Federal Court of Appeal | Cour d'appel fédérale

Date: 20180112

Docket: A-75-16

Citation: 2018 FCA 10

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
WOODS J.A.

BETWEEN:

HUSKY OIL OPERATIONS LIMITED

Appellant

and

CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD
AND
INFORMATION COMMISSIONER OF CANADA

Respondents

Heard at St. John's, Newfoundland and Labrador, on June 28, 2017.

Judgment delivered at Ottawa, Ontario, on January 12, 2018.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRING REASONS BY: GAUTHIER J.A.
CONCURRED IN BY: WOODS J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal from a judicial review of an access to information decision (*Husky Oil Operations Limited v. Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2016 FC 117 (the Reasons)) made by the Canada-Newfoundland and Labrador Offshore Petroleum Board (the Board). The Board decided to disclose the names of two employees of Husky Oil

Operations Limited (Husky) contained in records responsive to an access request under the *Access to Information Act*, R.S.C. 1985, c. A-1 (the *Access Act*), finding that this information was publicly available on the internet. Husky maintains that the names, and the employees' affiliation with Husky in the context of those documents, is personal information and therefore cannot be disclosed.

[2] In the decision that is the subject of this appeal, Justice Phelan (the Judge) dismissed Husky's application for judicial review. Husky now appeals to this Court. The Board and the Information Commissioner of Canada (the Information Commissioner) are respondents to this appeal.

[3] At the core of this appeal is the meaning of "personal information" under the *Privacy Act*, R.S.C. 1985, c. P-21, the definition of which is incorporated by reference in section 19 of the *Access Act*. More specifically, the issue is whether an employee's name appearing on administrative documents of the kind at issue here is to be considered "personal information", and whether the fact that the employee's name, job title and association with a third party organization is publicly available on the internet, authorizes the disclosure of the employee's name and job title contained in those documents. That same issue was also raised in a companion case argued before this Court (*Suncor Energy Inc. v. Canada-Newfoundland and Labrador Offshore Petroleum Board and the Information Commissioner*, 2018 FCA 11) one day prior to the case at bar.

I. Facts

[4] An undisclosed party completed an access to information request to the Board asking for certain records. Specifically, the request was for:

> 1. … the submitted application forms, correspondence, board response, work credit amounts granted, and all associated items and attachments for each program number on the attached March 13, 2012 CNLOPB letter …
>
> 2. … all records of any viewing, disclosure, borrowing, and copies being made of these same program numbers … including but not limited to liability agreements, correspondence, transmittals, copy disposition forms, emails, and invoices.
>
> Access to Information Request Form, Public Appeal Book, Tab 3.

[5] In other words, the request was for access to records pertaining to previous requests for geophysical and geological information made by companies to the Board. In response to this access request, the Board identified some records containing information about Husky's requests for information to the Board.

[6] As the requested documents were generated by a third party, the Board provided copies of the requested documents to Husky pursuant to section 27 of the *Access Act* and asked whether they consented to the release of the documents. Husky objected to the disclosure of the names, titles and contact information of the two employees who had authored the documents at issue pursuant to section 19 of the *Access Act* and as a result, the Board agreed to redact the contact information. However, the Board determined that the names and affiliation of the two employees were publicly available since they were available on the internet and came to the conclusion that it was appropriate to exercise its discretion under subsection 19(2) of the *Access Act*, to release the requested documents without redaction of the names and titles.

II. The impugned decision

[7] In terse reasons, the Judge found that Husky had "not advanced any evidence or analysis as to why the Board should not release this information" (Reasons at para. 15). The disadvantage to Husky from this disclosure was unclear. The Judge noted that this "type of concern" was usually dealt with under section 20 of the *Access Act*, which addresses third party information (Reasons at para. 16). As the Board had discretion to disclose personal information under subsection 19(2) of the *Access Act*, the Judge found no reason to interfere with the Board's decision and dismissed the application for judicial review.

III. Issues

[8] This appeal raises the following issues:

A. What is the proper standard of review?

B. Are the names and titles of Husky's employees, in the context of the requested records, "personal information" under subsection 19(1) of the *Access Act*?

C. Did the Board err in finding that the "personal information" at issue was publicly available and in exercising its discretion to disclose it under subsection 19(2) of the *Access Act*?

IV. Analysis

A. *What is the proper standard of review?*

[9] In *Blank v. Canada (Justice)*, 2016 FCA 189, [2016] F.C.J. No. 694 (QL) (*Blank*), this Court unanimously came to the conclusion that the applicable standard of appellate review of a Federal Court judge's decision in a judicial review under section 41 of the *Access Act* is the standard generally used in appeals of judicial review proceedings, as set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (*Agraira*). At paragraphs 22 and 23 of the *Blank* decision, this Court stated:

> In an appeal from an application for judicial review, the task of this Court is to assess whether the Federal Court correctly selected the standard of review and then properly applied it: (references omitted).
>
> Contrary to the respondent's submission, this Court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard. On the contrary, the Supreme Court has held that a court sitting in appeal of a lower court's judgment on an application for judicial review of an administrative decision should "step […] into the shoes" of the lower court and review for itself the administrative decision on the correct standard of review: (references omitted).

[10] Counsel for the Information Commissioner argued before us that this decision does not sit well with *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 (*Merck*), where both the majority and the dissenting judges affirmed this Court's approach in applying the standard of appellate review established in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. It is contended that the Supreme Court of Canada's ruling in *Agraira* has not overturned that Court's previous decision in *Merck* regarding the distinct standard of appellate review to be applied in judicial review cases under the *Access Act*. Relying on the

dissent in *Merck*, counsel also argues that the peculiarities of the review process provided for under the scheme of the *Access Act* account for this distinct approach to appellate review. In *Merck* at paragraph 249, Justice Deschamps (for the minority) identified these peculiar features as: the Commissioner's non-adjudicative role in providing independent review; the fact that the institution's opinions on the obligation to disclose or refuse to disclose records under the *Access Act* are not authoritative; and the Federal Court judge's role as the first impartial gatekeeper who makes his or her own findings and draws inferences on the basis of the information in the court's record at that time. For the reasons that follow, I do not find these arguments persuasive.

[11] First, there is no doubt that the same standard of review should apply to appeals stemming from both section 41 and section 44 of the *Access Act*. Section 41 provides a right of judicial review for a person who has been refused access to a record (as in *Blank*), whereas section 44 provides the same right to third parties whose information may be disclosed (as in the case at bar). There are no principled reasons to distinguish between these two scenarios, and none was put forward by the parties.

[12] Second, it could not be expected that the Supreme Court of Canada would explicitly overturn the *Merck* decision as part of its reasons in *Agraira*. Indeed, an appellate court rarely comments on the potential impact of its decisions on earlier rulings. The fact that the Court briefly referred to Justice Deschamps's description in *Merck* of the process followed by an appellate court when reviewing the decision of a superior court on an application for judicial review should by no means be interpreted as an implicit endorsement of her entire reasoning

with respect to the application of the appellate standard of review in the context of the *Access Act*.

[13] Finally, in my view, there is no compelling reason to distinguish between the judicial review by a superior court of a decision made by a government official and of that made by an administrative tribunal, when determining the standard of review to be applied by an appellate court. In the context of the immigration law, by way of illustration, some decisions are made by one of the four divisions of the Immigration and Refugee Board, while others are made for the Minister by designated departmental officials. Decisions taken by the Minister include: requests for visas and electronic travel authorizations (*Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), s. 11), the decision to designate as an "irregular arrival" the arrival in Canada of a group suspected of human smuggling or trafficking (IRPA, s. 20.1), requests for permanent resident status granted for humanitarian and compassionate considerations (IRPA, s. 25(1)), decisions regarding Pre-removal Risk Assessments (IRPA, s. 112), and decisions to revoke a person's citizenship in cases where it was obtained by false representation or fraud (*Citizenship Act*, R.S.C. 1985, c. C-29, s. 10).

[14] All of these decisions, whether made by a quasi-judicial body or by delegates of the Minister, are subject to judicial review (with or without leave of the Federal Court), albeit under various standards of review to take into account the expertise of the decision-maker, the procedure followed and the nature of the questions to be determined upon review. At the appeal stage, however, these decisions of the Federal Court are all reviewed under the same standard; indeed, the Supreme Court of Canada in *Agraira* made no distinction of the kind suggested by

Justice Deschamps, and quoted approvingly (at para. 45) the following extract from this Court's decision in *Canada Revenue Agency v. Telfer*, 2009 FCA 23 at para. 18, [2009] 4 C.T.C. 123:

> Despite some earlier confusion, there is now ample authority for the proposition that, on an appeal from a decision disposing of an application for judicial review, the question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. The appellate court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard.

[15] When reviewing the decision made by the head of an institution to withhold information, it is well established that the role of the Federal Court judge is to determine the correctness of the decision made that the withheld information falls within the statutory exemption, and the reasonableness of the discretionary decision to refuse to release exempted information. This is the classic role of a superior court judge sitting on judicial review of an administrative decision. It is also consistent with the language of the *Access Act*, which grants any person who has been refused access to a record requested under the *Access Act*, the Information Commissioner and a third party whose information may be disclosed, the right to apply to the Federal Court for a "review" (emphasis added) of the matter. Had Parliament wanted to deviate from that principle, it could have used explicit language to that effect as it did in subsection 13(1) of the *Competition Tribunal Act*, R.S.C. 1985 (2nd Supp.), c. 19 where it is expressly stated that an appeal lies to this Court from any decision of the Tribunal "as if it were a judgment of the Federal Court": see *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 at paras. 36-39, [2015] 1 S.C.R. 161.

[16] In *Merck*, the majority aptly noted that the review by the Federal Court judge of the decision made by the institutional head is not, strictly speaking, a *de novo* assessment despite

some earlier rulings to that effect. Any suggestion that the Federal Court's task is akin to the role of a trial court, that the Federal Court judge is the first impartial gatekeeper for the party seeking disclosure or objecting to it, and that the appellate court's role as a result is to review the reviewing judge's decision and not that of the head of the institution, must in my opinion be rejected. Not only is there no evidence that the institution head or his or her designates do not apply the law impartially, but more importantly the determination of the role played by the Federal Court (either as a trial court or as a reviewing court) does not turn on the identity and characteristics of the original decision-maker but on the powers granted to that Court by Parliament. Since there can be no question that the Federal Court acts in its capacity as a court of judicial review under section 44 of the *Access Act*, the standard of review in this Court must be the one used generally in appeals of judicial review proceedings.

[17] For all of the above reasons, I shall therefore determine whether the Federal Court selected the correct standard of review and then properly applied it. It is not in dispute that the Judge correctly identified the applicable standard of review, being correctness when deciding whether the information is "personal information" pursuant to section 19(1) and reasonableness when deciding whether the information is publicly available and may be disclosed. Accordingly, this Court must then "step into the shoes" of the Federal Court to assess whether the Judge applied those standards appropriately.

B. *Are the names and titles of Husky's employees, in the context of the requested records, "personal information" under subsection 19(1) of the Access Act?*

[18] The appellant alleges that the Judge erred in not considering whether the information at issue was personal information as defined by the *Privacy Act*. The appellant points to the structure of the exemptions to personal information carved out by the definition in subsection 3(j) of the *Privacy Act*. This subsection exempts, in certain circumstances, the names and titles of government employees, as well as the fact that an individual is a government employee. There is no parallel exemption for private sector employees, and such information, it is argued, should fall within the definition of personal information.

[19] Before addressing the merits of this argument, it is helpful to briefly summarize the objective and the key provisions of the *Access Act*. Its purpose is clearly set out in subsection 2(1) of that act: to provide a right of access to information in records under the control of a government institution, subject to some necessary exceptions that must be strictly construed. This provision reads as follows:

2 (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.	2 (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.

[20] In his seminal reasons in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para. 61, 148 D.L.R. (4th) 385 (*Dagg*), Justice La Forest (dissenting but not on this point) stated emphatically that the overarching purpose of the *Access Act* is to facilitate democracy, first by ensuring that citizens have the information required to participate meaningfully in the democratic process, and secondly by ensuring that politicians and officials may be held to account to the public. See also: *Merck* at para. 22. This right of access to information has been described as a quasi-constitutional right: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 at para. 40, [2011] 2 S.C.R. 306; *Statham v. Canadian Broadcasting Corporation*, 2010 FCA 315 at para. 1, [2012] 2 F.C.R. 421.

[21] One of the exemptions from disclosure is found in section 19 of the *Access Act* and relates to personal information:

Personal information	**Renseignements personnels**
19 (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.	19 (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la *Loi sur la protection des renseignements personnels*.
Where disclosure authorized	**Cas où la divulgation est autorisée**
(2) The head of a government institution may disclose any record requested under this Act that contains personal information if	(2) Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où :
(a) the individual to whom it relates consents to the disclosure;	a) l'individu qu'ils concernent y consent;
(b) the information is publicly available; or	b) le public y a accès;
(c) the disclosure is in accordance	c) la communication est conforme à

with section 8 of the *Privacy Act*.	l'article 8 de la *Loi sur la protection des renseignements personnels*.

[22] Personal information in section 19 of the *Access Act* is defined by reference to section 3 of the *Privacy Act*, which reads in part as follows:

personal information means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,	***renseignements personnels*** Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment :
...	[…]
(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,	i) son nom lorsque celui-ci est mentionné avec d'autres renseignements personnels le concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet;
but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include	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 :
(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including	j) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment :
(i) the fact that the individual is or was an officer or employee of the government institution,	(i) le fait même qu'il est ou a été employé par l'institution,
(ii) the title, business address and telephone number of the individual,	(ii) son titre et les adresse et numéro de téléphone de son lieu de travail,
(iii) the classification, salary range and responsibilities of the position held by the individual,	(iii) la classification, l'éventail des salaires et les attributions de son poste,
(iv) the name of the individual on a document prepared by the individual	(iv) son nom lorsque celui-ci figure sur un document qu'il a établi au cours

in the course of employment, and	de son emploi,
(v) the personal opinions or views of the individual given in the course of employment,	(v) les idées et opinions personnelles qu'il a exprimées au cours de son emploi;
…	[…]

[23] The right to privacy is no less important than the right to disclosure of information, and has also been described as a quasi-constitutional right: see, for example, *Lavigne v. Canada (Commissioner of Official Languages)*, 2002 SCC 53 at paras. 24-25, [2002] 2 S.C.R. 773. It is also encompassed, to some extent, by section 8 (the right to be free from unreasonable searches and seizures) and section 7 (the right to life, liberty and security of the person) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter). In *Dagg* (at para. 64), Justice La Forest, referring to section 2 of the *Privacy Act*, described its purpose as being twofold: to protect personal information held by government institutions, and to provide individuals with a right to access information about themselves.

[24] The *Privacy Act* and the values that it enshrines are therefore no less worthy of protection than the right to access to information. Indeed, the Supreme Court of Canada has made it clear that the two statutes have equal status and must be read together, having regard to the purposes of both in considering whether a government record constitutes "personal information". In *Dagg* (at para. 51), Justice La Forest quoted Chief Justice Isaac of this Court in *Dagg v. Canada*, [1995] 3 F.C. 199, 124 D.L.R. (4th) 553, stating:

> It is obvious that both statutes are to be read together, since section 19 of the Access Act does incorporate by reference certain provisions of the *Privacy Act*. Nevertheless, there is nothing in the language of either statute which suggests, let alone compels, the conclusion that the one is subordinate to the other. They are

> each on the same footing. Neither is pre-eminent. There is no doubt that they are complementary and must be construed harmoniously with each other according to well-known principles of statutory interpretation in order to give effect to the stated parliamentary intention and in order to ensure the attainment of the stated parliamentary objectives.

[25] Accordingly, Justice La Forest made it clear that even though access is the general rule under the *Access Act*, it does not follow that the "personal information" exemption should receive a "cramped" interpretation as such an approach would effectively read the *Privacy Act* as subordinate to the *Access Act* (*Dagg*, at para. 51). In the same vein, the statement in section 2 of the *Access Act* that exceptions to access should be "limited and specific" must not be interpreted as creating a presumption in favour of access. It simply provides that the party seeking to avoid disclosure of information bears the onus to show, on a balance of probabilities, that the information falls within one of the exceptions: see *Merck* at paras. 94-95; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8 at para. 21, [2003] 1 S.C.R. 66; *Canada (Information Commissioner) v. Canada (Prime Minister)*, [1993] 1 F.C. 427 at para. 113, [1992] F.C.J. No. 1054 (QL); *Rubin v. Canada (Minister of Health)*, 2001 F.C.T. 929 at para. 43, [2001] F.C.J. No. 1298 (QL); *Canada Post Corp. v. Canada (National Capital Commission)*, 2002 F.C.T. 700 at para. 8, [2002] F.C.J. No. 982 (QL). Moreover, subsection 19(1) of the *Access Act* and the parallel prohibition against disclosure of personal information in section 8 of the *Privacy Act* makes it clear that privacy is paramount over access, insofar as it is encompassed by the definition of "personal information" in section 3 of the *Privacy Act*: *Dagg* at para. 48; *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13 at paras. 2, 22 and 25, [2006] 1 S.C.R. 441.

[26] However, the protection of personal information is not absolute. If any of the conditions in subsection 19(2) are met, and no other exemptions apply, the government institution should disclose the information.

[27] The Judge did not (at least explicitly) grapple with the notion of "personal information", and seems to have taken it for granted that the information at issue (which the Board considered to be the name and position of the two employees who made an access request to the Board on behalf of the appellant) was indeed "personal information" for the purposes of section 19 of the *Access Act* and of section 3 of the *Privacy Act*. Counsel for the appellant submits that the Judge erred in failing to consider that the personal information at stake was not just the names of the employees and their affiliation with Husky, but also the information in the context of the requested records, namely the information revealing the employees' involvement in Husky's procurement of certain geophysical and geological information from the Board.

[28] A useful starting point to determine the breadth of "personal information" is, once again, the discussion of that concept by Justice La Forest in *Dagg*. At paragraph 68 of his reasons, he recognized the expansive nature of the definition found in the *Privacy Act*, and noted that the list of specific examples that follows the general definition is not meant to limit the scope of the opening words. In his view, the intent of that definition is to capture "<u>any</u> information about a specific person, subject only to specific exceptions" (*Dagg* at para. 69) (emphasis in original).

[29] The name of an individual, *per se* and without any context, would not in my view be considered as personal information. A blank sheet of paper with a name on it found in a public

place does not reveal anything about that person. As the opening words of the definition of "personal information" reveals, the information that can be considered "personal information" must relate to an "identifiable" individual. It is only when a name can be associated with other personal information that its disclosure will be considered off limit. This is indeed what subsection 3(i) of the *Privacy Act* under the definition of "personal information" seems to suggest:

> (i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,
>
> i) son nom lorsque celui-ci est mentionné avec d'autres renseignements personnels le concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet;

[30] In the case at bar, the first part of this provision is clearly not applicable as there is no personal information relating to the two employees in the requests for information made to the Board. The name of the employees would not be disclosed, therefore, together with other personal information. Can it be said, however, that the disclosure of the employees' names would reveal information about these individuals in the context of their request to the Board?

[31] Commenting on that second branch of subsection 3(i) of the *Privacy Act* in *Dagg*, Justice La Forest found that the disclosure of the name itself need not reveal "personal" information, but only information about an identifiable individual. He came to that conclusion by contrasting the wording of the first and second branch of that provision (at paras. 84-85):

> The appellant argues, however, that this provision should be so read as to require that the disclosure of the name itself reveal <u>personal</u> information about the individual. In his view, a literal interpretation of para. (*i*) fails to recognize that the disclosure of a document will always reveal some information about the individual by connecting him or her with other information contained in the document. Such an interpretation, he states, would prohibit any disclosure where

> the name revealed any information whatsoever about the individual. In the result, names on documents would invariably constitute "personal information".
>
> I cannot accept this submission. Paragraph (*i*) clearly states that a record is personal information if the disclosure of the name itself would reveal information about the individual. It simply does not require this information to be "personal". Notably, the first part of para. (*i*) does refer to "personal" information that appears with the name of the individual. It is highly unlikely that the drafters of this provision would have inadvertently omitted to include the word "personal" in the second part of para. (*i*) when they included it in the first. (emphasis in original)

[32] In that case, the distinction was of no consequence since the disclosure of the names in the sign-in logs did reveal personal information (i.e. that these individuals were on specific premises, on particular days and between specified times). In the case at bar, the distinction could be of more significance as it is at least disputable that the documents wherein the employees' names are found could convey personal information about these individuals.

[33] This Court has struggled with this issue in at least two decisions, with seemingly contradictory results. In the first of these two decisions (*Information Commissioner of Canada v. Canadian Transportation Accident Investigation and Safety Board*, 2006 FCA 157, [2007] 1 F.C.R. 203 (*NavCanada*)), upon which both the respondent and the intervener unsurprisingly rely, the Court unanimously found that the concept of "personal information" and, indeed, the *Privacy Act* as a whole, must be understood in the context of the development of the right to privacy. Relying heavily on Justice La Forest's reasons in *Dagg* and on the constitutional jurisprudence developed in the context of sections 7 and 8 of the *Charter*, the Court found that privacy "connotes concepts of intimacy, identity, dignity and integrity of the individual" (at para. 52).

[34] Applying that conceptual approach, the Court noted that the information at issue in that case (records relating to four air occurrences which were subject to distinct investigations and public reports by the Safety Board) was of a professional and non-personal nature and did not fall within the concept of "privacy" and the values that concept is meant to protect. In other words, the information was not "about" an individual but related to the status of the aircraft, weather conditions, matters associated with air traffic control and the utterances of the pilots and controllers:

> The information contained in the records at issue is of a professional and non-personal nature. The information may have the effect of permitting or leading to the identification of a person. It may assist in a determination as to how he or she has performed his or her task in a given situation. But the information does not thereby qualify as personal information. It is not about an individual, considering that it does not match the concept of "privacy" and the values that concept is meant to protect. It is non-personal information transmitted by an individual in job-related circumstances. (emphasis in original)
>
> *NavCanada* at para. 54.

[35] One year later, a different panel of this Court upheld in a short decision a ruling of the Federal Court to the effect that names, titles, business phone and fax numbers of employees who had interacted with Health Canada on the appellant's behalf were personal information, and thus exempt under subsection 19(1) of the *Access Act*: see *Janssen-Ortho Inc. v. Canada (Minister of Health)*, 2007 FCA 252, 367 N.R. 134 (*Janssen-Ortho*). At issue in that case were not only the names and workplace contact information, as is the situation here, but also their opinions, suggestions and conclusions concerning the withdrawal of a prescription drug from the Canadian market during negotiations with Health Canada. It is in this context that the Court, in a single paragraph, dealt with the "personal information" argument (at para. 8):

> The Minister's argument relating to personal information was that the Motions Judge interpreted the definition in Section 3 of the *Privacy Act* which is referred

> to in section 19(1) under the *Access to Information Act*, R.S.C. 1995, c. A-1, too broadly in that it was only company information which was revealed rather than personal information. However, the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 (S.C.C.) interpreted the section broadly so as to capture any information about a person including their identity.

[36] In my opinion, these two decisions are not necessarily inconsistent. It is highly unlikely that this Court in *Janssen-Ortho* meant to reverse its earlier, one year old decision, without even mentioning it. I agree with the respondent and the intervener that the different results in *NavCanada* and *Janssen-Ortho* can be explained by the very different nature of information at stake in each of these cases. While the records considered in *NavCanada* appeared to have been purely transactional and informational, the disclosure of the names and titles of the individuals involved in *Janssen-Ortho* would have revealed far more intimate details about these individuals, their work and their opinions:

> In my view, the disclosure of the employees' names would reveal information about them which is not in the public domain. This information includes the fact that they attended meetings, wrote letters and authored studies related to the interface between JOI and Health Canada about whether Prepulsid should be withdrawn from the Canadian market. There is nothing in the Respondent's affidavit evidence which links the named employees to these negotiations. The public does not know of their involvement or about their opinions, suggestions and conclusions.
>
> *Janssen-Ortho Inc. v. Canada (Minister of Health)*, 2005 FC 1633 at para. 30, [2005] F.C.J. No. 2014 (QL).

[37] It is obviously impossible to draw a bright line between the facts of these two cases, and indeed to neatly categorize the myriad of factors to be taken into account before determining whether the disclosure of a name would reveal information about that individual in the context of a particular record. In the absence of any indication that the Court intended to reverse itself in *Janssen-Ortho*, however, it must be assumed that *NavCanada* is still good law and that the

different result in *Janssen-Ortho* can only be explained by the different nature of the information sought to be disclosed in those two cases. As stated in *Miller v. Canada (Attorney General)*, 2002 FCA 370 at para. 10, 220 D.L.R. (4th) 149, a panel of this Court will not overrule a previous decision of another panel unless it can be demonstrated that the earlier decision was "manifestly wrong"; in other words, it must be shown that the Court overlooked a relevant statutory provision or a binding precedent. In *Janssen-Ortho*, the Court did not even consider that possibility, with the result that *NavCanada* cannot be taken to have been implicitly set aside.

[38] Names appearing on documents will always reveal something about an individual. But such a broad test cannot be the standard to determine when the name on a document shall not be disclosed. Even if we accept that the information need not be "personal" for the purposes of the second branch of subsection 3(i) of the *Privacy Act*, it seems to me that it must tell us something of significance in relation to a person lest the protection afforded to privacy becomes meaningless. The illustrations that we find in subsections (a) to (h) under the definition of "personal information" in section 3 of the *Privacy Act* can all be said to relate to the intimacy and the core identity of an individual, and refer to the type of information the dissemination of which a person would prefer to control. Subsections (a) to (h) read as follows:

(a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,	a) les renseignements relatifs à sa race, à son origine nationale ou ethnique, à sa couleur, à sa religion, à son âge ou à sa situation de famille;
(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,	b) les renseignements relatifs à son éducation, à son dossier médical, à son casier judiciaire, à ses antécédents professionnels ou à des opérations financières auxquelles il a participé;
(c) any identifying number, symbol or other particular assigned to the	c) tout numéro ou symbole, ou toute autre indication identificatrice, qui lui

individual,	est propre;
(d) the address, fingerprints or blood type of the individual,	d) son adresse, ses empreintes digitales ou son groupe sanguin;
(e) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,	e) ses opinions ou ses idées personnelles, à l'exclusion de celles qui portent sur un autre individu ou sur une proposition de subvention, de récompense ou de prix à octroyer à un autre individu par une institution fédérale, ou subdivision de celle-ci visée par règlement;
(f) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,	f) toute correspondance de nature, implicitement ou explicitement, privée ou confidentielle envoyée par lui à une institution fédérale, ainsi que les réponses de l'institution dans la mesure où elles révèlent le contenu de la correspondance de l'expéditeur;
(g) the views or opinions of another individual about the individual,	g) les idées ou opinions d'autrui sur lui;
(h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (e), but excluding the name of the other individual where it appears with the views or opinions of the other individual, …	h) les idées ou opinions d'un autre individu qui portent sur une proposition de subvention, de récompense ou de prix à lui octroyer par une institution, ou subdivision de celle-ci, visée à l'alinéa e), à l'exclusion du nom de cet autre individu si ce nom est mentionné avec les idées ou opinions;

[39] In the case at bar, the information that would be conveyed about the appellant's employees if their names on the records sought were to be disclosed is of little import and is hardly the type of information that is integral to their dignity or identity, over which they would want to retain control, and in relation to which they would have a reasonable expectation of privacy. The documents in question contain correspondence and standard forms on behalf of Husky to the Board, seeking business-related information, and the response of the Board to those

requests. Not only are those records dated (some are from 1995), which in and of itself would not be sufficient to take away from the personal nature of those documents, but they reveal nothing about the employees who made these requests beyond the fact that the requests were made in the course of their employment.

[40] Counsel for the appellant made much of the exception found in subsection (j) of the definition of "personal information" in section 3 of the *Privacy Act*, which reads as follows:

but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include	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 :
(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,	j) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment :
(i) the fact that the individual is or was an officer or employee of the government institution,	(i) le fait même qu'il est ou a été employé par l'institution,
(ii) the title, business address and telephone number of the individual,	(ii) son titre et les adresse et numéro de téléphone de son lieu de travail,
(iii) the classification, salary range and responsibilities of the position held by the individual,	(iii) la classification, l'éventail des salaires et les attributions de son poste,
(iv) the name of the individual on a document prepared by the individual in the course of employment, and	(iv) son nom lorsque celui-ci figure sur un document qu'il a établi au cours de son emploi,
(v) the personal opinions or views of the individual given in the course of employment,	(v) les idées et opinions personnelles qu'il a exprimées au cours de son emploi;

[41] This subsection exempts, in certain circumstances, the names and titles of government employees, as well as the fact that an individual is a government employee. Since there is no parallel exemption for private sector employees, argues counsel for the appellant, it must be presumed that such information falls within the definition of personal information. More particularly, paragraph (j)(iv) provides that "personal information" does not include the name of the individual on a document prepared by the individual in the course of employment. It would seem to imply that the information described in that paragraph is otherwise *prima facie* captured by the term "personal information" and only excluded by the express language of that provision. By logical implication, such information about an individual other than an officer or employee of a government institution would be included in the definition of personal information. At first sight, this argument seems compelling. In my view, however, it is not conclusive.

[42] First of all, textual arguments are seldom sufficient, in and of themselves, to govern the interpretation of a statute. It is now well established that the words of a legislative provision must be interpreted in conformity with the scheme of the act, its object and the intention of Parliament: Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87, quoted with approval in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 154 D.L.R. (4th) 193. As a result, the argument put forward by the appellant must be balanced with the overarching principle of access conveyed by a purposeful reading of the *Access Act* and with the clear prescription that exceptions to that right be limited and specific (see *Access Act*, s. 2(1)).

[43] Second, the exception found in subsection (j) of the definition of “personal information” in the *Privacy Act* was presumably added to further access to information. It would be ironic if it could be used, *a contrario*, to restrain the disclosure of information in other circumstances where it would otherwise be captured by the opening words of the definition of “personal information”. Indeed, it does not necessarily follow from the fact that some information about public officials shall be considered public information that similar information relating to employees of the private sector shall not be considered public information. Subsection (j) may well have been added out of an abundance of caution, to ensure (as suggested by Justice La Forest in *Dagg* at para. 87) that the broad interpretation given to subsection (i) would not have the effect of preventing the disclosure of an unjustifiably broad array of government documents. It is not at all clear why this legitimate objective should translate into a corresponding narrow disclosure of documents emanating from the private sector, when they have been communicated to the government in the normal course of business.

[44] Third, it is worth noting that an opposite inference could be drawn from subsection (f). That provision, which is meant to illustrate what “personal information” means, refers to “correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence”. By implication, an argument could most certainly be made that business-like correspondence and forms of various kinds which must be filled out to obtain services, subsidies and grants or information from government departments and agencies should not be considered as “personal information” and do not fall within the exemption found at subsection 19(1) of the *Access Act*.

[45] For all of the foregoing reasons, I am therefore of the view that a purposive approach to the concept of "personal information" is to be preferred as it best carries out Parliament's intent in adopting the *Access Act* and the *Privacy Act*. Accordingly, I am unable to find that the names and titles of Husky personnel, in the context of the requested records, meet the definition of "personal information" in the *Privacy Act*. Contrary to the time entries in the sign-in logs that were at stake in *Dagg*, the information that would be conveyed by the records on which the employees' names are found in the case at bar, would not reveal anything intimately connected to their private life and which they might reasonably have expected to keep for themselves.

[46] Were the Court to adopt the broad scope of personal information that Husky is advancing, names would have to be redacted in every access request involving private sector employees, however mundane would be the information revealed by the disclosure of such names. Had Parliament intended such a result, it could have said so expressly. More importantly, it would trivialize the very notion of privacy and degrade the protection afforded to personal information in both the *Access Act* and the *Privacy Act*.

C. *Did the Board err in finding that the "personal information" at issue was publicly available and in exercising its discretion to disclose it under subsection 19(2) of the Access Act?*

[47] As a result of this finding, there is no need to deal with the exception found in paragraph 19(2)(b) for publicly available personal information. I will nevertheless address it, if only because it is the main ground upon which the Judge based his decision.

[48] Subsection 19(2) allows for disclosure of personal information if that information is already publicly available. There is no dispute that the names of the employees, and the fact of their employment with Husky, were publicly available on the internet. There is indeed no dispute that the names and job titles of the two employees, as well as their association with Husky as their employer, were publicly available on a web site at the time that the Board informed Husky of its intention to disclose this information under the *Access Act*.

[49] Husky submits that the names in the context of the documents were not publicly available and thus "the threshold for the Board's discretion found within that subsection was not met" (Appellant's Memorandum of Fact and Law at para. 21). The submission, as I understand it, is that the information relating to the fact that the employees, in the course of their employment, were involved with requests for information to the Board on behalf of their employer, was not publicly available.

[50] The determination of whether the information referred to in paragraph 19(2)(b) is in fact "publicly available" is a question of mixed fact and law and is subject to a reasonableness review. Husky bears the onus of showing that the Board unreasonably exercised its discretion. In my opinion, Husky has not shown any reason why this exercise of discretion was unreasonable.

[51] Husky failed to persuade the Board and the Judge that the records at issue disclosed anything more about the employees than what had previously been made publicly available on the internet. The Board found that the publicly available information disclosed a sufficient nexus between the individuals and the records in question. The Judge (and this Court) are at a

disadvantage when asked to question this finding, as the applicant did not see fit to file in evidence what was posted by the employees on the internet.

[52] I agree with the Judge that the purpose of the *Access Act* being to codify the right of access to information held by the government, the burden rests on the person resisting the disclosure. As a result, it was for Husky to show that the Board erred, either in fact or in law, in finding that the information was not publicly available or in exercising its discretion to allow the disclosure of the information. Instead, Husky chose not to disclose the information put on the internet by its employees, and did not provide any affidavit evidence in support of its argument from these employees. In those circumstances, and in the absence of any analysis as to why the information sought to be excluded does not logically flow from the publicly available employees' job titles, it cannot be said that the Judge erred when he refused to interfere with the Board's decision.

V. Conclusion

[53] For all of the above reasons, I would dismiss this appeal and deny the appellant's request for an order that the Board redact the employees' names and job titles from the records at issue, prior to their disclosure. Costs should be awarded to the Board only.

"Yves de Montigny"

J.A.

GAUTHIER J.A. (Concurring Reasons)

[54] I had the privilege of reading de Montigny J.A.'s reasons, and I agree with his conclusion that this appeal should be dismissed with costs. However, although I also agree with his view that Husky has not met its burden of establishing that the Board's decision to disclose the documents at issue without the deletion requested by Husky was unreasonable, I cannot concur with most of the views he expresses under the subtitle: Are the names and titles of Husky's employees, in the context of the requested records, "personal information" under subsection 19(1) of the *Access Act*?

[55] Obviously, I agree with the general principles my learned colleague summarizes at paragraphs 19 to 25 of his reasons. To these had it been necessary for me to deal with this substantive issue, I would have added two things. First, it is trite law that section 3 of the *Privacy Act* is to be construed broadly and is not limited to or by the examples set out in its subsections. Second, as was recently noted by the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] 3 S.C.R. 733, at para. 31, "[a] person's employment and the conditions of their workplace can inform their identity, emotional health, and sense of self-worth." As such, employment is a highly significant element in shaping a person's dignity and self-respect.

[56] I do not agree with the description of the main issue before us as set out in paragraph 18 of my colleague's reasons. Nor do I find it appropriate to make comments such as those found in

paragraphs 29, 30, 41 to 45 of the said reasons for these are simply not necessary to deal with this appeal, and in any event it would require a more thorough analysis.

[57] In my view, one should be particularly careful in cases involving personal information and/or interpretations of the relevant provisions of the *Access Act* and the *Privacy Act*, not to venture into matters that are not strictly necessary to decide an appeal.

[58] Although I recognize that there are circumstances where judicial minimalism is not the best approach, this is not one of them. For example, the blank sheet of paper on which a name appears, and to which my colleague refers to, would not be treated the same way if it appeared in a government file entitled "Terrorist Suspects" or "Sexual Offenders" rather than simply be found in a public place. Context is everything in matters such as this one, and every such case should be dealt with on a case-by-case basis without attempting to define a general approach other than that set out in the relevant legislation.

[59] In this appeal, the parties have invited us to make various findings or comments that would be useful for them in the future, especially considering the growing use of social media and websites containing what would otherwise be viewed as personal information within the meaning of section 3 of the *Privacy Act* and thus protected under the *Access Act*. This includes the standard of review applicable to decisions under subsection 19(1) of the *Access Act* because in their view, there is an issue as to whether the decision of the Supreme Court of Canada in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (*Agraira*), changed the standard of review set out in *Merck Frosst Canada Ltd. v. Canada*

(*Health*), 2012 SCC 3, [2012] 1 S.C.R. 23 (*Merck*). They say that it would also be useful to discuss whether this Court's decision in *Janssen-Ortho* overruled our prior decision in *NavCanada*. At the hearing, Husky's counsel even went so far as to ask us to reverse *NavCanada* because it was wrongly decided. But counsel did not provide us with detailed submissions as this particular point was not raised in their memorandum. No doubt one could have a different view than the one expressed in that case (particularly at paragraph 63). But one must follow the approach set out in *Miller v. Canada (Attorney General),* 2002 FCA 370, 293 N.R. 391 (leave to appeal to S.C.C. refused, 29501 (December 4, 2002), and it would not be appropriate to do so here given the lack of detailed submissions.

[60] The very fact that these may be important issues makes it even more important for this Appellate Court to use restraint (see *Defence Construction Canada v. Canada (Office of the Information Commissioner),* 2017 FCA 133 at paras. 38-52). This is particularly so in a matter where the evidentiary record is so poor that it does not even include a copy of what was actually available to the public through the internet. We also do not have the profile or the views of the employees whose "personal information" is at issue, and whose right to privacy is the only basis on which the information can be protected here.

[61] I agree with the Information Commissioner's characterization of the issue before us. This appeal concerns the scope and meaning of the word "information" under paragraph 19(2)(*b*) and only by extension the scope of personal information that was protected under subsection 19(1) (Memorandum of Fact and Law of the Information Commissioner at 2, at para. 4). I believe that this appeal can and should be determined on the sole basis of whether or not Husky has

established a reviewable error in the decision of the Board pursuant to subsection 19(2) of the *Access Act*. This means that there is no reason to embark on a discussion of the matters referred to in paragraph 59 above. This is especially so with respect to the standard of review applicable to decisions under subsection 19(1) considering that Parliament is in the process of amending the *Access Act* so as to provide for an independent administrative review of such decisions by the Information Commissioner, and to provide that an application under subsection 44(1) is to be determined by the Federal Court as a new proceeding (Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*, 1st Sess., 42nd Parl., 2017, s. 21 (as passed by the House of Commons 6 December 2017)).

[62] With respect to discretionary decisions of administrative decision-makers, in this matter, the standard of review is reasonableness and this is the standard that the Federal Court applied. Also, the approach set out in *Agraira* applies, for there was no discretionary decision involved in *Merck* (see at para. 53).The decision in *Merck* dealt solely with subsection 20(1) of the *Access Act*, which for our purpose is the equivalent of subsection 19(1). Thus, as the Federal Court chose the appropriate standard of review, this Court must step into the shoes of the court of first instance which initially reviewed the administrative decision to determine if that court applied it correctly (*Agraira* at paras. 45-46).

[63] Before doing so, it is worth mentioning that the Federal Court's reasons in respect of subsections 19(1) and (2) may have been brief simply because the parties before it agreed that the names of the employees, their titles and relationships with Husky, and their emails and phone numbers were personal information within the meaning of subsection 19(1) of the *Access Act*.

Also, the Federal Court found that the Board had the discretion to release the information, and that Husky had not advanced any evidence or analysis as to why the Board should not release this information.

[64] Obviously, Husky contests this last finding. It may have been more precise or clearer for the Federal Court to say "any real or satisfactory evidence or analysis". But, as explained by de Montigny J.A, Husky simply advanced a theory that was not grounded on the evidence. It provided no real or satisfactory analysis in its memorandum as to why this theory actually applies here nor was it in a position to do so when pressed in this respect at the hearing because it would have required more than what was in the evidentiary record. To use the terminology of de Montigny J.A., why is it that the so-called "additional information disclosed" does not logically flow from what was publicly available?

[65] Husky's argument before us is simple: by exercising its discretion to disclose the correspondence at issue with the identifiers that were publicly available on the internet (names, relationships with Husky and contact information), the Board was disclosing more personal information about these employees than what was already publicly available. The something more is the simple fact that they were involved in this correspondence (routine and non-confidential requests to provide or consult geophysical data or records collected and made available by the Board as part of its statutory mandate with respect to the region where these employees worked). Husky provided no other evidence or analysis as to the nature and significance of these requests. We know that it did not object to the disclosure of this correspondence including the fact that the request were made on its behalf. The data or reports

requested are listed on the Board's website and made available upon request. Still, Husky says that none of this is relevant or necessary to determine the issue.

[66] The position of the Board and of the Information Commissioner is that the limited correspondence at issue with the identifiers reveals no more personal information about the employees than what was already publicly available.

[67] In my view, this is a question of mixed fact and law in respect of which, crucial factual elements are missing from the record before this Court. Are we talking of something like a person publicly known to be a chemist wishing to consult a general chemistry book available at the only publicly known library in his area or something else?

[68] As mentioned, context is everything in cases such as this one. Otherwise, we have nothing more than a general theory that, if accepted, would render paragraph 19(2)(*b*) meaningless. I simply cannot accept the argument put forth by Husky.

[69] To determine whether the publicly available information about these employees can be construed as including or not the disclosure of the limited information to which Husky objects, one needs to look at exactly what the public job description of these employees was. Here, although the terms "title" and "relationship with Husky" were used by the parties, it is not even clear to me if this means something as simple as Vice-President, Director of Geophysical Research, Financial Clerk or Librarian or something more descriptive of their profile.

[70] This is sufficient to dismiss this appeal.

"Johanne Gauthier"

J.A.

"I agree

J. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-75-16
STYLE OF CAUSE:	HUSKY OIL OPERATIONS LIMITED v. CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD AND INFORMATION COMMISSIONER OF CANADA
PLACE OF HEARING:	ST. JOHN'S, NEWFOUNDLAND AND LABRADOR
DATE OF HEARING:	JUNE 28, 2017
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRING REASONS BY:	GAUTHIER J.A.
CONCURRED IN BY:	WOODS J.A.
DATED:	JANUARY 12, 2018

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