Federal Court of Appeal Cour d'appel fédérale

Date: 20231128

Docket: A-213-21

Citation: 2023 FCA 232

CORAM: **WOODS J.A.**
MACTAVISH J.A.
BIRINGER J.A.

BETWEEN:

SHELDON BLANK

Appellant

and

THE MINISTER OF JUSTICE AND
THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Winnipeg, Manitoba, on November 22, 2023.

Judgment delivered at Ottawa, on November 28, 2023.

REASONS FOR JUDGMENT BY: BIRINGER J.A.

CONCURRED IN BY: WOODS J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

BIRINGER J.A.

[1] This is an appeal of an order of the Federal Court (*per* Kane J.) allowing the respondents' motion to file a confidential affidavit and confidential exhibits.

[2] The context is an application to the Federal Court for judicial review under section 41 of the *Access to Information Act*, R.S.C. 1985, c. A-1 [*Access Act*] of the respondents’ refusal to disclose certain records requested by the appellant.

[3] The respondents released a total of 24,730 pages with 20,111 pages redacted in whole or in part. The redactions were made pursuant to various provisions of the *Access Act*, including subsection 16(2), subsection 19(1), section 23 and paragraph 68(*a*).

[4] The appellant complained to the Office of the Information Commissioner and a final report was issued confirming the refusal to disclose the redacted material. The appellant filed an application for judicial review.

[5] In connection with the section 41 application, the respondents brought a motion pursuant to Rule 151 of the *Federal Courts Rules*, S.O.R./98-106 [*Rules*] seeking to file a confidential affidavit with unredacted copies of the relevant records.

[6] An affidavit filed by the respondents in support of the motion [Anderson Affidavit] indicated that the proposed confidential affidavit was to contain three paragraphs:

- one setting out the affiant's identity and role;
- a second providing the affiant's authority under the *Access Act* to decide whether a requestor should be granted access to certain information; and

- a third paragraph summarizing the total number of pages relevant to the request and the number of pages withheld in whole or in part, and “attaching an unredacted copy of all the records relevant to the access request and at issue in the application.”

[7] The respondents also provided a chart setting out the general identifying particulars for records withheld in their entirety and the sections of the *Access Act* relied on for non-disclosure.

[8] The motion judge ordered that the respondents be permitted to file a confidential affidavit with confidential exhibits, which was subsequently filed [together, the Confidential Affidavit]. The appellant appeals the motion decision.

[9] The confidentiality order was issued pursuant to Rule 151 and subsection 47(1) of the *Access Act*. Rule 151 provides that the Court may order that material be treated as confidential, provided the Court is satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

[10] Subsection 47(1) of the *Access Act* directs the Court, in the context of a section 41 application, to take precautions to avoid premature disclosure of information. Subsection 47(1) provides:

Court to take precautions against disclosing	**Précautions à prendre contre la divulgation**
47 (1) In any proceedings before the Court arising from an application under section 41 or 44, the Court shall take every reasonable precaution, including, when	**47 (1)** Dans les procédures découlant des recours prévus aux articles 41 et 44, la Cour prend toutes les précautions possibles, notamment, si c’est indiqué, par la tenue

appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid the disclosure by the Court or any person of	d’audiences à huis clos et l’audition d’arguments en l’absence d’une partie, pour éviter que ne soient divulgués de par son propre fait ou celui de quiconque :
(a) any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Part; or	a) des renseignements qui, par leur nature, justifient, en vertu de la présente partie, un refus de communication totale ou partielle d’un document;
(b) any information as to whether a record exists where the head of a government institution, in refusing to disclose the record under this Part, does not indicate whether it exists.	b) des renseignements faisant état de l’existence d’un document que le responsable d’une institution fédérale a refusé de communiquer sans indiquer s’il existait ou non.

[11] The essence of a section 41 application is to determine whether statutory exemptions apply that were relied on by the government in withholding information: *Blank v. Canada*, 2005 FCA 405 at para. 18 [*Blank 2005*]. The Court’s process should not result in disclosure before the Court makes a substantive ruling on the availability of these exemptions.

[12] The decision of the motion judge was discretionary. The standards of review from *Housen v. Nikolaisen*, 2002 SCC 33 apply: *Lukács v. Canada (Citizenship and Immigration)*, 2023 FCA 36 at para. 30, citing *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100 and *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215.

[13] The standards of review are: correctness for questions of law; palpable and overriding error for questions of fact; and palpable and overriding error for questions of mixed fact and law — unless there is an extricable error of law, in which case correctness applies.

[14] The appellant does not oppose the filing of a confidential affidavit altogether. Consistent with this Court's guidance in *Blank 2005*, the appellant acknowledges that the Confidential Affidavit should include all of the records at issue in the section 41 application.

[15] In *Blank 2005* at paragraph 18, the Court stated that section 47 must apply not only to the record that is the subject of the section 41 (or section 42) proceeding, but to other material or information which, if disclosed in the course of the proceeding, would disclose some or all of the contents of the record itself.

[16] Based on the written submissions and those made at the hearing, the appellant raises two concerns with the motion judge's decision. One is with respect to the scope of the Confidential Affidavit. A second is with respect to the need for the motion judge to review for confidentiality certain records which he submits were included in the Confidential Affidavit but are not at issue in the section 41 application.

[17] First, the appellant submits that the Confidential Affidavit was overbroad — records were included over which the respondents no longer had a claim of litigation privilege. The appellant relies on *Leahy v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227 at paras.

51-53 [*Leahy*], where this Court confirmed that a confidential affidavit should not be overbroad; it should include only what is clearly confidential.

[18] As Rule 151 provides, there is public interest in open and accessible court hearings, which includes the filing of publicly available information. An overbroad claim for confidentiality is also inconsistent with the duty of procedural fairness: *Leahy* at paras. 51-53.

[19] The appellant submits that when the Confidential Affidavit was filed, it included documents over which a claim to litigation privilege had expired. The documents concerned litigation commenced by the appellant against the government which had been discontinued.

[20] In light of the discontinuance, the parties had communicated prior to the motion hearing about a reconsideration of the respondents' claim of litigation privilege and release of documents to the appellant. However, the reconsideration and release of documents did not occur until almost a year after the motion hearing.

[21] To the extent that the Confidential Affidavit included documents which the government knew were no longer privileged, it would not only be overbroad, but also inaccurate. It appears that the respondents knew of this possible inclusion but, pending a review of the more than 24,000 documents, took the position that the records should remain withheld.

[22] The motion judge declined to speculate as to possible overbreadth as she did not base her decision on the actual Confidential Affidavit but rather on the government's representation as to

what it would include. Nonetheless, the motion judge's decision contemplates that the confidentiality order could be amended in the event that the Court determined that exhibits to the Confidential Affidavit were not *prima facie* confidential.

[23] I have concluded that this after-the-fact determination that certain documents included in the Confidential Affidavit were no longer confidential does not support a conclusion that the motion judge erred in issuing the confidentiality order at issue in this appeal, based on the material before her.

[24] Whether the post-hearing release of non-privileged records requires an amendment to the confidentiality order and a removal of the records from the Confidential Affidavit is a matter for consideration by the case management judge in the section 41 application, not this Court.

[25] Second, the appellant submits that to the extent that the Confidential Affidavit includes “additional documents” that are neither at issue in the section 41 application nor have been disclosed, the motion judge should make a determination as to the information that can be filed confidentially.

[26] The appellant points to the description in the Anderson Affidavit as to what was to be in the Confidential Affidavit. The first paragraph was to set out the confidential affiant's identity and role; the second was to provide the affiant's authority under the *Access Act* to decide whether a requestor should be granted access to certain information and the third was to set out the total number of pages relevant to the request and the number of pages withheld in whole or in part. An

“unredacted copy of all the records relevant to the access request and at issue in the application” was to be attached to the affidavit.

[27] The appellant emphasized that he did not, through this appeal, seek the records that are the subject of the section 41 application, but rather the material relating to the information in the other paragraphs of the Confidential Affidavit.

[28] The parties agreed that a public version of the Confidential Affidavit had been sent to the appellant and that the paragraphs were as indicated in the Anderson Affidavit, but this Court was not provided with any version of the Confidential Affidavit.

[29] The respondents’ counsel submitted that there were no confidential exhibits with respect to the paragraphs or phrases in the Confidential Affidavit referenced by the appellant. They were merely statements as to the affiant’s identity, authority and the process undertaken. In other words, there were no exhibits to the Confidential Affidavit apart from the documents already disclosed and those remaining at issue in the section 41 application.

[30] The appellant sought to rely on *Blank 2005*, which is distinguishable. In *Blank 2005*, this Court decided that the Federal Court was required to determine whether material pertaining to an Information Commissioner investigation could be filed confidentially. The material was not the subject of the section 41 application and therefore required a review by the motion judge to determine whether there was some other basis for a confidential filing.

[31] Here, the appellant has not established that the Confidential Affidavit included anything other than the records at issue in the section 41 application and the documents already disclosed. Accordingly, unlike in *Blank 2005*, a review of material by the motion judge for confidentiality is not warranted at this stage of the proceeding.

[32] There is no basis for this Court to intervene in the motion judge's decision. The appellant's concerns do not raise any extricable question of law and the appellant has not demonstrated that the motion judge made a palpable and overriding error — or any error at all — in allowing the filing of the Confidential Affidavit.

[33] I would dismiss the appeal, with costs in the amount of $500 payable to the respondents.

"Monica Biringer"
J.A.

"I agree.
Woods J.A."

"I agree.
Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	WINNIPEG, MANITOBA
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CONCURRED IN BY:	WOODS J.A. MACTAVISH J.A.
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APPEARANCES:

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