *Privacy Act* is dismissed.

[40] That is not to say, however, that I have not been troubled by certain aspects of the present proceedings. As appears from the record before me, this is not the first time Mr. Sandiford has submitted requests for access to personal information, and in particular his medical records and correspondence related thereto. He has made numerous requests to government institutions, including the Department of National Defence over a decade ago. He has then lodged complaints with the OPC, which have been determined to be well founded. As part of a prior disclosure, he obtained correspondence dated October 13, 2009, on which there is a hand-written notation that his file, including his complete medical file, was sent from CFB Esquimalt to the Department of

Justice in Vancouver. Hence the reason that in his continued efforts to obtain his medical file, he lodged the request for information with the Department of Justice in 2020. In 2009, there was pending litigation between Mr. Sandiford and the Respondent. Mr. Sandiford believes that his medical file was sent to the Department of Justice and then has purposely been withheld from him because of the pending litigation. He bases this belief on a copy of an internal memorandum from the Department of Justice placing a litigation hold on documentation relevant to the subject matter of Mr. Sandiford's claim.

[41] In essence, Mr. Sandiford believes that the Department of Justice is not operating in good faith and is purposely withholding his medical file from him. As I explained during the hearing of this matter, the ability of the Court to assess such an allegation is predicated on the Court having access to the documents in the possession of the Department of Justice and considering the exemptions that have been applied to such documents. Any such exercise could only take place once a complaint is submitted to the OPC with respect to the DOJ Response, and after the resulting investigation by the Privacy Commissioner. As such, unfortunately for Mr. Sandiford, what he sought to achieve with the present proceedings is ultimately either moot or premature.

[42] While the Respondent is the successful party, they have not sought the costs of this application. In any event, I find, under the circumstances, that none shall be awarded.

JUDGMENT in T-431-23

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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