Federal Court  Cour fédérale

Date: 20160411

Docket: T-2584-14

Citation: 2016 FC 401

Ottawa, Ontario, April 11, 2016

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

BRIAN SAUVE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of an investigation report and finding by the Privacy Commissioner of Canada (the Commissioner) determining the Applicant's complaint (the Complaint) under subparagraph 29(1)(h)(ii) of the *Privacy Act*, RSC 1985, c P-21, (the Act) was not well-founded. The finding was delivered by a letter dated November 18, 2014 to the Applicant.

[2] It is common agreement between the parties that the Commissioner's investigation report is a non-binding finding and there is no recourse directly available to this Court under any section of the Act for judicial review of the report.

[3] The Applicant has brought an application pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, (the FC Act) asking this Court to provide the relief sought in the application.

[4] For the reasons that follow, this application is dismissed.

II. Background

[5] The Applicant is a member of the RCMP. At the time he filed the complaint he held the position of Staff Relations Representative (SRR) for "E" Division and he was Chair of one of the seven National SRR Health Committees.

[6] Under section 8 of the Act, personal information under the control of a government institution shall not be disclosed without the consent of the individual to whom it relates except if it falls within one or more of the various subsections. In this case it is paragraph 8(2)(d) that is applicable. It permits disclosure "to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada."

[7] In 2011, a protocol was developed by the RCMP and the Department of Justice (DOJ) establishing a process by which personal medical information of RCMP members could be disclosed to DOJ under the provisions of subparagraph 8(2)(d) of the Act for use in legal proceedings involving the Crown or the Government of Canada (the Protocol). The Protocol is

entitled "Protocol Concerning the Disclosure of Medical Information for the Purposes of Litigation involving the Attorney General".

[8] Under the Protocol, all requests from DOJ for the disclosure of medical information will be made in writing and addressed to the Director General of the Occupational Health and Safety Branch of the RCMP (DGOHSB). The request is to indicate there is a claim against the Crown and the information is sought pursuant to subparagraph 8(2)(d) of the Act. The DGOHSB will make a written request to the appropriate Human Resource Officer of the RCMP who will in turn request a medical professional engaged by the RCMP to provide the information in a sealed envelope. The sealed envelope will then travel back up the chain ending at DOJ.

[9] Prior to April 1, 2013, the RCMP was self-insured for all health costs of regular members. They acquired much more personal medical information about members and their families than would otherwise be the case. They maintain two sorts of medical files, one called "comprehensive" and the other called "occupational". In 2004, there was apparently a movement to retain only "occupational" medical files but, as of the date of hearing, there was no RCMP-wide directive and some divisions still hold "comprehensive" medical files. The evidence is that much of the information in the files has nothing to do with service in the RCMP. They also contain medical information about members' families who received health benefits through the RCMP.

[10] No personal information about the Applicant is at issue in this case nor is the Applicant involved in litigation with the Crown in right of Canada or the Government of Canada. The Applicant has brought this application because he is concerned about the privacy implications of

the Protocol. He first learned of the Protocol through his involvement with the National SRR Health Committee.

[11] The Commissioner investigated the complaint, receiving written representations from the complainant and from the RCMP. He found that the wording of paragraph 8(2)(d) "allows for very broad interpretation". In that respect, he decided that as long as the two criteria found in the Act – disclosure to the Attorney General, for use in legal proceedings involving either the Crown in right of Canada or the Government of Canada – are met, the government institution (the RCMP in this case) is authorized to disclose the personal information without consent.

[12] The Commissioner made one finding and one recommendation. He found the Protocol is consistent with the wording of paragraph 8(2)(d) of the Act and the complaint is considered not well-founded. He then recommended that if the Protocol is revised it include a requirement for DOJ to return any personal information to the RCMP that it considers is not relevant to the proceedings.

[13] There is no evidence before the Court that the Protocol has yet been used. The Commissioner indicates he was advised that a revised version of the Protocol has been drafted but not implemented as of the date of his report.

A. *The Protocol*

[14] In 2011, the RCMP and the Department of Justice (DOJ) developed the Protocol to handle the disclosure of medical information from the RCMP to the DOJ. The full Protocol, which is quite short and is composed of a Foreword and the Protocol itself, is contained in Annex "A". The Protocol section states:

> All requests from the Department of Justice Canada (DOJ) for the disclosure of medical information will be made in writing and addressed to the Director General of the Occupational Health and Safety Branch of the RCMP;
>
> The request will indicate that there is a claim against the Crown or the Government of Canada by an employee or former employee of the RCMP and indicate that it is being sought pursuant to paragraph 8 (2) (d) of the Privacy Act;
>
> Once received, the Director General of the Occupational Health and Safety Branch of the RCMP will make a written request to the Human Resource Officer (HRO) in the region where the information is located.
>
> The Human Resource Officer will in turn request that a medical professional engage [sic] by the RCMP provide a copy of this information to him/her in a sealed package;
>
> The HRO will thereafter provide the sealed, copied material to the Director General Occupational Health and Safety Branch; and
>
> The Director General Occupational Health and Safety Branch will provide that information to DOJ.

B. *The Complaint*

[15] The Protocol came to the attention of the Applicant through his involvement with the National SSR Health Committee of the RCMP. In his affidavit sworn on February 10, 2015, the Applicant states the following reason for filing his complaint:

> I was concerned about the privacy implications of this Protocol. Therefore, through counsel, I filed a complaint with the Privacy Commissioner under paragraph 29(1)(h) of the *Privacy Act*.

[16] The complaint was made under subparagraph 29(1)(h)(ii) of the Act, which deals with use or disclosure of personal information under the control of a government institution. The Applicant says the terms of the Protocol do not meet the requirements of paragraph 8(2)(d) of the

Act. Briefly, the Applicant alleges the Protocol violates paragraph 8(2)(d) of the Act in five ways in that it:

i. improperly fetters discretion,
ii. contains no limits on the types of legal proceedings,
iii. does not require notice to the affected person,
iv. contains no safeguards to the personal information being disclosed, and
v. does not require DOJ to identify the purpose for the disclosure.

[17] The Complaint was filed on March 21, 2013. When the Complaint was filed, counsel for the Applicant attached a detailed five-page explanation outlining the nature of the medical information held by the RCMP and referred to a variety of jurisprudence in support of his position. He explained his reasons for believing that each of the five problems he identified with the Protocol were correct. He attached some directives or policies of the Treasury Board concerning inter-departmental disclosure of personal information. He acknowledged they were not binding on the Commissioner but may be relevant as an interpretive tool or as a statement of best practices.

(1) The Investigation

[18] On June 13, 2013, the Senior Privacy Investigator wrote to the Applicant acknowledging the Complaint. He indicated there were four allegations that the Protocol does not meet the requirements of paragraph 8(2)(d). He invited the Applicant to make representations at any time prior to completion of the investigation and provide any additional information or comments he felt were relevant to the Complaint. The Investigator did not include in his summary of the complaint the Applicant's third allegation that the Protocol is silent about measures to safeguard personal information. That omission has not been raised as an issue in this judicial review.

[19] Counsel for the Applicant wrote to the Investigator on June 18, 2013 to indicate there was no additional information to add at that time but that he would like to receive a copy of the RCMP's written submissions in order that he could reply to them. In an email dated June 18, 2013 the Investigator indicated representations made by either party received during the investigation were confidential by virtue of section 33 of the Act and could not be shared.

[20] On April 14, 2014, the Investigator by email asked whether the Applicant had any specific examples of personal medical information being shared with DOJ that was not relevant to a legal proceeding and whether the Applicant thought DOJ or the RCMP are to determine relevance to the legal proceeding for which the information has been requested.

[21] On May 8, 2014, counsel for the Applicant indicated there might be an RCMP member whose personal information had been provided by the RCMP to DOJ as part of a legal matter but, ultimately, it was determined that the member was engaged in civil proceedings to deal with it. In response to a question from the Investigator the Applicant indicated he thought both DOJ and the RCMP should determine the relevance of any information requested. He felt DOJ should only request personal medical information if they considered it relevant to the legal proceeding and the RCMP should only release the medical information if they considered it relevant to the legal proceeding. He stated that independent exercise of discretion was required by subsection 8(2) of the Act because of the use of the words "may be disclosed".

[22] The Applicant also submitted that DOJ should return any personal medical information that was disclosed by the RCMP but was not relevant to the legal proceeding. I note that submission was accepted by the Commissioner and is the sole recommendation made in the Report of Findings (Finding).

[23] The RCMP made submissions on September 19, 2013. They note that "responsibility for disclosure is clearly placed with the Director General, Occupational Health & Safety Branch", the request must be in writing, and it must indicate there is a specific claim against the Crown by an employee or former employee of the RCMP. Any requests must also state the information is sought pursuant to paragraph 8(2)(d) of the Act.

[24] The RCMP notes the wording of the Act stipulates, without limitation or restriction, that information can be disclosed to the Attorney General of Canada for use in legal proceedings. They respond to each of the Applicant's specific complaints essentially relying on the wording of the disclosure provision in the Act and the requirements in the Protocol that the request be in writing, that it identify certain matters, and be handled by certain people.

[25] There were no further submissions or representations other than the above and a few telephone calls, the contents of which are unknown.

[26] The Finding was released November 18, 2014.

(2) The Finding

[27] The Commissioner's Report of Findings outlined the Complaint and provided a summary of the investigation as well as the arguments made by the parties under each of the four areas considered. He then noted that it was necessary to consider sections 3 and 8 of the Act to make his determination and that the Protocol deals with the disclosure of personal medical information.

[28] I will outline briefly each of the four areas considered by the Commissioner and his reasons for finding that the Complaint was not well-founded.

(a) *Improper Fettering of Discretion*

[29] The Commissioner reviewed the Applicant's position that his reading of the Protocol leads him to believe disclosure will happen automatically and there is no ability of the RCMP to elect not to disclose, but that the provisions of the Act require the exercise of discretion. That exercise cannot be fettered in advance and must be considered with each individual request while reserving the right to refuse a request. He also noted the RCMP's position that disclosure under the Protocol is consistent with the wording of the Act as it contains no limitations or restrictions but stipulates information can be disclosed to the Attorney General of Canada for use in legal proceedings.

[30] With respect to the Complaint, the Commissioner found paragraph 8(2)(d) of the Act allows for very broad interpretation and the government institution's role is to ensure the objective criteria outlined in the paragraph are met before disclosing personal information without consent. The criteria are that disclosure be made to the Attorney General of Canada and it must be for the use in legal proceedings involving the Crown in right of Canada or the Government of Canada.

[31] The Commissioner found "[o]nce these two conditions are met, the government institution is authorized to disclose personal information without consent." He went on to find use of the word "may" did not require the exercise of discretion on a case-by-case basis as it was simply empowering the RCMP to make disclosure it would not otherwise be authorized to make.

(b) *No Limit on the Types of Legal Proceedings/Relevance to a Legal Proceeding*

[32] The Commissioner identified the Applicant's concern that there was no limit on the type of legal proceeding for which medical information may be disclosed and that he raises an issue of relevance to the proceeding for which the information is sought. The Applicant notes there is no requirement in the Protocol that a detailed explanation be provided by DOJ of the relevance and necessity of the information being requested. Similarly there are no safeguards to ensure information is going to be used for defending the claims as opposed to prosecuting claims against RCMP members. The Applicant hypothesizes DOJ could request a member's medical information for the purpose of a judicial review proceeding related to a grievance over a term or condition of their employment such as overtime pay or travel allowance.

[33] The Commissioner notes the RCMP position that the Protocol requires any request by DOJ cite the specific claim against the Crown or Government of Canada.

[34] In his Finding, the Commissioner notes nothing in the Protocol precludes the RCMP from questioning the relevance of the request and his position is that the relevance is best determined by DOJ who is subject to the requirements of the Act. The Commissioner also notes the Protocol clearly applies to claims against the Crown, not any initiated by the Crown.

(c) *No Requirement for Notice to the Affected Party*

[35] The third aspect to the Complaint considered by the Commissioner was the Applicant's argument that any disclosure of personal information should not be done without first notifying the affected parties. The Applicant cites *Gordon v Canada*, 2007 FC 253, to say a person must be informed when their personal information has been disclosed under paragraph 8(2)(d).

[36] In reply, the RCMP simply offered their opinion there is no such requirement in the wording of paragraph 8(2)(d) but, if there is, then by initiating a legal proceeding against the Crown the person who does so implicitly agrees to the gathering of information relating to their claim.

[37] The Commissioner's analysis was that there is no general requirement under paragraph 8(2)(d) to provide notice and, in the absence of a requirement to seek consent, there is no requirement to notify an individual of an impending disclosure in any of the various exceptions enumerated in subsection 8(2). The Commissioner also noted the case referred to by the Applicant involved disclosure of personal taxpayer information under the *Income Tax Act*.

(d) *No Requirement for DOJ to Identify the Purpose of the Disclosure*

[38] The Commissioner noted this aspect of the Complaint was implicitly tied to the Applicant's position with respect to there being no limit on the types of legal proceedings for which disclosure might be sought. He then noted the RCMP position that the Protocol requires DOJ to cite the specific claim is against the Crown.

[39] Having related this part of the Complaint to the second allegation, the Commissioner simply found there was no specific evidence presented in the investigation that personal medical information of RCMP members has in fact been disclosed to DOJ that was not relevant to any particular legal proceeding for which it was sought.

[40] The ultimate conclusion by the Commissioner was that having reviewed the Protocol he found it to be consistent with the wording of paragraph 8(2)(d) of the Act therefore the Complaint was not well-founded. He did, however, make the recommendation that any personal

information that had been received by DOJ but not considered relevant to the proceedings be returned to the RCMP if the Protocol was being revised.

III. Relief Sought

[41] The Applicant alleges the Commissioner erred in law and/or came to an unreasonable conclusion in concluding that the Protocol meets the requirements of paragraph 8(2)(d) of the Act.

[42] As a result of this allegation the Applicant seeks a declaration that the Protocol violates paragraph 8(2)(d) of the Act. This is the same declaration he sought from the Commissioner.

[43] He also seeks:

i. an order setting aside the Commissioner's finding,
ii. an order remitting the matter to the Commissioner for determination of the appropriate remedy; and,
iii. costs.

IV. Issues

[44] The only issue identified by the Applicant is whether the Protocol violates the Act and, if it does then, what remedies are appropriate.

[45] The Respondent identifies three preliminary issues:

i. Does the Court have jurisdiction to determine this matter?
ii. Does the Applicant have standing to bring this application?
iii. What is the proper interpretive approach to the Act?

[46] If I determine I have jurisdiction to hear the matter and the Applicant has standing, the Respondent submits there are three additional issues:

i. What is the applicable standard of review?
ii. Was the Commissioner's finding that the Protocol was consistent with the Act reasonable?
iii. What remedies are available to the Applicant?

[47] As this is a judicial review my focus is on whether the Commissioner's Finding on the Complaint was reasonable. Within that analysis both the Protocol and the Act will necessarily be reviewed. The Protocol itself however is not the main focus of these proceedings, the Finding is the focus and the Protocol is a necessary ingredient in the analysis.

[48] Having considered the submissions as to the issues, I have determined that I will approach the analysis this way:

i. Is this application properly before the Court?
ii. If so, what is the standard of review?
iii. Can the Commissioner's Finding withstand Judicial Review?
iv. If not, should the discretionary relief sought by the Applicant be granted?

V. Is the Application Properly Before the Court?

[49] There is a very live issue between the parties as to whether the application is properly before the Court. They approach the issue from different perspectives. The areas to be canvassed in this respect include:

i. whether the Court has jurisdiction to consider the matter at all given the provisions of the Act and the FC Act; and, if so,
ii. whether the issue raised by the Applicant is justiciable; and, if so,
iii. whether the Applicant has standing to bring the application.

[50] With respect to the last two issues, they tend to overlap. In his book *Boundaries of Judicial Review: The Law of Justiciability in Canada, 2nd Edition* (Carswell, 2012), Dean Lorne Sossin explains the difference between them this way at page 10:

> Justiciability is often confused with standing. Standing addresses the question of *who* is entitled to bring proceedings to a court, while justiciability relates to *what* such people may ask a court to decide.

A. *Jurisdiction under the Legislation*

[51] The first question is whether I have jurisdiction to determine this application given the provisions of the Act and the FC Act.

[52] The grounds for the application are based on paragraphs 8(2)(a) and (d) and section 29 of the Act and paragraphs 18.1(4)(a) and (c) of the FC Act. The relevant portions of the Act and the FC Act are attached as Annex "B". The most important extracts appear below:

Privacy Act	*Loi sur la protection des renseignements personnels*
Disclosure of personal information	Communication des renseignements personnels
8 (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.	8 (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.
Where personal information may be disclosed	Cas d'autorisation
(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed	(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants:
(d) to the Attorney General of	

Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada;

Receipt and investigation of complaints

29(1) Subject to this Act, the Privacy Commissioner shall receive and investigate complaints

(h) in respect of any other matter relating to

(ii) the use or disclosure of personal information under the control of a government institution

d) communication au procureur général du Canada pour usage dans des poursuites judiciaires intéressant la Couronne du chef du Canada ou le gouvernement fédéral;

Réception des plaintes et enquêtes

29 (1) Sous réserve des autres dispositions de la présente loi, le Commissaire à la protection de la vie privée reçoit les plaintes et fait enquête sur les plaintes :

h) portant sur toute autre question relative à :

(ii) l'usage ou la communication des renseignements personnels qui relèvent d'une institution fédérale

Federal Courts Act

Definitions

2 (1) In this Act,

federal board, commission or other tribunal means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Loi sur les Cours fédérales

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

office fédéral Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la

Powers of Federal Court	demande.
(3) On an application for judicial review, the Federal Court may	Pouvoirs de la Cour fédérale
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
Grounds of review	b) déclarer nul ou illégal, ou annuler, ou infirmer et
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	Motifs
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
	a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer ;
	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

(1) The *Privacy Act*

[53] There is common agreement between the parties that the Commissioner's finding is non-binding. It does not fall under section 41 of the Act which provides for review in this Court

when an individual is refused access to their own personal information. That is the only section of the Act providing an avenue to this Court for an individual. Sections 42 and 43 provide avenues for the Commissioner to come to this Court in specified circumstances.

[54] The Respondent says that is the end of the matter. There is no jurisdiction to provide the requested relief.

[55] The Applicant says he is not relying on the Act. He seeks his remedy under the FC Act precisely because there is no avenue for review available to him under the Act.

(2) The FC Act

(a) *Federal Board, Commission or Tribunal*

[56] Under paragraph 18(1)(a) of the FC Act, this Court has exclusive jurisdiction to grant declaratory relief against any federal board, commission or other tribunal, and to hear and determine any application for such relief on an application for judicial review under section 18.1 other than those matters assigned directly to the Federal Court of Appeal by section 28, none of which are present.

[57] A "federal board, commission or other tribunal" is defined in section 2 of the FC Act as "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament".

[58] There is no question that the Privacy Commissioner exercises powers under federal legislation and is therefore a federal board or commission pursuant to section 2 of the FC Act. There is thus a *prima facie* case for jurisdiction. The second part of the analysis is whether the

Finding made by the Commissioner is a "decision or order" as specified in paragraphs 18.1(3)(b) and 18.1(4)(c) of the FC Act.

(b) *Decision or Order*

[59] Under paragraph 18.1(3)(b) of the FC Act, the Court, on an application for judicial review, has certain powers including the power to "quash, set aside or set aside and refer back a decision, order, act or proceeding of a federal board, commission or other tribunal." One of the questions is whether a non-binding finding can fall within the ambit of "a decision, order, act or proceeding"?

[60] I have no trouble in holding the Finding is "an act or proceeding" given the extensive jurisdiction of this Court and the Court of Appeal dealing with this question. For example, in *Air Canada v Toronto Port Authority et al*, 2011 FCA 347 at paragraph 24, [*Air Canada*] Mr. Justice Stratas summarized the various sections of the FC Act and its Rules addressing this topic as follows:

> [24] Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by "the matter in respect of which relief is sought." A "matter" that can be subject of judicial review includes not only a "decision or order," but any matter in respect of which a remedy may be available under section 18 of the Federal Courts Act: *Krause v. Canada*, 1999 CanLII 9338 (FCA), [1999] 2 F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing," a "decision," an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply to "applications for judicial review of administrative action," not just applications for judicial review of "decisions or orders": Rule 300 of the *Federal Courts Rules*.

[61] The Applicant says the Finding is justiciable because it is a "decision" within the meaning of paragraph 18.1(3)(b). However, that is not determinative of justiciability. It simply shows there is "an act or thing" in play. It does not address the quality or characteristics of the "act or thing". It simply moves us to the next two stages to be considered: justiciability and standing.

B. *Is there a Justiciable Issue before the Court?*

[62] As noted at paragraph 50 of these reasons, justiciability is concerned with what the court is being asked to decide. If the matter is not justiciable, there is no point in granting standing to an Applicant, as there is nothing to be determined by the Court.

[63] If the Finding is justiciable then the question turns to whether the Applicant is directly affected and thereby has standing. I pause to note the validity of subparagraph 8(2)(d) of the Act is not in issue in this application for judicial review.

[64] The focus of the parties in their arguments was on the non-binding nature of the Finding and whether the Applicant was directly affected by it as well as whether there is a serious issue to review. Without doubt these arguments overlap the areas of justiciability and standing. I will do my best to differentiate them but, in this case, I believe nothing in particular turns on how the arguments are categorized.

(1) Positions of the Parties

[65] Justiciability deals with whether it is appropriate for the Court to decide a particular issue. This is done by looking at what is placed before the Court for adjudication. The Notice of

Application, filed December 19, 2014, describes what I am asked to review. It is clearly framed as follows:

> This is an application for judicial review of the decision of the Privacy Commissioner of Canada ("Privacy Commissioner") concluding that a complaint filed by the Applicant was not "well-founded", dated November 18, 2014 but received on November 21, 2014.

[66] Technically, the Protocol is not being reviewed by me other than within the context of whether the Finding that the Complaint was not well founded can stand.

[67] The Respondent says that as the Finding is a non-binding opinion there is no consequence at all so there is nothing to review. Relying on *Air Canada* the Respondent submits that to be amenable to judicial review the Finding must affect the rights of the Applicant or there must be legal consequences to him.

[68] The Respondent relies on, amongst others, the Court of Appeal decision in *Democracy Watch v Conflict of Interest and Ethics Commissioner*, 2009 FCA 15. In that case, a non-binding letter from the Conflict of Interest and Ethics Commissioner was held not to be reviewable under the legislation as it was not a decision or order. The Court also found at paragraph 10 that "[w]here administrative action does not affect an Applicant's rights or carry legal consequences, it is not amenable to judicial review."

[69] The Applicant agrees the Finding is non-binding but distinguishes the various cases relied upon by the Respondent based on the facts. The Applicant puts forward his own cases to show non-binding opinions are in fact reviewable.

[70] The Applicant asks me to read the decision of the Federal Court of Appeal in *Morneault v Canada (Attorney General)*, [2001] 1 FCR 30 (FCA), [*Morneault*] as standing for the proposition that "if the decision has an impact on a person it is a reviewable decision". He says privacy rights are important and he is impacted in that his personal privacy rights are at risk of being improperly disclosed because the Protocol does not sufficiently protect those rights.

[71] The Applicant also referred me to *Moumdjian v Canada (Security Intelligence Review Committee*, [1999] 4 FCR 624, [*Moumdjian*], which is a case dealing with deportation of a landed immigrant on the basis that there were reasonable grounds to believe he was likely to engage in acts of violence that would endanger the lives or safety of persons in Canada. In that instance the Court of Appeal found there was jurisdiction to hear the application although the SIRC "statement of circumstances summarizing allegations" upon which the deportation was founded was not a "decision or order".

(2) Analysis

[72] Mr. Justice Stratas in *Air Canada* summarizes the considerations in determining whether a matter is reviewable (justiciable) at paragraphs 28-29:

> [28] The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review.
>
> [29] One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects.

[73] This summary is consistent with the cases the Applicant relies upon. *Morneault* dealt with a commission of inquiry struck under the *Inquiries Act* to investigate and make findings with respect to the deployment of Canadian Forces to Somalia in 1992. After the commission

issued their report the commanding officer applied to quash various findings on the grounds of lack of procedural fairness and absence of evidentiary support. In determining that the commission report was reviewable, the Court of Appeal relied upon paragraph 18.1(4)(b) of the FC Act dealing with procedural fairness and natural justice. They found that although the report was a non-binding opinion and was not strictly a decision or order, serious harm might be caused to the complainant's reputation by findings that lacked support in the record (see paragraphs 41, 42, and 45).

[74] In *Moumdjian*, the Court of Appeal found jurisdiction to review the SIRC statement also on the basis that there was a serious issue. The Court held at paragraph 23 that:

> [23] In conclusion, I am of the view that this Court possesses the requisite jurisdiction to hear the applicant's application for judicial review of the SIRC decision. The jurisprudence reveals that the term "order or decision" has no fixed or precise meaning but, rather, depends upon the statutory context in which the advisory decision is made, having regard to the effect which such decision has on the rights and liberties of those seeking judicial review. (my emphasis)

[75] In both *Morneault* and *Moumdjian*, the underlying reason for assuming jurisdiction despite the presence of a non-binding report or statement was the level of serious harm occasioned by the matter being reviewed. In *Morneault*, the court was concerned with the serious harm to Lt. Col. Morneault's reputation, resulting from the contents of the report of the inquiry particularly if there was a lack of support in the record for certain findings. In *Moumdjian*, the serious harm was deportation from Canada because of the SIRC statement of allegations.

[76] There are three distinguishing characteristics in *Morneault* and *Moumdjian* that are not present in this case. Firstly, both Lt. Col. Morneault and Mr. Moumdjian were personally the

subject of a specific finding made about them. Secondly, those findings were made by administrative bodies that acted more like a court in that they heard evidence over an extended period of time and the complainant's were active participants in the proceedings leading to the determinations they were challenging. Thirdly, there was a magnitude of harm, serious harm, flowing directly to the complainants as a result of the findings being challenged. There was cause and effect. In one case personal reputation was at stake and in the other case the ability to remain living in Canada without being deported was at risk. In *Morneault*, there was also an issue of procedural fairness.

[77] There is no allegation of procedural unfairness with respect to the Finding.

[78] The investigation leading to the Finding involves only written submissions from the parties. There was no hearing, no witnesses, just the written submissions. Under the Act, the Applicant was not even permitted to receive a copy of the submissions made by the RCMP. The trappings of a Court proceeding are absent in this case.

[79] The Commissioner is not an adjudicator despite being "like an Ombudsman", notwithstanding the "quasi-constitutional" origins of the Act as determined by the Supreme Court of Canada in *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44. The function and role of the Commissioner is outlined at paragraph 20:

> The Privacy Commissioner is an officer of Parliament who carries out "impartial, independent and non-partisan investigations": *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006] 1 S.C.R. 441, 2006 SCC 13 (CanLII), at para. 33. She is an administrative investigator not an adjudicator.
>
> (internal citation omitted) (my emphasis)

[80] In terms of serious harm, the Applicant submits, I agree, and the Act and jurisprudence confirms that privacy rights are very important. Matters dealing with privacy rights are therefore also very important. But consideration of the importance alone is not enough – there needs to be some sort of harm occasioned to the Applicant by the Finding in order to be justiciable. The Applicant's personal privacy rights have not been affected by the Finding. He himself notes he has "concerns" about the Protocol but he does not allege any magnitude of harm has occurred, to him or to anyone, as a result of either the Finding or the Protocol. The Finding simply reviews the Protocol and determines it does not violate the Act. The Applicant personally has not been caused any prejudicial effect by the Finding. It is also true that no one has suffered prejudicial effects as a result of the Finding.

[81] It does not escape me that there is a "chicken and egg" problem in that the Applicant's complaint is about the Protocol. The Protocol is not being judicially reviewed, but it does form the basis of the issues underlying this application for judicial review. If however the Finding cannot stand, the Protocol could apply to the Applicant if he engages in legal proceedings against the government. That is the reason for his Complaint to the Commissioner.

[82] The problem with this "chicken and egg" situation is that any harm that might occur to the Applicant or others as a result of the future use of the Protocol is purely speculative and entirely hypothetical. At this time, no solid factual foundation involving improper release of medical information has been put forward for analysis. There is no factual basis upon which the possible harm resulting from the Protocol can be identified, assessed, or evaluated. Additionally, as the Commissioner stated in the Finding, DOJ is subject to the Act. The RCMP is also subject to the Act. For the Protocol to cause prejudicial effect or serious harm to the Applicant or others

he would need to be involved in legal proceedings with the Crown in right of Canada or the Government of Canada and at least one or possibly both of these government institutions would have to violate the Act. At this stage, in this judicial review, and on these facts, the matter is not ripe for determination.

[83] On considering all of the foregoing, the subject matter of the Finding, and the cases cited by the parties in this matter, it is my determination that the Finding does not rise to the level of triggering legal rights enabling the Applicant to bring this application for judicial review.

[84] Although this determination is sufficient to dispose of this application, I will continue to address the issues raised by the parties both in the event that I am subsequently found to be incorrect as to justiciability and as this is a case of first impression.

C. *Standing to bring the Application*

[85] If this matter is in fact justiciable then standing is the next issue to address. Standing looks at the qualities of the Applicant rather than the nature of the matter under review. Under subsection 18.1(1) of the FC Act the Applicant must be *directly affected* in order to bring an application for judicial review. Being directly affected is therefore a condition of qualifying or, having standing, to bring an application for judicial review in this Court.

(1) Positions of the Parties

[86] The Applicant submits he comes within subsection 18.1(1) as being directly affected because he is a member of the RCMP and the Protocol reviewed in the Finding deals with all members of the RCMP. He also submits that if he has to wait until the Protocol is used and he is

engaged in litigation with his employer or another government body, it might be too late. Improper disclosure may have been made already.

[87] In support of the foregoing proposition the Applicant relies upon the Court of Appeal decision in *Moresby Explorers Ltd v Canada (Attorney General)*, 2006 FCA 144 [*Moresby*]. There the challenge was brought against a decision made by a federal park superintendent to allocate passenger tourist quotas. The applicant claimed the underlying policy that capped operators to a yearly total of 2,500 user-days/nights was *ultra vires* as a violation of his section 15 *Charter* rights. The respondent claimed the applicant had no status to challenge the policy because he could not show the policy had been applied against him in an adverse manner as his quota of 2,372 user-day/nights had been properly calculated.

[88] The Court of Appeal looked at whether the Applicant was directly affected and determined it was not necessary that he wait for that impact. They held at paragraphs 16 and 17:

> [16] . . .The appellants are clearly within the intendment of the Haida Allocation Policy. They do not have to wait until it causes them a loss to challenge it on jurisdictional grounds.
>
> [17] Standing is a device used by the courts to discourage litigation by officious inter-meddlers. It is not intended to be a pre-emptive determination that a litigant has no valid cause of action. There is a distinction to be drawn between one's entitlement to a remedy and one's right to raise a justiciable issue.

[89] The Applicant submits that given the decision in *Moresby*, being a *potential object* of the Protocol is sufficient. He says that being directly affected is not a requirement in the usual sense of the word "directly" and the Applicant does not have to wait until he is actually affected by the Protocol.

[90] The Applicant also put forward a position that amounts to a claim for standing as a public interest litigant saying that as he is a member of the RCMP and the Protocol deals with release of medical information held by the RCMP, therefore he has a sufficient interest in the Protocol and hence in the Finding to be granted standing as a public interest litigant.

[91] Finally, the Applicant says he is entitled to standing *because he is a party* in that he filed the Complaint that is the subject of this judicial review. Counsel candidly stated he could not find a case that puts it as starkly as the authority upon which he relies being the following passage from Brown and Evans in *Judicial Review of Administrative Action in Canada* (Carswell, May 2015) found at 4:3431:

> Parties to an administrative proceeding, including those granted standing at the hearing, are persons affected or aggrieved by any legal error committed by the decision-maker in those proceedings, and accordingly, they are entitled to seek judicial review.

[92] The Respondent's position is that the Applicant is bringing this application for judicial review as a way to attack the Protocol itself because he has no standing to challenge it directly. They say the Applicant has no private interest standing because he is not directly affected and he has no public interest standing as he is the equivalent of a busybody.

(2) Analysis

[93] In his ground-breaking book *Locus Standi: A Commentary on the Law of Standing in Canada*, Thomas A. Cromwell, as he then was, (Carswell, 1986) defines standing at page 7 independently of the interest of the person seeking it:

> The term standing, as used in the remainder of this book, means entitlement to seek judicial relief apart from questions of substantive merits and the legal capacity of the plaintiff.

[94] I find that I am unable to accept the last proposition of the Applicant's, that he is entitled to standing because he is a party by virtue of his initiating the complaint to the Commissioner. The Applicant is saying he is entitled to standing or, as stated above, to seek judicial relief, simply because he filed a complaint. Under subsection 29(1) of the Act, the Commissioner has no option but to accept the Complaint and to investigate once it is submitted in writing (as required by section 30) provided that at least one of the enumerated grounds in subsection 29(1) is the subject of the complaint. The "act" of becoming a party is entirely passive and one-sided as an individual simply files a complaint. To determine whether that is sufficient to establish standing I turn to the above definition in *Locus Standi* and ask "is the Applicant entitled to seek judicial relief?" In subsection 18.1(1) of the FC Act, being a party is not sufficient *in and of itself* to seek judicial relief. The requirement is that the person seeking relief be *directly affected by the matter in which relief is being sought*. Here, relief is being sought against the Finding.

[95] The Applicant is directly affected by the Finding in that his complaint was dealt with and has been found to be not well-founded. As such, if this matter had been found to be justiciable, I would accord the Applicant standing on that basis.

[96] Although it is not directly under review, I will also address the Applicant's position that he is directly affected by the Protocol. The Protocol is a procedural document. It adds an administrative process to create the mechanism by which information may be delivered by the RCMP to DOJ further to paragraph 8(2)(d) of the Act. The Applicant is not a party to it. No current legal rights of the Applicant are added, subtracted or otherwise affected by the Protocol. Unless in the future he is involved in legal proceedings with the Crown in right of Canada or the

Government of Canada *and* this Protocol is in place at that time, he will never be affected by the Protocol. That is too tenuous a tie to be considered to be "directly affected".

[97] If, contrary to my decision, the Finding is justiciable then the Applicant would be accorded standing as he is the complainant. It is not necessary to address his arguments of public interest standing.

VI. Standard of Review

[98] As stated, in the event it is subsequently determined that I am not correct in determining there is no justiciable issue, I will determine whether the Finding can withstand judicial review. For that purpose it is necessary to establish the standard of review.

[99] The Commissioner was interpreting his "home statute". If there is jurisdiction to review the Finding, the standard of review presumptively is reasonableness, see *Tervita Corp v Canada (Commissioner of Competition*), 2015 SCC 3 at paragraph 35.

[100] Both the Applicant and Respondent agree this is the appropriate standard and there are no grounds to rebut the presumption. I agree with that position and will proceed on that basis.

[101] Reasonableness is to be determined by reference to the reasons and outcome. The Court should only intervene if the Finding falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" while "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process." See *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*].

[102] I am also mindful that *Dunsmuir* at paragraph 49 elaborated upon what deference to the decision-maker involves: "deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers" given their expertise and the different roles played by the courts and administrative bodies.

[103] The Applicant in his written submissions acknowledges the Privacy Commissioner is an expert on the Act and best privacy practices. He states at paragraph 19:

> …If, as submitted below, the Privacy Commissioner made a reviewable error in interpreting the *Privacy Act*, the parties should still have the benefit of the Privacy Commissioner's recommendations on how to correct the RCMP Protocol. If the Applicant is successful in this application, and if the Privacy Commissioner makes a recommendation that the RCMP declines to follow, then further proceeding against the RCMP's decision not to follow the Privacy Commissioner's recommendation would be available. Until that time, the best way to respect the Privacy Commissioner's role and expertise is to review the Privacy Commissioner's interpretation of the *Privacy Act*, and then send the matter back to the Privacy Commissioner to make whatever recommendations he feels appropriate.

[104] That submission possibly indicates that the margin of appreciation to be accorded to the Commissioner is narrow, perhaps even to the point of correctness. For clarity, I find that as the Commissioner is an expert dealing with his home statute, which is his core competency, the margin of appreciation when he is conducting an investigation into compliance with the Act is not narrow. It may well be quite wide given the specialized area and position he occupies but I need not determine that given the findings that follow.

VII. Can the Commissioner's Finding withstand Judicial Review?

[105] The Applicant does not take issue with the fact that there is a Protocol but rather with the *details* of it given the nature of the medical information held by the RCMP. They say the

manner and circumstances in the Protocol allow personal medical information to be disclosed without sufficiently protecting the privacy rights of RCMP members. The five ways previously listed enumerate the Applicant's concerns. For ease of reference, I repeat them here. The Applicant says the Protocol violates paragraph 8(2)(d) of the Act in that it:

i. fetters discretion,
ii. contains no limits on the types of legal proceedings,
iii. does not require notice to the affected person,
iv. contains no safeguards to the personal information being disclosed, and
v. does not require DOJ to identify the purpose for the disclosure.

[106] The Applicant's general proposition is that the Finding is unreasonable because the Commissioner did not consider the well-established rule of statutory construction that when dealing with a quasi-Constitutional legislation such as the Act, exceptions and defences are to be narrowly or strictly construed. The interpretive approach to statutory interpretation they suggest is from *Bell ExpressVu Limited Partnership v Rex*, [2002] 2 SCR 559 at paragraph 26 [*Bell ExpressVu*]:

> Today there is only one principle or approach, namely, the words of an Act are to 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

[107] The Respondent's general proposition is that the words used in the Act are unequivocal and unambiguous so there is nothing requiring resolution and the Court can apply the ordinary meaning of the words which are to play a dominant role. In this respect they rely on *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 that is in agreement with *Bell ExpressVu* and at paragraph 10 adds that:

> …When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the

> interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role.

A. *If there is Discretion, has it been Fettered?*

(1) Positions of the Parties

[108] The Applicant and the Respondent disagree with respect to the meaning of the word "may" as it is used in subsection 8(2) that "personal information under the control of a government institution may be disclosed". They both agree it is permissive, however they disagree as to whether it imbues discretion or it is simply empowering.

[109] The Applicant says "may" as used in this section of the Act connotes discretion. It is permissive but not mandatory. Even if it is empowering, as alleged by the Respondent, he says that is not at odds with the exercise of discretion. To show it is permissive, the Applicant relies on the distinction drawn in section 11 of the *Interpretation Act*, RSC 1985, c I-21:

11. The expression "shall" is to be construed as imperative and the expression "may" as permissive.	11 L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions.

[110] The Applicant also says when discretion is given it must be applied in each case, on a case by case basis. Both the Applicant and the Respondent rely on the Court of Appeal reasons in *Ruby v Canada (Solicitor General)*, [2000] 3 FCR 589 (FCA) [*Ruby*] (overturned on unrelated grounds) to support their position. The Applicant relies on *Ruby* to say that the decision there to

permit a blanket non-disclosure policy when dealing with subsection 16(2) requests for disclosure was the exception, not the rule. He points to paragraph 67 where the Court of Appeal said:

> While generally administrative decision-makers should not fetter their discretion by adopting a general rule of always responding the same way to certain requests, this is one of those rare instances where the adoption of a general policy is itself a judicious exercise of discretion.

[111] Finally, on this question the Applicant concedes the RCMP must provide documents to DOJ for the purpose of disclosure in litigation but says the relevant paragraph for that disclosure is paragraph 8(2)(c) and that the purpose of paragraph 8(2)(d) is to permit the RCMP to disclose documents to DOJ that do not need to be produced in litigation.

[112] The Respondent says "may" is, in this instance, simply empowering. As subsection 8(1) establishes that personal information shall not be disclosed without consent it falls to subsection 8(2) to provide the exceptions to the non-disclosure. As a result, the Respondent says use of the word "may" simply indicates permission to make an otherwise prohibited disclosure. They also rely on the French version of the Act where instead of the words "may be disclosed" the Act says the disclosure of personal information "is authorized". They say that when combined with the Commissioner's interpretation and the deference owed to him in interpreting his home statute his conclusion that the word "may" in subsection 8(2) denotes a power, not discretion, is reasonable.

[113] In further support of their analysis, the Respondent relies on the Court of Appeal in *Ruby* at paragraphs 54 and 55:

> [54] It is true that the word "may" is often a signal that a margin of discretion is given to an administrative or judicial decision maker. The normal interpretation of this word occurring in a statutory provision is that there is an element of discretion. In many

> circumstances, the use of the "may" certainly has this effect. However, the word should not be treated like a ritualistic talisman. As Driedger has pointed out, statutory "[w]ords, when read by themselves in the abstract can hardly be said to have meanings".
>
> [55] When read in context, "may" can sometimes have functions other than to confer discretion. It is well known that in some cases, "may" can be read as "must", thereby rebutting the presumptive rule that "may" is permissive stated in section 11 of the *Interpretation Act*, R.S.C., 1985, c. I-21. That, however, is not all. Thorson J.A. drew attention to the fact that the word "may" can sometimes be no more than a signal from the legislator that an official or tribunal is being empowered to do something:
>
> > In some contexts, of course, the word "may" is neither necessarily permissive nor necessarily imperative, but rather merely empowering. Its function is to empower some person or authority to do something which, otherwise, that person or authority would be without any power to do.

[114] The Respondent finally submits that even if there is discretion the Protocol does not fetter it and the Applicant merely speculates that it does. There is no requirement that the information requested will be the same as the information delivered. Moreover, nothing prevents DOJ or the RCMP from questioning the other as the Protocol is a nonbinding framework to allow the RCMP to deal with requests for medical information from DOJ.

[115] In reply, the Appellant submits the facts of *Ruby* deal with subsection 16(2) of the Act so it is inapplicable as a precedent with respect to subsection 8(2) and, the wording is different than the wording under paragraph 8(2)(d). In subsection 16(2), the phrase used is “[t]he head of a government institution may but is not required to indicate under subsection (1) whether personal information exists.”

B. *Analysis*

[116] The Applicant relies on the passage in *Zurich Insurance Co v Ontario (Human Rights Commission)*, [1992] 2 SCR 321 [*Zurich*] to say a corollary to the purposive approach is that exceptions, while being narrowly construed, may be subject to a contrary intention expressed by the legislature. Mr. Justice Sopinka in *Zurich* found these comments by Mr. Justice Lamer in *Insurance Corporation of British Columbia v Heerspink*, [1982] 2 SCR 145 to be apposite:

> When the subject matter of the law is said to be the comprehensive statement of the "human rights" of the people . . . There legislature clearly indicated that they consider that law, and the values it endeavors to buttress and protect, are, save their constitutional law, is more important than all others. Therefore, *short of that legislature speaking to the contrary in express and unequivocal language in the Code* or in some other enactment, it is intended that the Code supersede all other laws when conflict arises.
>
> (Emphasis in *Zurich*)

[117] While *Zurich* dealt with human rights legislation it is equally applicable here to the Act. The Respondent states there is express and unequivocal language to the contrary. Unfortunately, both parties agree the word "may" is unequivocal – but to opposite effect.

[118] In *Ruby*, the Court of Appeal determined the words in subsection 16(2) of the Act connote an ability or power, not a discretion. The Court at paragraphs 57 and 58 said there were two reasons for that determination:

> [57] First, the words "may but is not required" are used in a context where access to personal information is the rule, denial of access is an exception which needs to be stated. These words show Parliament's intent to confer upon a government institution the power to refuse an applicant access to the very fact of the existence of personal information which otherwise it would be compelled to disclose if the enabling power were absent.
>
> [58] Second, the French version of subs. 16(2) makes Parliament's intent even clearer as the word "may" has been dropped. It simply

> states that the head of a government institution is not required to indicate whether personal information exists. It makes it clear that the institution, notwithstanding the general obligation to disclose, is empowered not to indicate the existence of personal information. As the institution is under no obligation or duty to reveal the fact of the existence of personal information, it has the right or power not to reveal that fact.

[119] The same context is found in subsection 8(2), just in reverse. In subsection 8(1) non-disclosure is the rule (absent consent) and subsection 8(2) permitting disclosure is the exception. With respect to the exception, paragraph 57 of *Ruby* says, in effect, that the exception shows Parliament's intent to confer the power to do something which otherwise one would be compelled not to do.

[120] In this case, subsection 8(2) of the French version says disclosure "is authorized". It does not use the word "may". To "authorize" someone means to "give legal authority", "to empower" (Black's Law Dictionary), or to "give official permission for or approval to" (Canadian Oxford Dictionary). As per paragraph 58 of *Ruby* I find the French version makes it entirely clear that the exception has been inserted to authorize/empower a disclosure which is otherwise prohibited.

[121] At paragraph 20 of the Finding, it is clear the Commissioner understood the Applicant's position that "may" requires exercise of discretion by the RCMP on a case-by-case basis. But, the Commissioner was of the view that:

> the permissible disclosure provisions in the act do not uniformly require the same degree of discretion. Some provisions, including paragraph 8(2)(d), simply empower a government institution to make a disclosure that it would not otherwise be authorized to make.

[122] It is not necessary in this instance to resolve with any finality whether subsection 8(2) imports discretion into the disclosure process it authorizes. As I have indicated, "is authorized"

equates to empowerment. I am reviewing the reasonableness of the interpretation of the legislation by the Commissioner. The standard of review is reasonableness, not correctness. Given the analysis in *Ruby* and the certainty of the French version of subsection 8(2) coupled with the clear, intelligible reasons provided by the Commissioner, I am not prepared to say the Commissioner's interpretation that subsection 8(2) simply empowers disclosure without requiring discretion, was unreasonable. I find it is certainly within the range of possible, acceptable outcomes.

C. *There are No Limits on the Types of Legal Proceedings Covered by the Protocol*

(1) Positions of the Parties

[123] The Applicant complains that the wording of the Protocol is mandatory in that it uses the word "will" throughout. For example, "the Human Resource Officer will in turn request" and "the Director General . . . will provide that information to DOJ". They say the Commissioner unreasonably disregarded the "need to know" principle when reviewing the absence of restrictions in the Protocol and not considering the militaristic model of the RCMP so that "will" means "must". He refers to a statement by the Saskatchewan Information and Privacy Commissioner that "the exercise of disclosure is always subject to the need-to-know rule and the data minimization rule" and points out that the British Columbia Information and Privacy Commissioner has also applied this principle to legislation equivalent to paragraph 8(2)(d). The Applicant says the Protocol gives the RCMP no discretion or ability to assess the DOJ's "need to know".

[124] The Respondent counters that the Protocol actually does limit the legal proceedings to those which have been commenced by an employee or former employee. They also

acknowledge the Commissioner's position that nothing prevents the RCMP from questioning the relevance of any request made by DOJ and that if DOJ did request irrelevant information they would be acting contrary to the Act, by which they are bound.

[125] The Respondent denies the "need to know" principle is applicable to the Act.

(2) Analysis

[126] The position of the Applicant disregards the fact that both the RCMP and the DOJ are subject to the Act at all times and the Protocol, a document setting out an administrative process, cannot and does not alter their respective obligations with respect to collection, use, and disclosure of personal information. The Protocol also cannot change the provisions of paragraph 8(2)(d), which given my finding that subsection 8(2) does not import discretion, contains a blanket authority to disclose personal information to the Attorney General "for use in legal proceedings" as long as they involve the Crown in right of Canada or the Government of Canada.

[127] The Commissioner in his Finding outlined the main arguments of the parties and noted the Act requires the disclosure must be for use in legal proceedings involving the Crown. He then noted the Protocol requires a statement to that effect and found that relevance is best determined by DOJ. Finally he also noted that there is a limit imposed in that the request is to indicate there is a claim against the Crown by a member or former member of the RCMP – not just any legal proceeding involving the RCMP.

[128] Once again, given the wording of paragraph 8(2)(d) imposes only that disclosure is made to the Attorney General and is for the purpose of use in legal proceedings involving the Crown, I

find the Commissioner's reasoning and conclusion on this aspect is entirely reasonable. This is particularly so as the Protocol does contain a limit that the member of the RCMP be the initiator of the proceeding. The Commissioner's conclusion on this second alleged defect is transparent, justified, intelligible and within the range of possible, acceptable outcomes.

D. *The Protocol does not Require Notice to the Affected Person*

(1) Positions of the Parties

[129] The Applicant cites *Gordon v Canada*, 2007 FC 253 [*Gordon*] to say this court ordered a taxpayer be given notice before his or her personal information was released from Canada Revenue Agency to DOJ under paragraph 8(2)(d) of the Act. They also refer to *R v Dowling*, 2011 ABQB 302 at paragraph 23 holding that "s.8 suggests an attempt to obtain consent . . . is a preferred first option" as well as the Treasury Board Directive on Privacy Practices, which requires when inter-governmental disclosure occurs "the privacy notice reflects, as appropriate, the disclosure." He also submits the requirement to take a broad and liberal interpretation of the Act means any interpretive doubt should be resolved in a way that advances the overall purpose of the legislation and requiring notice will serve the important purpose of preventing abuse of the RCMP's right to disclose under paragraph 8(2)(d) of the Act.

[130] The Respondent relies on the absence of a notice requirement in paragraph 8(2)(d) and also on *Ferenczy v MCI Medical Clinics* (2004), 70 OR (3d) 277 (Ont Sup Ct); affirmed [2005] OJ No 2076 (ONCA), [*Ferenczy*] that holds initiating legal proceedings implies consent to gathering of information relevant to such proceedings.

(2) Analysis

[131] The *Gordon* case involved an accounting firm suing Canada Revenue Agency in relation to the way CRA handled claims filed by the accounting firm for its clients. CRA was seeking the permission of the Court to release taxpayer information about the plaintiff's clients to DOJ to enable DOJ to prepare a defence. In addition to this being a proceeding under a different statute it also involved the release of personal information belonging to a non-party. This distinguishes it from the case at bar.

[132] In addition, Mr. Justice O'Keefe in *Gordon* at paragraph 18 determined that the relevant confidentiality provisions of the *Income Tax Act* (*ITA*) did not apply and that paragraphs 8(2)(b) and 8(2)(d) of the Act "clearly allow the release of the information in question." He then noted there is no requirement under the ITA that third parties be given notice that their tax information will be released and he opined that it did not mean some type of advance notice should not be given to the taxpayer. That opinion did not purport to address the provisions of the *Privacy Act*, it was clearly rendered to deal with an absence he discerned in the *ITA*. If Mr. Justice O'Keefe had felt the Act addressed the notice requirement he found was lacking under the *ITA* he would not need to have made the comment. His reference to paragraphs 8(2)(a) and 8(2)(b) was to confirm where the source of permission to disclose lay.

[133] *Ferenczy* is a ruling dealing with whether video surveillance gathered about a plaintiff in a medical malpractice suit could be entered into evidence without her consent given the enactment of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 (*PIPEDA*). At the time *PIPEDA* had been in force a scant five weeks. Mr. Justice Dawson of the Ontario Superior Court carefully reviewed various rules and the relevancy of the videotape to

the proceeding and then found that it was admissible for the limited purpose of challenging the plaintiff's credibility. With respect to *PIPEDA* he noted the video was made in a public place and was not a commercial activity. He then found at paragraph 31 the plaintiff "must know that by commencing action against a defendant, rights and obligations will be accorded to the parties to both prosecute and defend . . . the plaintiff has put the degree of injury to her hand . . . into issue. . ." and she "surely cannot be heard to say that [she] [does] not consent to the gathering of information as to . . . [the] injury." This is a useful observation that may apply here, but is not necessary given the language in paragraph 8(2)(d).

[134] The Commissioner found there was no general requirement under paragraph 8(2)(d) to provide notice. He looked at subsection 8(2), which provides numerous exceptions to the general requirement to seek consent and determined that, in the absence of the requirement to seek consent there is no requirement to notify an individual of any impending disclosure. He then added that *Gordon* involved disclosure under the *ITA*.

[135] I can find no fault with the Commissioner's reasoning and no persuasive case has been put forward by the Applicant that notice is required and should have been included in the Protocol.

[136] Accordingly, the Finding is reasonable with respect to the Commissioner's analysis and conclusion on this aspect of the complaint.

E. *The Protocol Contains No Safeguards for the Personal Information Disclosed*

(1) Analysis

[137] The Commissioner did not directly address this part of the Applicant's complaint but the Applicant notes the Commissioner presumably concluded the responsibility for safeguarding the personal information lay with DOJ. That is a reasonable assumption as the Commissioner had previously relied on the fact that both the RCMP and DOJ are bound by the Act and that relevance ought to be determined by DOJ.

[138] The Applicant contrasts that position with the Treasury Board directive to say that the disclosing organization must obtain assurances that the information is safeguarded by the recipient and, if such assurance is not forthcoming, refuse to disclose the personal information.

[139] The Respondent notes various safeguards are built into the Protocol although paragraph 8(2)(d) does not require them. These include the request being made in writing, the reason for the request indicating there is a claim against the Crown by an employee or former employee of the RCMP, reference to subparagraph 8(2)(d), the involvement of a senior official at the RCMP, and transfer of the information via a sealed package to DOJ who remains subject to the Act.

[140] As the Applicant acknowledged, the Treasury Board directives are non-binding. I observe they are also purely administrative and cannot alter the Act. I am satisfied the Commissioner took note of the safeguards in the Protocol and the omission to deal with them in his Finding in no way invalidates it or makes it unreasonable.

F. *DOJ is not Required to Identify the Purpose of the Disclosure*

[141] The Applicant links this ground to the first two (fettering of discretion and no limits on disclosure) to say that if there is discretion to refuse to disclose then the RCMP should refuse unless DOJ specifies the purpose as, without knowing the purpose, the RCMP cannot exercise its discretion.

[142] The Respondent re-iterates that the purpose under the Protocol is to obtain medical information for use by the Attorney General in a claim against the Crown in right of Canada or the Government of Canada brought by an employee or former employee of the RCMP.

[143] As I have determined the Commissioner's Finding that discretion is not a necessary element of the disclosure under subsection 8(2) is reasonable, it follows that the purpose in the Protocol is adequately stated since it meets the criteria established in the legislation empowering the disclosure.

VIII. Summary and Conclusion

[144] I have found the Applicant's request to set aside the non-binding Finding of the Commissioner made with respect to the non-binding Protocol entered into between the RCMP and the DOJ to operationalize the transfer of personal medical information from the RCMP to DOJ in accordance with the provisions of paragraph 8(2)(d) of the Act is not a justiciable matter.

[145] I have also found the Applicant is not directly affected by the Protocol, but he is directly affected by the Finding as he is the complainant. While I have some doubts as to whether that ought to qualify in and of itself given the compulsory requirement on the Commissioner to

investigate, I have resolved it in favour of the Applicant. As such he would have standing to bring the application if it had raised a justiciable issue.

[146] However, I have concluded that, in any event, the Finding is reviewable on a standard of reasonableness and it is reasonable.

[147] This application for judicial review is therefore dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. The parties may make submissions on costs within twenty days of the date of this decision.

"E. Susan Elliott"
Judge

ANNEX "A"

Protocol concerning the disclosure of medical information for the purposes of litigation involving the Attorney General of Canada

Foreword

Subsection 8 (2) of the *Privacy Act* provides for several instances whereby personal information may be disclosed without the consent of the individual to which the information relates. Of these, paragraph 8 (2) (d) specifically states that:

> *8 (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed*
>
> *(d) to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada;*

For the purposes of the *Privacy Act*, medical information is considered personal information and under the control of the RCMP, as a federal institution. Accordingly, and without restricting the RCMP's ability to apply any of the other exemptions contained at subsection 8 (2) of the *Act*, the following protocol will be adhered to when dealing with issues of disclosure of medical information for use in legal proceedings involving the Crown in right of Canada or the Government of Canada.

Protocol

All requests from the Department of Justice Canada (DOJ) for the disclosure of medical information will be made in writing and addressed to the Director General of the Occupational Health and Safety Branch of the RCMP;

The request will indicate that there is a claim against the Crown or the Government of Canada by an employee or former employee of the RCMP and indicate that it is being sought pursuant to paragraph 8 (2) (d) of the *Privacy Act*;

ANNEX "B"

Privacy Act

Disclosure of personal information

8 (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.

Where personal information may be disclosed

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;

(b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;

(c) for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information;

(d) to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada;

Receipt and investigation of complaints

29(1) Subject to this Act, the Privacy Commissioner shall receive and investigate complaints

Loi sur la protection des renseignements personnels

Communication des renseignements personnels

8 (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.

Note marginale :Cas d'autorisation

(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :

a) communication aux fins auxquelles ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins;

b) communication aux fins qui sont conformes avec les lois fédérales ou ceux de leurs règlements qui autorisent cette communication;

c) communication exigée par subpoena, mandat ou ordonnance d'un tribunal, d'une personne ou d'un organisme ayant le pouvoir de contraindre à la production de renseignements ou exigée par des règles de procédure se rapportant à la production de renseignements;

d) communication au procureur général du Canada pour usage dans des poursuites judiciaires intéressant la Couronne du chef du Canada ou le gouvernement fédéral;

Réception des plaintes et enquêtes

(a) from individuals who allege that personal information about themselves held by a government institution has been used or disclosed otherwise than in accordance with section 7 or 8;

(b) from individuals who have been refused access to personal information requested under subsection 12(1);

(c) from individuals who allege that they are not being accorded the rights to which they are entitled under subsection 12(2) or that corrections of personal information requested under paragraph 12(2)(a) are being refused without justification;

(d) from individuals who have requested access to personal information in respect of which a time limit has been extended pursuant to section 15 where they consider the extension unreasonable;

(e) from individuals who have not been given access to personal information in the official language requested by the individuals under subsection 17(2);

(e.1) from individuals who have not been given access to personal information in an alternative format pursuant to a request made under subsection 17(3);

(f) from individuals who have been required to pay a fee that they consider inappropriate;

(g) in respect of the index referred to in subsection 11(1); or

(h) in respect of any other matter relating to

(i) the collection, retention or disposal of personal information by a government institution,

(ii) the use or disclosure of personal information under the control of a

29 (1) Sous réserve des autres dispositions de la présente loi, le Commissaire à la protection de la vie privée reçoit les plaintes et fait enquête sur les plaintes :

a) déposées par des individus qui prétendent que des renseignements personnels les concernant et détenus par une institution fédérale ont été utilisés ou communiqués contrairement aux articles 7 ou 8;

b) déposées par des individus qui se sont vu refuser la communication de renseignements personnels, demandés en vertu du paragraphe 12(1);

c) déposées par des individus qui se prétendent lésés des droits que leur accorde le paragraphe 12(2) ou qui considèrent comme non fondé le refus d'effectuer les corrections demandées en vertu de l'alinéa 12(2)a);

d) déposées par des individus qui ont demandé des renseignements personnels dont les délais de communication ont été prorogés en vertu de l'article 15 et qui considèrent la prorogation comme abusive;

e) déposées par des individus qui n'ont pas reçu communication de renseignements personnels dans la langue officielle qu'ils ont demandée en vertu du paragraphe 17(2);

e.1) déposées par des individus qui n'ont pas reçu communication des renseignements personnels sur un support de substitution en application du paragraphe 17(3);

f) déposées par des individus qui considèrent comme contre-indiqué le versement exigé en vertu des règlements;

g) portant sur le répertoire visé au

government institution, or

(iii) requesting or obtaining access under subsection 12(1) to personal information.

paragraphe 11(1);

h) portant sur toute autre question relative à :

(i) la collecte, la conservation ou le retrait par une institution fédérale des renseignements personnels,

(ii) l'usage ou la communication des renseignements personnels qui relèvent d'une institution fédérale,

(iii) la demande ou l'obtention de renseignements personnels en vertu du paragraphe l2(1).

Federal Courts Act

Definitions

2 (1) In this Act,

…

federal board, commission or other tribunal means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867; (office fédéral)

…

Extraordinary remedies, federal tribunals

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or

Loi sur les Cours fédérales

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

…

office fédéral Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la Loi constitutionnelle de 1867. (federal board, commission or other tribunal)

…

Recours extraordinaires : offices fédéraux

18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en

writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Extraordinary remedies, members of Canadian Forces

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

Remedies to be obtained on application

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Time limitation

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada

première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

Recours extraordinaires : Forces canadiennes

(2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d'*habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*.

Exercice des recours

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Délai de présentation

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge

or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud

de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans

or perjured evidence; or

(f) acted in any other way that was contrary to law.

Defect in form or technical irregularity

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

Vice de forme

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

Mesures provisoires

18.2 La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	BRIAN SAUVE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
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APPEARANCES:

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