Federal Court  Cour fédérale

Date: 20100429

Docket: T-1040-09

Citation: 2010 FC 470

Ottawa, Ontario, April 29, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES

Applicant

and

MINISTER OF PUBLIC SAFETY CANADA and CORRECTIONAL SERVICE CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to section 41 of the *Privacy Act*, R.S.C. 1985, c. P-21 as amended (the "Act") for a review of the decision of the Correctional Services of Canada (CSC) wherein it refused to disclose to the applicant access to certain personal information regarding Ms. Ashley Smith, a 19 year old prisoner who committed suicide in her cell.

FACTS

Background facts

[2] Ms. Ashley Smith was imprisoned in New Brunswick's youth justice system at the age of 15. In custody, she committed a number of additional criminal offences and her sentence was extended. When she reached the age of majority (i.e. 18), she was transferred in October 2006 to New Brunswick's adult correctional system, and then to the custody of the federal prison system operated by the respondent.

[3] The respondent allegedly moved Ms. Smith several times among a number of penitentiaries, treatment facilities and hospitals across Canada until her death by suicide in her cell on October 19, 2007 at the Grand Valley Institution for Women in Kitchener, Ontario.

[4] During her incarceration, Ms. Smith alleged to the applicant, the Elizabeth Fry Society, that she was being subjected to improper treatment including alleged assaults from the staff, alleged inadequate living conditions, alleged lack of psychiatric care or assessment, and alleged frequent segregation and transfers.

[5] The applicant, the Canadian Association of Elizabeth Fry Societies, is an umbrella organization of 25 Elizabeth Fry Societies across Canada. The applicant is a non-profit organization committed to raising public awareness with respect to decreasing the number of criminalized and imprisoned women in Canada, promoting the decarceration of women presently in prison, and

increasing the availability of a publicly funded and community-based social system to care for women before they imprisoned.

[6] The respondent, the Correctional Services of Canada, is responsible for the care of imprisoned persons. Ms. Smith was in the custody and care of the respondent at the time she made the *Privacy Act* request which is the subject of this application.

Privacy Act request and subsequent denial

[7] Ms. Smith sought the assistance of the Elizabeth Fry Society. The Affidavit of Ms. Kim Pate sets out the interaction between the Elizabeth Fry Society and Ms. Smith from the initial contact. Ms. Pate is the Executive Director of the Canadian Association of Elizabeth Fry Societies (CAEFS) and a part-time professor at the University of Ottawa in the Faculty of Law.

[8] On May 31, 2007 Ms. Smith requested under the *Privacy Act* access to her personal records held by the respondent and consented to the release of her private CSC records to the Elizabeth Fry Society and Ms. Pate. The Consent for Disclosure of Personal Information Form states:

> *I hereby consent to the disclosure* by the Correctional Services of Canada of the personal information pertaining to myself which may be described as segregation, transfer, charges, and other information related of my prison term to the following individual(s) or organization(s) Kim Pate (CAEFS) and lawyer for the purpose of assisting me.
>
> [Emphasis added]

[9] Ms. Pate made the following specific request for information on Ashley's behalf on June 14, 2007, which was received on June 18, 2007:

> With respect to Ms. Ashley Smith, FPS #820435E (D.O.B. 29/01/88), please forward all information pertaining to:
>
> a. the terms of reference and investigation report regarding the allegations of staff assault of and by Ms. Smith;
> b. the various transfers of Ms. Smith to and from Nova, Pinel GVI,. St. Thomas;
> c. security classification and re-assessments, including information utilized from the youth system, police reports and court decisions;
> d. placement and retention of Ms. Smith in segregation, including segregation reviews;
> e. all incident reports, charge sheets, and decisions regarding institutional behavioural issues, including institutional preventive security reports, et cetara;
> f. psychological and psychiatric reports, assessments for decision;
> g. internal CSC memoranda, electronic and other correspondence regarding the management and/or treatment of Ms. Smith, including, but not limited to activity and log sheets pertaining to staff assessments of her ongoing behaviour, et cetera.

[10] On July 18, 2007 Ms. Ginette Pilon, a Senior Analyst of the CSC's Access to Information and Privacy Division, advised Ms. Pate that a 30-day extension beyond the statutory 30-day limit contained in section 14 of the *Privacy Act* would be required to process the request because meeting the original 30-day timeline would unreasonably interfere with the operations of the government institution. CSC did not disclose Ms. Smith's records at the conclusion of the 30 day extension, which was August 17, 2007.

[11] Ms. Smith sent a second consent and request for release of her information on September 24, 2007. The form was written and signed by an Executive Director of the Elizabeth Fry Society and witnessed by a CSC staff person because Ms. Smith not allowed writing utensils. The Release of Information Form states:

> I, Ashley Smith, hereby authorize CSC, to release to Kim Pate, CAEFS, the following information: All CSC, Police, Court, health records, reports et cetera, for the purpose(s) of assisting me. This release will be in effect from Sept 24/07 until Jan 30/09.

[12] Ms. Pate stated in her cross examination that the dates January 31, 2009 and January 30, 2009 were inserted into the consent and authorization forms respectively because those were the last days of Ms. Smith's sentence.

[13] Ms. Smith committed suicide on October 19, 2007, 123 days after the first request for records was received, 62 days after the last day of the 30-day extension.

[14] On May 23, 2008 counsel for the applicant contacted the CSC by email to inquire about the status of the outstanding request for records. On May 26, 2008 CSC sent out the following reply by email:

> Unfortunately, due to the incident that resulted in the death of this inmate on October 19, 2007, all files related to this individual are exempted in their entirety pursuant to section 22 and 26 of the *Privacy Act*.

Ms. Anne Rooke, Access to Information and Privacy Coordinator to the CSC reportedly instructed the author of this email.

[15] On the same day, May 26, 2008, CSC issued a short letter setting out the reasons for refusing to disclose the requested records:

> This is in response to your request for access to the personal information contained in documentation held by Correctional Services of Canada pertaining to Ashley Smith (deceased).
>
> Please note that the information has been exempted in its entirety pursuant to section 22 and 26 of the *Privacy Act*.
>
> You are entitled to file a complaint with the Office of the Privacy Commissioner of Canada concerning this request. Should you wish to exercise this right, you complaint should be forward to the Office of the Privacy Commissioner Place de Ville, Tower "B", 112 Kent Street, Ottawa, Ontario, K1A 1H3.

Report of the Privacy Commissioner of Canada

[16] The applicant filed a complaint against Ms. Rooke and CSC with the Privacy Commissioner on June 26, 2008.

[17] On May 15, 2009 the Privacy Commissioner determined that the complaint was well founded. The Commissioner held that the death of the individual did not vitiate their consent under the Act and that the CSC did not properly invoke the exemptions found in the Act. Part of the Commissioner's reasons are reproduced below for convenience:

> …
>
> 5. In order to determine the appropriateness of the application of section 26, our office needed to asses the validity of the consent upon the death of the individual providing the consent. *After careful consideration, our office concluded that the individual's death does not vitiate the consent provided to the Executive Director of the Canadian Association of Elizabeth Fry Societies.* Consequently, for CSC's purposes, the death of the individual was only relevant to the extent that it may have affected the exemptions CSC was entitled to rely on. As a result, we are of the view that CSC could not rely on the application of section 26 to deny access to the entire personal information requested.

> …
>
> 7. In this particular case, CSC advised the requester that the information requested was exempted in its entirety pursuant to section 22 of the Act without specifying the paragraph or paragraphs invoked to exempt the information requested. In the course of this investigation, we have reviewed the actions taken by the institution and its representations and concluded that CSC did not establish to our satisfaction that it properly invoked the provisions contained in section 22 to exempt the requested information in its entirety.
>
> [Emphasis added]

[18] The Commissioner elected not to apply to the Federal Court to order the release of Ms. Smith's records. However, the applicant applied to this Court to compel the release of Ms. Smith's records under the Act.

Evidence before the Court

[19] The evidence before this Court consists of an affidavit sworn on behalf of the applicant by Ms. Pate and the public and confidential affidavits by Mr. Nick Fabiano on behalf of the respondent. Both affiants were cross examined on their affidavits and exhibits. Mr. Fabiano was not cross examined on his confidential affidavit which attaches as an exhibit Ms. Smith's undisclosed records.

Ms. Pate's Affidavit and cross examination

[20] The affidavit dated July 16, 2009 by Ms. Kim Pate, the Executive Director of the Canadian Association of Elizabeth Fry Societies and a part-time professor at the University of Ottawa in the Faculty of Law deposes, *inter alia*:

a. the role of the applicant in assisting incarcerated women in Canada through direct action and advocacy;
b. allegations of mistreatment of Ms. Smith at the hands of CSC staff and Ms. Pate's personal observations of Ms. Smith during her visits;
c. on May 31, 2007 and September 24, 2007, Ms. Smith requested and consented to the release of her CSC records to the applicant and Ms. Pate;
d. on June 14, 2007 a request was sent to CSC for specific release of records;
e. the applicant has since commenced an application in the Federal Court to compel the release of Ms. Smith's records in order the understand "exactly what happened to Ashley, and to allow us to better assist other imprisoned women who are experiencing treatment similar to that to which Ashley was subjected, and to try to prevent similar treatment in the future".

Mr. Fabiono's Affidavit and cross examination

[21] The public affidavit dated August 28, 2009 by Mr. Nick Fabiano, the Director General, Rights, Redress and Resolution of CSC deposes:

a. on June 18, 2007 CSC received a request enclosing a copy of the Consent for Disclosure of Personal Information form for release of specific records belonging to Ms. Smith, ;
b. on July 18, 2007 the CSC's Access to Information Division (also known as the "ATIP Division") sent a notice of extension;

c. Ms. Smith died on October 19, 2007 before the ATIP Division completed a review of the documents in question;

d. Mr. Fabiano was advised by Ms. Anne Rooke, Director, Access to Information and Privacy at CSC that Ms. Smith's consent for disclosure of her records ceased to be valid upon her death and that all her files were exempted pursuant to section 22 and 26 of the Act:

The confidential personal records of Ms. Smith filed with the Court

[22] The respondent CSC filed the confidential personal records of Ms. Smith with the Court attached to the confidential affidavit dated August 28, 2009 by Mr. Nick Fabiano. The confidential affidavit does not provide any elaboration on the events that led to denial of the applicant's request for records. This affidavit attaches the personal records of the Ms. Smith, which I can describe in general, non-confidential terms as follows:

a. numerous assessments of Ashley Smith by CSC;

b. transfer records;

c. violent incident records in both CSC and provincial custody;

d. criminal code charge sheets;

e. at least one sentencing court transcript; and

f. security classification for Ms. Smith in the "Maximum" security risk category.

The records of Ms. Smith's personal information contain 291 pages, and end in June 2007. There are no records for the last few months before her suicide, or records following her suicide.

Evidence from cross-examination

[23] The following points emerged from Mr. Fabiano's cross-examination:

a. Ms. Anne Rooke, to whom Mr. Fabiano reports, made the decision to deny the requested disclosure of record;

b. Mr. Fabiano never reviewed Ms. Smith's requested records and has no knowledge of their contents;

c. Mr. Fabiano could not answer who made the decision not to meet the original or extended deadline for releasing Ms. Smith's records;

d. CSC has in the past disclosed the records of deceased inmates on a case by case basis;

e. the ongoing criminal investigation which was cited as a reason for exempting the records under section 22 of the Act had ended at the time of his affidavit; and

f. Ms. Rooke was not available to swear an affidavit at the time it was requested.

[24] At the conclusion of the cross examination counsel for the respondent undertook to provide the Court and the applicant with the respondent's current grounds for refusing to release Ms. Smith's information. The respondent's current position is as follows:

a. Section 26 of the Act is no longer relied on;

b. Section 22(1)(b) of the Act is relied upon as a ground for refusal; and

c. Section 3 of the Act and section 10 of the *Privacy Regulations* form the basis of the respondent's objection to the applicant's standing to bring this application.

Judicial notice of Criminal Code charges

[25] The Court was asked by the parties to take judicial notice of the fact that a Royal Canadian Mounted Police investigation was initiated with respect to Ms. Smith's death which led to Criminal Code charges of "criminal negligence causing death" against four CSC employees. This investigation was conducted in and around May 26, 2008. The Court was informed that those charges were later dismissed at the preliminary hearing stage.

Key dates and timelines

[26] The key dates and timelines with respect to this application are as follows:

a. request and consent for disclosure by Ms. Smith of her personal information was dated June 18, 2007;

b. the extension to the 30 day timeline for producing this personal information was made by the respondent on July 18, 2007;

c. the personal information was due from the respondent at the end of this extension, which was August 17, 2007. At that time, under the law, the respondent is deemed to have denied that the request and consent to produce the personal documents;

d. Ms. Smith and the applicant sent a second request for the release of her personal information on September 24, 2007 since the first request was not being complied with;

e. Ms. Smith committed suicide on October 19, 2007;

f. the decision of the respondent to deny the request for the disclosure was dated May 26, 2008; and

g. the date of the hearing before this Court was March 29, 2010.

LEGISLATION

[27] The purpose of the *Privacy Act* is set out at section 2:

2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.	2. La présente loi a pour objet de compléter la législation canadienne en matière de protection des renseignements personnels relevant des institutions fédérales et de droit d'accès des individus aux renseignements personnels qui les concernent.

[28] Section 3 of the Act defines "personal information" as follows:

3. "personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing, […] but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include […] (*m*) information about an individual who has been dead for more than twenty years;	3. « renseignements personnels » Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment : […] toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'article 19 de la *Loi sur l'accès à l'information*, les renseignements personnels ne comprennent pas les renseignements concernant : […] *m*) un individu décédé depuis plus de vingt ans.

[29] Section 8 of the Act sets out the circumstances where personal information shall be disclosed:

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.

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed
[…]
(*j*) to any person or body for research or statistical purposes if the head of the government institution
(i) is satisfied that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and
(ii) obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates;
[…]
(*m*) for any purpose where, in the opinion of the head of the institution,
(i) the public interest in disclosure clearly outweighs any invasion of privacy that

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.

(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :
[…]
j) communication à toute personne ou à tout organisme, pour des travaux de recherche ou de statistique, pourvu que soient réalisées les deux conditions suivantes :
(i) le responsable de l'institution est convaincu que les fins auxquelles les renseignements sont communiqués ne peuvent être normalement atteintes que si les renseignements sont donnés sous une forme qui permette d'identifier l'individu qu'ils concernent,

(ii) la personne ou l'organisme s'engagent par écrit auprès du responsable de l'institution à s'abstenir de toute communication ultérieure des renseignements tant que leur forme risque vraisemblablement de permettre l'identification de l'individu qu'ils concernent;

could result from the disclosure, or (ii) disclosure would clearly benefit the individual to whom the information relates.	[…] *m*) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution : (i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée, (ii) l'individu concerné en tirerait un avantage certain.

[30] Section 12 of the Act grants individuals the right of access to their personal information:

12. (1) Subject to this Act, every individual who is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* has a right to and shall, on request, be given access to (*a*) any personal information about the individual contained in a personal information bank; and (*b*) any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution. […]	12. (1) Sous réserve des autres dispositions de la présente loi, tout citoyen canadien et tout résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés* ont le droit de se faire communiquer sur demande : *a*) les renseignements personnels le concernant et versés dans un fichier de renseignements personnels; *b*) les autres renseignements personnels le concernant et relevant d'une institution fédérale, dans la mesure où il peut fournir sur leur localisation des indications suffisamment précises pour que l'institution fédérale puisse les retrouver sans problèmes sérieux. […]

[31] Section 14 of the Act requires the head of the government institution to acknowledge in writing receipt of a request for access to personal information within 30 days of the request being made and indicate whether access will be granted:

14. Where access to personal information is requested under subsection 12(1), the head of the government institution to which the request is made shall, subject to section 15, within thirty days after the request is received,	14. Le responsable de l'institution fédérale à qui est faite une demande de communication de renseignements personnels en vertu du paragraphe 12(1) est tenu, dans les trente jours suivant sa réception, sous réserve de l'article 15 :
(*a*) give written notice to the individual who made the request as to whether or not access to the information or a part thereof will be given; and	*a*) d'aviser par écrit la personne qui a fait la demande de ce qu'il sera donné ou non communication totale ou partielle des renseignements personnels;
(*b*) if access is to be given, give the individual who made the request access to the information or the part thereof.	*b*) le cas échéant, de procéder à la communication.

[32] Section 15 of the Act allows the head of a government institution to extend the time limit for complying with a request for access for a maximum of an additional 30 days:

15. The head of a government institution may extend the time limit set out in section 14 in respect of a request for	15. Le responsable d'une institution fédérale peut proroger le délai mentionné à l'article 14 :
(*a*) a maximum of thirty days if (i) meeting the original time limit would unreasonably interfere with the operations	*a*) d'une période maximale de trente jours dans les cas où : (i) l'observation du délai entraverait de façon sérieuse le

of the government institution, or (ii) consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit, or	fonctionnement de l'institution, (ii) les consultations nécessaires pour donner suite à la demande rendraient pratiquement impossible l'observation du délai;
(*b*) such period of time as is reasonable, if additional time is necessary for translation purposes or for the purposes of converting the personal information into an alternative format, by giving notice of the extension and the length of the extension to the individual who made the request within thirty days after the request is received, which notice shall contain a statement that the individual has a right to make a complaint to the Privacy Commissioner about the extension.	*b*) d'une période qui peut se justifier dans les cas de traduction ou dans les cas de transfert sur support de substitution. Dans l'un ou l'autre de ces cas, le responsable de l'institution fédérale envoie à la personne qui a fait la demande, dans les trente jours suivant sa réception, un avis de prorogation de délai en lui faisant part du nouveau délai ainsi que de son droit de déposer une plainte à ce propos auprès du Commissaire à la protection de la vie privée.

[33] Subsection 16(3) of the Act deems the government institution to have refused the request for disclosure following the expiry of the time limits under the Act:

16(3) Where the head of a government institution fails to give access to any personal information requested under subsection 12(1) within the time limits set out in this Act, the head of the institution shall, for the purposes of this Act, be deemed to have refused to give access.	16(3) Le défaut de communication de renseignements personnels demandés en vertu du paragraphe 12(1) dans les délais prévus par la présente loi vaut décision de refus de communication.

[34] Subsection 22(1)(b) of the Act permits the government institution to refuse to disclose personal information which by its disclosure would be injurious to the conduct of a lawful investigation:

22. (1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)	22. (1) Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) :
(*b*) the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information	*b*) soit dont la divulgation risquerait vraisemblablement de nuire aux activités destinées à faire respecter les lois fédérales ou provinciales ou au déroulement d'enquêtes licites, notamment :
(i) relating to the existence or nature of a particular investigation, (ii) that would reveal the identity of a confidential source of information, or (iii) that was obtained or prepared in the course of an investigation; or	(i) des renseignements relatifs à l'existence ou à la nature d'une enquête déterminée, (ii) des renseignements qui permettraient de remonter à une source de renseignements confidentielle, (iii) des renseignements obtenus ou préparés au cours d'une enquête; .

[35] Subsection 22(3) defines the term "investigation":

(3) For the purposes of paragraph (1)(*b*), "investigation" means an investigation that	(3) Pour l'application de l'alinéa (1)*b*), « enquête » s'entend de celle qui :

(*a*) pertains to the administration or enforcement of an Act of Parliament;	*a*) se rapporte à l'application d'une loi fédérale;
(*b*) is authorized by or pursuant to an Act of Parliament; or	*b*) est autorisée sous le régime d'une loi fédérale;
(*c*) is within a class of investigations specified in the regulations.	*c*) fait partie d'une catégorie d'enquêtes précisée dans les règlements.

[36] Section 29 of the Act allows individuals or their representatives to file a complaint with the Commissioner if their request for disclosure has been refused:

29. (1) Subject to this Act, the Privacy Commissioner shall receive and investigate complaints	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 :
(*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; […]	*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; […]
(2) Nothing in this Act precludes the Privacy Commissioner from receiving and investigating complaints of a nature described in subsection (1) that are submitted by a person authorized by the complainant to act on behalf of the complainant, and a reference to a complainant in any other section includes a reference to a person so authorized.	(2) Le Commissaire à la protection de la vie privée peut recevoir les plaintes visées au paragraphe (1) par l'intermédiaire d'un représentant du plaignant. Dans les autres articles de la présente loi, les dispositions qui concernent le plaignant concernent également son représentant.

[37] Section 41 of the Act gives individuals or their representatives who have been refused access to their personal records a right to apply to the Federal Court for a review of the matter following an investigation and report by the Commissioner:

41. Any individual who has been refused access to personal information requested under subsection 12(1) may, if a complaint has been made to the Privacy Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Privacy Commissioner are reported to the complainant under subsection 35(2) or within such further time as the Court may, either before or after the expiration of those forty- five days, fix or allow.	41. L'individu qui s'est vu refuser communication de renseignements personnels demandés en vertu du paragraphe 12(1) et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à la protection de la vie privée peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 35(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

[38] Section 47 of the Act places the burden of justifying refusal to grant access to the applicant's personal information upon the government institution:

47. In any proceedings before the Court arising from an application under section 41, 42 or 43, the burden of establishing that the head of a government institution is authorized to refuse to disclose personal information requested under subsection 12(1) or that	47. Dans les procédures découlant des recours prévus aux articles 41, 42 ou 43, la charge d'établir le bien-fondé du refus de communication de renseignements personnels ou le bienfondé du versement de certains dossiers dans un fichier inconsultable classé

a file should be included in a personal information bank designated as an exempt bank under section 18 shall be on the government institution concerned.	comme tel en vertu de l'article 18 incombe à l'institution fédérale concernée.

[39] Section 48 and section 49 of the Act delineate the remedial powers of the Federal Court under the Act:

48. Where the head of a government institution refuses to disclose personal information requested under subsection 12(1) on the basis of a provision of this Act not referred to in section 49, the Court shall, if it determines that the head of the institution is not authorized under this Act to refuse to disclose the personal information, order the head of the institution to disclose the personal information, subject to such conditions as the Court deems appropriate, to the individual who requested access thereto, or shall make such other order as the Court deems appropriate.	48. La Cour, dans les cas où elle conclut au bon droit de l'individu qui a exercé un recours en révision d'une décision de refus de communication de renseignements personnels fondée sur des dispositions de la présente loi autres que celles mentionnées à l'article 49, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relèvent les renseignements d'en donner communication à l'individu; la Cour rend une autre ordonnance si elle l'estime indiqué.
49. Where the head of a government institution refuses to disclose personal information requested under subsection 12(1) on the basis of section 20 or 21 or paragraph 22(1)(*b*) or (*c*) or 24(*a*), the Court shall, if it determines that the head of the institution did not have	49. Dans les cas où le refus de communication des renseignements personnels s'appuyait sur les articles 20 ou 21 ou sur les alinéas 22(1)*b*) ou *c*) ou 24*a*), la Cour, si elle conclut que le refus n'était pas fondé sur des motifs raisonnables, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont

reasonable grounds on which to refuse to disclose the personal information, order the head of the institution to disclose the personal information, subject to such conditions as the Court deems appropriate, to the individual who requested access thereto, or shall make such other order as the Court deems appropriate.	relèvent les renseignements d'en donner communication à l'individu qui avait fait la demande; la Cour rend une autre ordonnance si elle l'estime indiqué.

[40] Section 52 of the Act grants the Court discretion to awards the costs of all judicial proceedings following the event or to the unsuccessful applicant if an important principle was raised:

52. (1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.	52. (1) Sous réserve du paragraphe (2), les frais et dépens sont laissés à l'appréciation de la Cour et suivent, sauf ordonnance contraire de la Cour, le sort du principal.
(2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.	(2) Dans les cas où elle estime que l'objet du recours a soulevé un principe important et nouveau quant à la présente loi, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle, même si cette personne a été déboutée de son recours.

[41] Section 10 of the *Privacy Act Regulations* ("*Privacy Regulations*"), SOR/83-508 sets out who may exercise the rights to access under Act:

10. The rights or actions provided for under the Act and these Regulations may be exercised or performed […] (*b*) on behalf of a deceased person by a person authorized by or pursuant to the law of Canada or a province to administer the estate of that person, but only for the purpose of such administration; and (*c*) on behalf of any other individual by any person authorized in writing to do so by the individual.	10. Les droits ou recours prévus par la Loi et le présent règlement peuvent être exercés, […] *b*) au nom d'une personne décédée, par une personne autorisée en vertu d'une loi fédérale ou provinciale à gérer la succession de cette personne, mais aux seules fins de gérer la succession; et *c*) au nom de tout autre individu, par une personne ayant reçu à cette fin une autorisation écrite de cet individu.

ISSUES

[42] The applicant raises the following issues:

a. Does the death of Ms. Ashley Smith vitiate her consent and authorization for the applicant to have access to her records?

b. Can the respondent rely on the RCMP criminal investigation to exempt the personal records from disclosure under subsection 22(1)(b) of the Act?

STANDARD OF REVIEW

[43] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference)

to be accorded with regard to a particular category of question": see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at paragraph 53.

[44] Applications under section 41 are for review of a decision not to disclose personal information. While seeking an opinion from the Privacy Commissioner is a prerequisite to filing an application under section 41, the Commissioner's determination is not the subject of the review: see my decision in *Cemerlic v. Canada (Solicitor General)*, 2003 FCT 133, at para. 7. Despite the non-binding nature of the Commissioner's report, this Court has held that its opinions are an important consideration in the proceedings under section 41 of the Act: *Richards v. Canada (Minister of National Revenue)*, 2003 FC 1450, per Justice Lemieux at paragraph 9; *Gordon v. Canada (Minister of Health)*, 2008 FC 258, per Justice Gibson at paragraph 20; *Canada (Attorney General) v. Canada (Information Commissioner)* (2004), 32 C.P.R. (4th) 464 (F.C.), per Justice Dawson at paragraph 84.

[45] In *Savard v. Canada Post Corp.*, 2008 FC 671, Justice Blanchard set out at paragraph 17 the standard of review in an application under section 41 of the Act:

> ¶17 In this matter, the Court is invited to review a decision made by the respondent on an issue of disclosure of personal information under the PA. It is a two-step analysis (*Kelly v.Canada (Solicitor General)*, [1992] F.C.J. No. 302 (Lexis) at paragraph 5). The first is to determine whether the statement of mailing is in fact the applicant's "personal information" within the meaning of paragraphs 3(*g*) and (*h*) of the PA. The goal is to determine whether the information at issue falls under a legal exception (*Blank v. Canada (Minister of the Environment)*, 2006 FC 1253, [2006] F.C.J. No. 1635 (Lexis), at paragraph 26). The appropriate standard at this stage is that of correctness (*Elomari v. Canada (Space Agency)*, 2006 FC 863 at paragraph 19; and *Thurlow, supra* at paragraph 28). If this first

> question is answered in the affirmative, we then move on to the second step. This step involves determining whether the discretionary power exercised by the respondent in regard to the refusal to disclose the statement of mailing was reasonable. On this issue, it should be noted that the PA does not contain any privative clause, that the decision-maker does not have special expertise in the matter and that the nature of the question is essentially discretionary. Taking these factors into account, it is my opinion that the appropriate standard at this stage is that of reasonableness.

(See also *Blank v. Canada (Minister of Justice)*, 2009 FC 1221 per Justice de Montigny at paragraph 27).

[46] The parties and the Court are in agreement that Ms. Smith's records are "personal information" and thus governed by the Act. The first issue in this application is whether Ms. Smith's consent to the disclosure of her personal information was vitiated by her death. In other words, the question is whether the respondent made the correct decision in law in determining that Ms. Smith's records are wholly exempted by reason of her vitiated consent. This issue is determinable on a correctness standard. The second issue, whether section 22(1)(b) of the Act operates to exempt Ms. Smith's records, if her consent is not vitiated, is also reviewable on a correctness standard.

BURDEN OF PROOF

[47] Section 48 of the Act places the burden of justifying an exemption under the Act on the respondent government organization. Therefore, the respondent must satisfy the Court that, on a balance of probabilities, that the CSC's decision to refuse to disclose Ms. Smith's personal records

was correct: see my decision in *Canada (Information Commissioner) v. Canada (Minister of Industry)*, 2006 FC 132, at paragraph 25.

ANALYSIS

The importance of privacy in a free and democratic society

[48] Privacy is a fundamental right in a free and democratic society. The Canadian Charter of Rights and Freedoms protects a person's privacy from unreasonable search and seizure by government authorities. Government cannot interfere with the privacy of an individual unless there are reasonable grounds to believe that that person has committed an offence, and it is necessary for the government to enter the private domain of that person. As well as this privacy right of an individual, the *Privacy Act* sets out two quasi-constitutional rights of privacy for an individual:

a. it protects personal information held by government institutions from disclosure to any third parties. This protects the individual's privacy; and,
b. it provides individuals with a right to access their personal information which any government institution holds about them. This ensures that an individual knows what information the government has about them. It is in this context that Ashley Smith consented and authorized the Correctional Services of Canada to disclose to the Canadian Association of Elizabeth Fry Society enumerated personal information about Ashley Smith.

[49] The purpose of the Privacy Act was set out by the Supreme Court of Canada in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2. S.C.R. 773, per Justice Gonthier at paragraphs 24-25:

> ¶24 The Privacy Act is also fundamental in the Canadian legal system. It has two major objectives. Its aims are, first, to protect personal information held by government institutions, and second, to provide individuals with a right of access to personal information about themselves (s. 2)…
>
> ¶25 The Privacy Act is a reminder of the extent to which the protection of privacy is necessary to the preservation of a free and democratic society…

[50] Any exceptions to the right of access must be interpreted narrowly with a view to the purpose of the Act: *Davidson v. Canada (Solicitor General)*, [1989] 2 F.C. 341 (F.C.A.), per Justice MacGuigan at paragraph 17.

[51] Privacy is a fundamental right in our democracy and exemptions from that right are to be strictly construed against the government institution. There is a reverse onus on the government to show that the personal information sought by an individual is not subject to disclosure under the *Privacy Act*.

<u>Issue No. 1</u>: Does the death of Ms. Ashley Smith vitiate her consent and authorization for the applicant to have access to her records?

[52] The respondent submits that:

a. The applicant no longer has standing to make a request for disclosure pursuant to section 12 of the Act on behalf of Ms. Smith because her consent has been vitiated by her death;

b. Personal information of a deceased individual is protected for a minimum of 20 years and can only be released for the purpose of administrating their estate, absent exceptional circumstances; and
c. The applicant had a valid agency relationship on behalf of Ms. Smith however that relationship ended upon Ms. Smith's death.

The respondent adduced no evidence that explains the CSC's reasoning at the time it made its decision to refuse the applicant access on the basis of Ms. Smith's passing. Its submissions on this issue are made *de novo* before the Court.

[53] The respondent submits that the applicant has no standing to bring the application at bar because Ms. Smith, the applicant's principal, died on October 19, 2007 and the consent for disclosure and authorization for the applicant to act on its behalf has been automatically revoked. It further submits that any agency relationship between Ms. Smith and the applicant ended upon her death.

[54] The Court finds that the law of agency or standing has no application to the facts at bar. The *Privacy Act*, similar to the *Access to Information Act*, R.S.C. 1985, c. A-1, is a complete code of procedure: *St-Onge v. Canada* (1995), 62 C.P.R. (3d) 303 (F.C.A.), per Justice Décary at paragraph 3; *Information Commissioner v. Commissioner of the RCMP*, 2003 SCC 8, [2003] 2 S.C.R. 66, per Justice Gonthier at paragraph 22 ["*Information Commissioner v. Commissioner of the RCMP*"]. This application was properly brought by the applicant before the Court pursuant to section 41 of the Act.

[55] Section 41 of the Act allows “any individual” or “complainant” who has been refused access under this Act, to apply to the Court following receipt of the Commissioner’s report. Section 41 encompasses by reference subsection 29(2), which allows anyone who is authorized to act on behalf of the individual whose records have been requested to complain to the Commissioner. This section is broad enough to encompass the applicant since the applicant was still clothed with Ms. Smith’s authorization to act at the time the initial request was made on June 18, 2007, at the time the respondent was deemed to have refused the request for disclosure on August 17, 2007, at the time CSC explicitly stated its refusal on May 26, 2008, and at the time the applicant filed its complaint with the Commissioner on August 22, 2008.

What is the date of the decision which is the subject of this application for judicial review

[56] There are three possible dates. First, on August 17, 2007 the head of the Correctional Service of Canada, the respondent, is deemed for the purposes of the *Privacy Act*, under subsection 16(3) of the Act, to have refused to give access to the applicant the personal records of Ms. Smith as requested by Ms. Smith and consented to by Ms. Smith. Of course, this date is before Ms. Smith committed suicide so that the date of death of Ms. Smith had not yet happened, and the respondent cannot argue that her death vitiated her consent at that time.

[57] Second, on May 26, 2008, the Canadian Correctional Service explicitly for the first time refused to provide the applicant with the personal documents of Ms. Smith for the reason, which was not explained, that the information has been exempted pursuant to section 22 of the *Privacy*

Act. (The other reason stated in the letter was section 26 of the *Privacy Act*, which the respondent no longer relies upon). Accordingly, in the letter dated May 26, 2008, the respondent did not state that the death of Ms. Smith vitiated the consent.

[58] Third, the other possible date is the date of the hearing before the Court, March 29, 2010. On this date, the Court reviews *de novo* the correctness of the decision to deny the applicant access on the facts before the Court on this date.

Consent not vitiated by death

[59] Regardless of the relevant date of the decision which is being reviewed by the Court, the Court concludes that the applicant has standing to bring this application. On August 17, 2007, Ms. Smith had not yet died, and the applicant clearly had standing. On May 26, 2008, the Court is satisfied that the consent was not intended to lapse or be of no force and effect because Ms. Smith had died. That consent had a valid purpose when it was given by Ms. Smith on June 18, 2007, and that purpose continued after Ms. Smith's death. That purpose was to explore how the penitentiary authorities were treating Ms. Smith. While that exploration will be too late for Ms. Smith to benefit from it, that exploration may assist the applicant learn how to deal with other female prisoners like Ms. Smith in the future.

[60] The respondent advised the Court that this issue arises for the first time before this Court. I conclude that the Act intended that an individual's right to grant access to their personal information survives their death.

[61] The authorities on point are the Commissioner's report in the present case and an administrative decision by the Ontario Information and Privacy Commissioner (OIPC) decided under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPDA), R.S.O. 1990, c. M-56: *Order M-1048*, [1997] O.I.P.C. No. 348 ["*M-1048*"]. In both cases the Commissioners held that the statutes intended that a deceased person's consent for disclosure survive their death. In *M-1048*, the OIPC held that 54(a) of the MFIPDA, which is nearly similar to subsection 10(b) of the *Privacy Regulations*, was not an exemption, but rather an independent right of access granted to a deceased person's estate: *M-1048, supra,* at paragraphs 9-11.

[62] The respondent bases its argument on the same grounds as the respondent in *M-1048*. The respondent relies on the equivalent Federal provision found at subsection 10(b) of the *Privacy Regulations* to exempt Ms. Smith's records except "for the purpose" of administering her estate.

[63] In my view the reasons of the OIPC in *M-1048* are equally applicable in the case at bar. Subsection 10(b) of the *Privacy Regulations* does not bar the release of any deceased person's personal information, except "for the purpose of administrating their estate". This subsection is simply an avenue of access to a deceased person's personal information by the deceased person's estate without any means of ascertaining consent. Section 10 of the *Privacy Regulations* provides for three avenues of access to another person's personal information:

10. The rights or actions provided for under the Act and these Regulations may be exercised or performed	10. Les droits ou recours prévus par la Loi et le présent règlement peuvent être exercés,

(*a*) on behalf of a minor or an incompetent person by a person authorized by or pursuant to the law of Canada or a province to administer the affairs or estate of that person;	*a*) au nom d'un mineur ou d'un incapable, par une personne autorisée en vertu d'une loi fédérale ou provinciale à gérer les affaires ou les biens de celui-ci;
(*b*) on behalf of a deceased person by a person authorized by or pursuant to the law of Canada or a province to administer the estate of that person, but only for the purpose of such administration; and	*b*) au nom d'une personne décédée, par une personne autorisée en vertu d'une loi fédérale ou provinciale à gérer la succession de cette personne, mais aux seules fins de gérer la succession; et
(*c*) on behalf of any other individual by any person authorized in writing to do so by the individual.	*c*) au nom de tout autre individu, par une personne ayant reçu à cette fin une autorisation écrite de cet individu.

Subsections 10(a) and (b) are very different from subsection 10(c). The first two subsections grant access without consent to another individual's personal information for limited purpose. The third subsection grants access to any person authorized in writing for any purpose. Subsection 10(c) is in my view broad enough to encompass authorization by a person who is no longer alive. As long as the consent is in writing, the requesting party can rely on subsection 10(c) regardless of the individual's living status.

[64] Ms. Smith's consent is valid despite the lapse of time. The respondent is deemed to have refused her validly consented and authorized request on August 17, 2007. The refusal to provide access is a continuous refusal which is not interrupted by the act of complaining to the

Commissioner and the subsequent issuance of a report: *Moar v. Canada (Privacy Commissioner)*, 1992 1 F.C. 501, 45 F.T.R 57, per Justice Reed.

[65] As explained above, subsection 16(3) of the *Privacy Act* deems the respondent to have refused the request for disclosure following the expiry of the time limits under the Act. In this case, the expiry of the time limit took place on August 17, 2007, and for the purpose of this judicial review, the Court is satisfied that this is the key date under the law upon which the Court should review the decision of the respondent to refuse access to the applicant. At this date, no death had occurred and there can be no argument that the death vitiated the consent.

Respondent breached sections 14 and 15 of the Act

[66] The respondent's failure to provide the personal information to the applicant within the 30-day extension is a breach of sections 14 and 15 of the Act. Section 14 of the Act provides that the requester shall be given access to his or her personal information within 30 days. Section 15 of the Act provides that the government institution may extend this time limit to a maximum of 30 days if meeting the original time limit would unreasonably interfere with the operations of the government institution. It is ironic and illogical that the respondent would, delay the disclosure of these personal records, and then argue that the consent and authorization for the disclosure is vitiated upon the suicide of Ms. Smith 62 days after the personal information was legally required by the respondent to be produced to the applicant.

[67] The respondent submits that these delays in production of personal information "happen all the time". The Court understands that the volume of such requests may overwhelm the limited resources given by the government to the respondent for fulfilling such requests. At the same time, the fact that the delay is normal does not excuse the respondent from being in breach of the law by not fulfilling the request within the prescribed time period under the *Privacy Act*.

Issue No. 2: Can the respondent rely on the RCMP criminal investigation to exempt the personal records from disclosure under subsection 22(1)(b) of the Act?

[68] The respondent submits that the fact that there was at one time an ongoing criminal investigation is sufficient to meet the exemption under subsection 22(1)(b) of the Act and exclude the Ms. Smith's records in their entirety. There is no basis in law for this submission.

[69] Of course, there was no investigation in place on August 17, 2007, the date that the respondent is deemed to have refused the applicant access to the personal information of Ms. Smith under sections 14 and 15 of the Act.

[70] In the alternative, that the respondent's decision is that communicated to the applicant by letter dated May 26, 2008, it is clear that this short letter provides no explanation, does not provide sufficient evidence to support a subsection 22(1)(b) exemption, does not set out how the disclosure of the personal information could reasonably have caused injury to the criminal investigation, and provides no rationale for the exemption. This letter does not provide a valid basis to claim the exemption because it does not provide concrete reasons which meet the requirements imposed by

subsection 22(1)(b), does not provide what is the reasonable expectation of injury from the disclosure, does not provide any specific facts to establish any likelihood of injury to the investigation, does not provide what would be the harmful consequences of disclosing the personal information. Moreover, after this case was commenced, when the witness for the respondent filed his affidavit, the investigation had been concluded and this basis for the exemption had passed. When the affidavit was sworn, the deponent did not state that the investigation was over, and continued to suggest that this exemption was still valid.

[71] The Supreme Court of Canada has previously set out the proper application of the exemption found in subsection 22(1)(b) of the Act in *Lavigne, supra*, at paragraphs 60-61:

> ¶60 As I have said, s. 22(1)(b) is not an absolute exemption clause. The decision of the Commissioner of Official Languages to refuse disclosure under s. 22(1)(b) must be based on concrete reasons that meet the requirements imposed by that paragraph. Parliament has provided that there must be a reasonable expectation of injury in order to refuse to disclose information under that provision. In addition, s. 47 of the Privacy Act provides that the burden of establishing that the discretion was properly exercised is on the government institution. If the government institution is unable to show that its refusal was based on reasonable grounds, the Federal Court may then vary that decision and authorize access to the personal information (s. 49)…
>
> ¶61 … The Commissioner's decision must be based on real grounds that are connected to the specific case in issue… The appellant does not rely on any specific fact to establish the likelihood of injury. The fact that there is no detailed evidence makes the analysis almost theoretical. Rather than showing the harmful consequences of disclosing the notes of the interview with Ms. Dubé on future investigations, Mr. Langelier tried to prove, generally, that if investigations were not confidential this could compromise their conduct, without establishing specific circumstances from which it could reasonably be concluded that disclosure could be expected to be injurious. There are cases in

> which disclosure of the personal information requested could reasonably be expected to be injurious to the conduct of investigations, and consequently the information could be kept private. There must nevertheless be evidence from which this can reasonably be concluded…

[72] *Lavingne*, *supra*, affirmed the prior case law of this Court, which held that in order to justify the refusal to disclose information pursuant to subsection 22(1)(b) of the Act, the head of the government institution must demonstrate that there is a reasonable expectation of probable harm from disclosure to the conduct of lawful investigations: *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)* (1997), 140 F.T.R. 140, per Justice Richard (as he then was) at paragraph 37. As Justice John Richard held, there must be tangible evidence of harm from the disclosure of the personal information. In the case at bar, there is none.

[73] In *Kaizer v. Minister of National Revenue*, [1995] F.C.J. No. 926 (QL), Justice Rothstein (as he then was) set out at paragraphs 2 and 3 of his reasons the evidentiary burden required to justify an exception under subsection 22(1)(b) of the Act:

> ¶2 …The Court must be given an explanation of how or why the harm alleged might reasonably be expected to result from disclosure of the specific information. This is not a case where harm from disclosure is self-evident. I have been asked to infer that harm will result if disclosure is allowed. In order to make such an inference, explanations provided by the Minister must clearly demonstrate a linkage between disclosure and the harm alleged so as to justify confidentiality.
>
> ¶3 In the present case, the deponent for the Minister of National Revenue sets forth narratives with respect to the specific paragraphs and pages which are sought to be kept confidential. However, an explanation such as "disclosure of this information would prejudice the integrity of the investigation and therefore be injurious to the enforcement of the Income Tax Act" is insufficient.

> That is not an explanation but only a conclusion. Indeed, there may be reasons why disclosure would prejudice the integrity of an investigation, but an explanation has to be given as to why that is so. No such explanation has been given…

[74] The case law is clear: the Court will not infer injurious harm on a theoretical basis from the mere presence of an investigation, whether past or present, without evidence of a nexus between the requested disclosure and a reasonable expectation of probable harm.

[75] The evidentiary deficiencies in the respondent's case are sufficient to dismiss subsection 22(1)(b) as a valid exemption and to order the full disclosure of the requested documents. The Court nevertheless considers it worthwhile to provide some guidance with respect to the particular facts in this case.

[76] At the time the request was deemed refused, on August 17, 2007, there was no investigation. Subsection 22(1)(b) could not have applied. The Court was asked to take judicial notice of the fact that the investigation around May 26, 2008 into Ms. Smith's death led to criminal charges against four CSC employees. The respondent submitted that the CSC's decision to exempt Ms. Smith's records from disclosure were therefore reasonable at the time. The Court cannot agree with this submission. The investigation did not relate to the information in the requested records, which predated Ms. Smith's death by a few months.

[77] Lastly, this Court is carrying out a review of the matter *de novo*. It is clear that now there are no ongoing investigations or criminal proceedings where disclosure of the requested materials could cause injurious harm.

CONCLUSION

[78] The Court will therefore order the disclosure of Ms. Smith's personal records as requested to the applicant. The personal records of Ms. Smith, as contained in the confidential Affidavit of Mr. Fabiano, shall be provided forthwith to the applicant.

COSTS

[79] The respondent submits that this was an unusually complex piece of litigation involving important new principles of law in relation to the *Privacy Act*, and that Parliament contemplated in section 52 of the Act that the applicant ought be awarded its legal costs even if the applicant is not successful. The respondent supports the award of costs to the applicant on this basis, and agrees that the applicant ought be entitled to full reimbursement of its legal costs.

[80] In this case the applicant has been successful. The arguments raised by the respondent in opposing this litigation, and in denying the applicant access to the personal records, were not well-founded. The respondent caused delay and legal expense for the applicant. Moreover, the respondent produced an affiant with little knowledge of the case who was not able to answer questions on cross-examination. This unnecessarily increased the costs.

[81] The Court considers it just and equitable that the applicant have its costs on either a solicitor and client basis or at the highest number of units under Column III of Tariff B, including the counsel fee at the hearing for the second counsel at 50% of the counsel fee at the hearing for the first counsel under Column III. At the hearing, it was evident that the applicant received some of its legal services on a *pro bono* basis, and the respondent ought not to benefit from this *pro bono* arrangement. Accordingly, the applicant is entitled to its legal costs calculated on either a solicitor and client basis, or at the highest number of units under Column III of Tariff B, whichever is greater.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed with costs either on a solicitor and client basis, or under Column III of Tariff B of the *Federal Courts Rules, 1998*, whichever is higher as explained herein; and
2. The personal records of Ms. Ashley Smith contained in the confidential affidavit of Mr. Fabiano filed with the Court shall be disclosed to the applicant forthwith.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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