Federal Court  Cour fédérale

Date: 20151105

Docket: T-828-12

Citation: 2015 FC 1251

Ottawa, Ontario, November 5, 2015

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

SHELDON BLANK

Applicant

and

THE MINISTER OF THE ENVIRONMENT

Respondent

JUDGMENT AND REASONS

[1] This is at least the 20th application by Mr. Blank for judicial review of alleged refusals by government officials to provide records requested under the *Access to Information Act*. There have been 10 appeals, 7 by Mr. Blank and 3 by the Government. One case even made it to the Supreme Court, the unsuccessful appeal by the Minister of Justice from a decision of the Federal Court of Appeal holding that litigation privilege, unlike solicitor/client privilege, expired at the end of the litigation (*Blank v Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 SCR 319).

[2] It all began 20 years ago with the laying of 13 charges in 1995 against Mr. Blank and his company Gateway Industries Ltd for alleged regulatory offences under the *Fisheries Act* and the *Pulp and Paper Effluent Regulations*. Five counts alleged pollution of the Red River in Winnipeg and the other eight alleged breaches of reporting requirements under the *Fisheries Act*. The eight charges relating to the reporting requirements were dismissed by the Manitoba Provincial Court in 1997 and the summary conviction offences for alleged pollution were quashed by the Manitoba Court of Queen's Bench in 2001. Thereafter, the following year, new charges by way of indictment were laid. The Crown permanently stayed these charges after the trial had been scheduled to commence in 2004.

[3] In the meantime, in 2002, Mr. Blank sued the Federal Crown and others in damages in the Manitoba Court of Queen's Bench for alleged fraud, perjury, conspiracy and abuse of prosecutorial powers. I am told that case is still pending.

[4] The history of Mr. Blank's saga has been summarized in a number of cases, including the decision of the Federal Court of Appeal in *Blank v Canada (Minister of Justice)*, 2004 FCA 287 and more recently by Mr. Justice Brown in *Blank v Canada (Minister of Justice)*, 2015 FC 753 (under appeal). By January 2004, he had made 119 requests to Environment Canada for records relating to his prosecution. More than 59,000 pages were released to him.

[5] Although Mr. Blank is not required to justify his requests, he is pleased to say that they are in aid of his action in the Manitoba Court of Queen's Bench, and also are taken as a matter of principle. He does not suggest that the discovery process in Manitoba is inadequate, but rather

that if he frames his requests properly documents are produced which might otherwise not meet the relevance test. It is, he says, up to him to decide what is relevant and what is not.

[6] This particular judicial review relates to a request on April 7, 2005 to Environment Canada for:

> All records of Daniel Woo dealing with Gateway Industries Ltd. and/or Sheldon Blank on the subject of:
>
> -section 82 Fisheries Act
>
> -Ministerial awareness
>
> -Amendment to the Charges
>
> -Limitation Period
>
> -Minister's Certificate
>
> This will include all communications on the above subjects to Mr. Woo from anyone else; and from Mr. Woo to anyone else; and copies that Mr. Woo was in receipt of. This request will include emails and notes of conversations dealing with the above subjects.

[7] Mr. Woo was an employee in the Environmental Protection Branch, Prairie and Northern Region of Environment Canada. He searched his records and stated that he did not possess any record responsive to the request. An additional search was carried out by the Environmental Protection Branch of the Prairie and Northern Region. Again, no records responsive to the request were said to be found.

[8] Mr. Blank was so informed on April 28, 2005 and told (although he already knew) that he was entitled to complain to the Office of the Information Commissioner of Canada (hereinafter the "Commissioner" or "she"), which he did on May 6, 2005. On May 26, 2005, the

Commissioner gave Environment Canada a Notice of Intention to Investigate and a Summary of the Complaint.

[9] It was only some four and a half years later, in connection with the investigation of another complaint by Mr. Blank, that documents which contained Mr. Woo's name were sighted. These documents were not in Environment Canada's offices in Winnipeg, but rather were at the law firm of Fillmore Riley, who were defending the civil action brought by Mr. Blank.

[10] Some 1,350 pages were reviewed by the Commissioner. Although Environment Canada maintained the position that none of these documents were responsive to the request, the Commissioner suggested that 99 pages were responsive and recommended that they be produced. They were provided to Mr. Blank, although many pages were redacted on the grounds of solicitor/client privilege, personal information or Cabinet confidence.

[11] On March 23, 2011, the Commissioner wrote to Mr. Blank to report the above and to say that she was now satisfied that thorough and proper searches were conducted and that all relevant records responsive to the request had been processed. Mr. Blank's complaint was recorded as being well founded and resolved without the need to make formal recommendations to the head of the government institution in question.

[12] Mr. Blank did not complain to the Commissioner that parts of the 99 pages were redacted. Rather, he applied to this Court for a judicial review. Although his application was filed out of time, the Court, in its discretion, extended the delays.

[13] His application reads as follows:

> **APPLICATION UNDER section 41 of the Access to Information Act, R.S.C. 1985, Chapter A-1 (The "Act") for review to the Federal Court of Canada of the refusal by the head of the Department of Justice to disclose records requested by Sheldon Blank, by access request of April 7, 2015 under the Act. The Respondent failed to include all relevant records that responded to the request.**
>
> [Emphasis in the original.]

I. The *Access to Information Act*

[14] It is important to bear in mind that prior to the passage of this Act, there was no legal right of access to Government records (*X v Canada (Minister of National Defence)*, [1991] 1 FC 670). The production of documents in civil litigation in which the Crown is a party is another matter altogether.

[15] The purpose of the Act as set out in sections 2 and 4 is to give Canadian citizens and permanent residents a right of access to information in records under the control of Government institutions, subject to the exceptions set out in the Act. Exceptions include personal information (s 19), solicitor/client privilege (s 23) and confidences of the Queen's Privy Council (s 69). Section 25 provides that even when refusal to disclose is justified, nevertheless such part of the record that does not contain sensitive information and which can reasonably be severed is to be disclosed.

[16] Complaints may be made to the Commissioner in accordance with s 30 and following. The Commissioner has great powers of investigation but cannot compel the government

institution in question to provide the requested documents to the complainant. The Commissioner investigated and recommended to Environment Canada and the Department of Justice that they disclose 99 pages of material as being responsive to Mr. Blank's request. Although they disagreed, they complied but, apparently unbeknownst to the Commissioner, redacted some of those pages. As aforesaid, Mr. Blank did not complain to the Commissioner but rather came directly to this Court by way of judicial review of Environment Canada's decision.

II. Points at Issue

[17] Mr. Blank submits the following five points are at issue:

> How much deference should be accorded the Information Commissioners Report of Finding?
>
> Was the material gathering procedure in compliance with the regulations set out in the Treasury Board guidelines?
>
> Has the Respondent exercised its discretion lawfully and severed the records in accordance with s. 25 of the Access to Information Act?
>
> Has the Respondent vitiated its claim of privilege over records that demonstrate an abuse of process?
>
> Whether the Court in an s41 Judicial Review has the jurisdiction to consider an incomplete response (missing records)?

[18] In his Memorandum of Fact and Law, he seeks the following order:

> 1. A search of the Winnipeg offices of Environment Canada for a complete response to the request.
>
> 2. Some of the records were severed at an earlier time and considered original for the purpose of this request. The Respondent should examine the records in their intact form for severing in response to his request.

[19] However, during the hearing, he said he was no longer seeking an order for a new search. He would be satisfied with the production of the approximately 1,250 pages seen by the Commissioner but not produced, and a ruling on the redactions. He also submitted that there should be no order as to costs, irrespective of outcome.

III. Analysis

[20] The first of Mr. Blank's submissions relates to the production of the 99 pages in redacted form. The second challenges the opinion shared by the Commissioner, Environment Canada and the Department of Justice, that the other 1,250 pages sighted in the offices of Fillmore Riley are not responsive to his request.

A. *The Redactions*

[21] Although Mr. Blank only has the 99 pages in redacted form, they were provided to me in full in the confidential affidavit of Shelley Emmerson, Environment Canada's manager of its Access to Information and Privacy Office.

[22] This case turns on s 41 of the *Access to Information Act* which reads:

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an	41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du

investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.	Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

[23] There are two conditions precedent to a judicial review by this Court. The first is that Mr. Blank be refused access to a requested record. The second is that he must have complained to the Commissioner. In this case, he did not complain to the Commissioner that some pages had been redacted. Rather, he came directly to this Court.

[24] The case law has been completely consistent. Mr. Blank did not fulfil one of the conditions precedent and so this portion of his application must be dismissed as being premature.

[25] A recent case directly on point is the decision of Mr. Justice Brown in *Blank*, above. In that case, Mr. Blank did not ask the Commissioner to review or report on redactions on pages which had been produced, but rather, as here, he came directly to this Court. Mr. Justice Brown stated at paragraph 45:

> …that without a complaint to and a review and report by the Information Commissioner regarding the Department of Justice's disclosure, this Court lacks jurisdiction to engage in judicial review of the relevant records by virtue of section 41 of the Act.

I agree. Mr. Blank suggests that the decision is wrong and he has taken it to appeal.

[26] Even if Mr. Justice Brown had gone into unchartered territory, I find his decision eminently reasonable and would follow it on the grounds of judicial comity. As Madam Justice Dawson said in *Alfred v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1134 at para 15 (borrowing from Justice Wilson in *Re Hansard Spruce Mills Ltd.*, [1954] BCJ No 136, [1954] 4 DLR 590 (BCSC)):

> …I will only go against a judgment of another Judge of this Court if:
>
> (a) Subsequent decisions have affected the validity of the impugned judgment;
>
> (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
>
> (c) the judgment was unconsidered, *a nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.
>
> If none of these situations exist I think a trial Judge should follow the decisions of his brother Judges
>
> [Emphasis in the original removed]

[27] But in any event, Mr. Justice Brown was following decisions of the Federal Court of Appeal, which he, and I, are bound to follow. See *Canada (Information Commissioner) v Canada (Minister of National Defence)* (1999), 240 NR 244, at paragraph 28, *Statham v Canadian Broadcasting Corporation*, 2010 FCA 315 at paragraph 55, and *Whitty v Canada (Attorney General)*, 2014 FCA 30 at paragraphs 8 and 9.

[28] It is a sound principle of administrative law that except in unusual circumstances, administrative recourses must be exhausted before coming to this Court. In *CB Powell Limited v*

Canada (Border Services Agency) , 2010 FCA 61, Mr. Justice Stratas, speaking for the Federal Court of Appeal, stated at paragraphs 30 through 33:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at paragraphs 38-43; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 at paragraph 14-15, 58 and 74; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14; *Vaughan v. Canada*, [2005] 1 S.C.R. 146, 2005 SCC 11 at paragraphs 1-2; *Okwuobi v. Lester B. Pearson School Board*, [2005] 1 S.C.R. 257, 2005 SCC 16 at paragraphs 38-55; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30 at paragraph 96.
>
> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> [32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, e.g., *Consolidated*

Maybrun, supra at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68 at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, e.g., *Consolidated Maybrun*, supra at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994), 119 D.L.R. (4th) 136 (B.C.S.C.), aff'd (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 48.

[33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see Harelkin, supra; Okwuobi, supra at paragraphs 38-55; *University of Toronto v. C.U.E.W, Local 2* (1988), 55 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

[29] Although said in a different context, factual findings and the record compiled by an administrative tribunal, as well as its informed and expert view of the various issues, will often be invaluable to a reviewing court (*Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54, [2003] 2 SCR 504) per Mr. Justice Gonthier at para 30.

[30] Furthermore, the Commissioner has persuasive power. It persuaded Environment Canada to release 99 pages even though the head of that institution was not satisfied that they were responsive to Mr. Blank's request. She might likewise have brought about a change of heart with respect to the redactions.

[31] Consequently, there is no need to consider Mr. Blank's never-ending complaint that such solicitor/client privilege as there might otherwise have been has been lost by fraud. To the extent that he has already received at least one of the 99 pages in full in another Information Request, the point is moot. It cannot be said that as a consequence the right to redact other pages was lost. No such intention appears from the record. (*Stevens v Canada (Prime Minister)*, [1997] 2 FC 759, affirmed [1998] 4 FC 89; *Blank v Canada (Minister of Justice)*, 2005 FC 1551; and *Blank v Canada (Minister of Justice)*, 2006 FC 841).

IV. The 1,250 pages

[32] As to the other 1,250 pages in the offices of Fillmore Riley, both Environment Canada and the Department of Justice maintain the position that they do not fall within the four corners of his 2005 request. This view is shared by the Commissioner. Mr. Blank submits that this decision of Environment Canada is unreasonable.

[33] I am not quite certain as to exactly what Mr. Blank wants. He first asked for a search of the Winnipeg Offices of Environment Canada, but now says he would be satisfied with production of the remaining pages which were found in the offices of Fillmore Riley. If he seeks an order that the Commissioner again review these documents, I can refuse it on the simple ground that the Commissioner is not party to these proceedings. The Office of the Information Commissioner is an independent office. It is not named as respondent in this application, and is not represented by the Minister of Justice.

[34] However, there are more fundamental reasons to dismiss this portion of Mr. Blank's application for judicial review.

[35] The position of Environment Canada is that there is no record to produce. It must be a record of Mr. Woo dealing with Gateway Industries Ltd or Mr. Blank on certain specified subjects. Consequently, there has been no refusal to produce a record.

[36] If, for the sake of argument, I were to indulge Mr. Blank and take the position that the Commissioner's investigation was shoddy and incomplete, there still would be no recourse to this Court. We must remember always that prior to the enactment of the *Access to Information Act* Canadians did not have access to government records. Thus, the right of access must fall within the Act.

[37] This Court has no authority to challenge a finding by the Commissioner, after investigation, that there is no record. Although dealing with similar provisions in the *Privacy*

Act, the decision of Mr. Justice MacKay in *Connolly v Canada Post Corp*, 197 FTR 161, [2000] FCJ No 1883, is very much on point. He said at paragraph 10:

> [10] The rights assessed under the *Privacy Act* are those set out in that Act, and any redress for their contravention exists by virtue of that Act. There is no common law remedy, and no remedy is provided by the Act, for wrongly withholding publicly held personal information from the person requesting it. There is no right to damages under the common law or under the *Privacy Act*.

[38] Mr. Connolly's appeal was dismissed (*Connolly v Canada Post Corp*, 2002 FCA 50, [2002] FCJ No 185 (QL)). As Mr. Justice Noël, as he then was, said, at paragraphs 3 and 4:

> [3] The appellant does not take issue with the conclusion reached by MacKay J. Rather he submits that the Act ought to be amended so as to allow the Court to review the manner in which government institutions respond to information requests and to grant the appropriate remedy where the institution is found to be at fault.
>
> [4] This as we attempted to explain to the applicant during the course of the hearing is a matter for Parliament, and not one which we can entertain on appeal.

[39] This Court has not been given jurisdiction to review the Commissioner's findings and recommendations (*Canada (Attorney General) v Bellemare*, [2000] FCJ No 2077 (QL)).

[40] To summarize, Mr. Blank's application with respect to the redacted pages shall be dismissed as being premature because he did not complain to the Commissioner. The rest of his application shall be dismissed as the Commissioner's findings that there is no record cannot be challenged in this Court.

V. Costs

[41] Although Mr. Blank's right to seek records pursuant to the *Access to Information Act* is not challenged (no argument has been made as to proportionality), as he well knows there are consequences if he is unsuccessful. There is no reason why costs should not follow the event. Counsel for the Minister submitted a draft bill in accordance with our current practice. It is based on Tariff B, Column III, which is the default column. Disbursements are not claimed although they could have been. The draft was based on the scheduled hearing of one and one half days. However, the hearing took only one day.

[42] In the circumstances, I shall fix costs at $11,270.

JUDGMENT

FOR REASONS GIVEN;

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed with costs in favour of the Minister fixed at $11,270, all inclusive.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-828-12
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PLACE OF HEARING:	WINNIPEG, MANITOBA
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