Federal Court of Appeal  Cour d'appel fédérale

Date: 20120904

Docket: A-302-11

Citation: 2012 FCA 227

CORAM: **DAWSON J.A.**
TRUDEL J.A.
STRATAS J.A.

BETWEEN:

TIMOTHY EDW. LEAHY

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on April 26, 2012.

Judgment delivered at Ottawa, Ontario, on September 4, 2012.

REASONS FOR JUDGMENT OF THE COURT BY: DAWSON J.A.
TRUDEL J.A.
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REASONS FOR JUDGMENT OF THE COURT

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Introduction

[1] The appellant, Mr. Timothy Leahy, appeals from a decision of the Federal Court, reported as 2011 FC 1006, 395 F.T.R. 260, rendered in connection with Mr. Leahy's application under section 41 of the *Privacy Act*, R.S.C., 1985, c. P-21 (Act) for judicial review of a decision of Citizenship and Immigration Canada (CIC). CIC, in a decision letter dated February 19, 2009, refused Mr. Leahy's request for access to certain information under the Act (Privacy Request) based on the third-party information and solicitor-client privilege exemptions found in sections 26 and 27 of the Act. A judge of the Federal Court (Applications Judge) dismissed Mr. Leahy's application and ordered him to pay costs to the respondent.

[2] Two principal issues are raised on this appeal. One is procedural, the other is substantive in nature.

[3] The procedural issue concerns the proper scope and format of confidential evidence and submissions made to the Court on behalf of a government institution in respect of documents or information disclosed to the Court on a confidential basis, but not disclosed to the person who has requested access to such information.

[4] The substantive issue concerns the nature of the information which should be provided to a reviewing court in order for it to be able to properly review a decision made under the Act to withhold personal information from a requester.

[5] The other issue to be considered is whether CIC erred in the circumstances of this case by limiting the scope of Mr. Leahy's Privacy Request.

[6] For the reasons which follow, we have decided that the appeal should be allowed with costs, and that Mr. Leahy's Privacy Request should be remitted to the respondent for redetermination by a different decision-maker in accordance with these reasons. We have reached this decision on the basis of the failure of CIC to provide an evidentiary basis sufficient to permit this Court, or the Federal Court, to properly review the decision to withhold access to personal information from Mr. Leahy.

Factual Background

[7] The relevant facts are set out in detail in the decision of the Federal Court. The following facts are sufficient for the purpose of the issues to be decided.

[8] Mr. Leahy was at all material times a lawyer with Forefront Migration Ltd. In that capacity, he represented or advised persons in conjunction with immigration proceedings or applications. In 2007, CIC decided that Mr. Leahy was not an "authorized representative" as then defined in section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[9] Section 2 of the Regulations provided that:

"authorized representative" means a member in good standing of a bar of a province, the Chambre des notaires du Québec or the Canadian Society of	« représentant autorisé » Membre en règle du barreau d'une province, de la Chambre des notaires du Québec ou de la Société canadienne de consultants en

Immigration Consultants incorporated under Part II of the *Canada Corporations Act* on October 8, 2003.	immigration constituée aux termes de la partie II de la *Loi sur les corporations canadiennes* le 8 octobre 2003.

[emphasis added] [Non souligné dans l'original.]

[10] CIC decided Mr. Leahy was not an "authorized representative" after it discovered that the appellant's status was listed by the Law Society of Upper Canada (LSUC) as "Not Practicing Law – Employed". For the purposes of the LSUC this category describes "a lawyer who is employed by an organization … and who does not provide legal services" [emphasis added]. From this information, CIC concluded that the appellant was not a "member in good standing" of his bar association since, by not providing legal services, he was exempt from contributing to the compulsory professional liability insurance plan. We need not, and do not, decide whether this interpretation is correct.

[11] The practical result that flowed from CIC's conclusion about Mr. Leahy's status was that he was no longer able to provide services to his clients.

[12] On September 25, 2007, the International Region of CIC issued Operational Instruction 07-040 (RIM) to all visa offices requiring them to "send Mr. Leahy a letter simply stating that the Visa Office will have no further contact with him" and to advise Mr. Leahy's clients of the situation and inform them "on how to proceed with their application" (tribunal record, appeal book volume 2, tab 7, page 2361).

[13] Subsequently, on January 15, 2008, CIC reversed its previous position through Operational Bulletin 046. It issued Operational Instructions 08-002 (RIM) which authorized visa offices to

resume dealing with Mr. Leahy as he had regained "authorized representative" status (tribunal record, appeal book volume 2, tab 7, page 2368). This about-face occurred after CIC received information from the LSUC indicating that Mr. Leahy was now listed as a "member in private practice" and thus obliged to contribute to the liability insurance plan (tribunal record, appeal book volume 2, tab 7, page 2370).

[14] These events caused a string of administrative and legal proceedings to be initiated by Mr. Leahy against CIC, including his Privacy Request, made pursuant to section 12 of the Act. This Privacy Request formed the basis of Mr. Leahy's application for judicial review in the Federal Court and his appeal in this Court.

[15] Section 12 of the Act in its relevant part reads:

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	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*) any personal information about the individual contained in a personal information bank; and	*a*) les renseignements personnels le concernant et versés dans un fichier de renseignements personnels;
(*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	*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.

> retrievable by the government institution.
>
> [emphasis added] [Non souligné dans l'original.]

[16] In his Privacy Request, Mr. Leahy sought the following:

> […] copies of all items, emanating from, or received by, CIC and pertaining to me, directly or indirectly. My request encompasses correspondence, emails, telephone messages and any other recorded items. The initial time-frame is from 1 January 2007 and extends to the date this request is executed and includes NHQ, visa-posts, CPC's, CIC's, etc. Partial disclosure would be acceptable and probably preferable; *i.e.*, disclosure from NHQ file(s), followed by specific visa-posts, etc.
>
> (tribunal record, appeal book volume 2, tab 7, page 1)

[17] After an initial assessment, Peter Maynard, the access to information and privacy (ATIP) administrator in charge of the Privacy Request, determined that it did not meet the requirements of section 12. In his view, for CIC to process the request, Mr. Leahy had to provide "sufficiently specific information" to allow CIC to locate the materials (see paragraph 12(1)(*b*) of the Act), such as the names, titles, locations or other information to identify the employees involved. Moreover, in Mr. Maynard's view, the scope of the search should be limited to communications from January 1, 2007 to May 16, 2008, *i.e.* the date the Privacy Request was received rather than the date on which it would eventually be fulfilled.

[18] On May 22, 2008, Mr. Maynard wrote to Mr. Leahy advising that the Privacy Request had been received and would be treated as covering the period from January1, 2007 to May 16, 2008. Mr. Maynard also advised that the request was on hold because Mr. Leahy had not provided sufficiently specific information on the location of the information to render it reasonably

retrievable. Mr. Leahy was asked to provide the names of employees, their specific titles, their locations and other identifying information in order to allow the materials to be reasonably located (tribunal record, appeal book volume 2, tab 7, page 3).

[19] Mr. Maynard's request was met by the following answer from Mr. Leahy who maintained his position as to the content and time-frame of his request:

> […] you start with Legal, seeking direction from someone there. I am sure that you can find someone who can direct you to the NHQ [National Headquarters] cabal orchestrating a worldwide campaign to destroy my company and me, including, but not limited to, sending a memorandum to various, if not all, visa-posts ordering direct interference with our clients.
>
> (tribunal record, appeal book volume 2, tab 7, page 4)

[20] Need we say that this reply was of no particular assistance to Mr. Maynard? Having found that it would be unreasonable to go to every Citizenship and Immigration office around the world, including over 80 overseas missions, 43 Canadian CIC offices, 4 Case Processing Centres and CIC National Headquarters (public affidavit of John Warner, appeal book volume 1, tab 6 at paragraph 26), CIC determined that the search's scope would be limited to the National Headquarters and that May 16, 2008 would be the end date as, otherwise, the Privacy Request would require an ongoing process of consultations. As a result, Mr. Maynard reformulated the Privacy Request in these terms:

> I (Timothy LEAHY) am requesting copies of all items, emanating from, or received by, CIC and pertaining to me, directly or indirectly. My request encompasses correspondence, emails, telephone messages and any other recorded items. The initial time-frame is from 1 January 2007, until May 16, 2008.
>
> (tribunal record, appeal book volume 2, tab 7, page 6)

[21] On June 11, 2008, Mr. Leahy received written notice that his Privacy Request could not be processed within the 30-day statutory limit imposed pursuant to section 14 of the Act (tribunal record, appeal book volume 2, tab 7, page 42). In view of Mr. Leahy's international client base, external consultations were necessary to comply with his Privacy Request. Consequently, the time limit was extended for the 30-day maximum provided by paragraph 15(*a*)(ii) of the Act. Mr. Leahy acquiesced to the extension.

[22] In the end, Mr. Leahy's Privacy Request led CIC to collect approximately 1,030 pages of documents. Five hundred and twenty-one pages were duplicate copies. Therefore, in substance, 509 pages were responsive to the Privacy Request. On February 19, 2009, Mary-Anne McManus, Acting Manager of the CIC ATIP Division, released to Mr. Leahy 87 pages, advising him as follows:

> The processing of your request is now complete and I am pleased to enclose the documents requested. Certain information contained on the exempted pages qualifies for exemption pursuant to sections 26 and 27 of the [Act].
>
> (tribunal record, appeal book volume 2, tab 7, page 2360)

[23] Unsatisfied with this partial disclosure, Mr. Leahy exercised his rights under section 29 of the Act. He complained to the Privacy Commissioner that: (a) CIC had improperly applied exemptions to his Privacy Request; and (b) failed to provide him with access to information held at NHQ (public affidavit of John Warner, appeal book volume 1, tab 6).

[24] Following an investigation into the complaint, the Assistant Privacy Commissioner concluded that the complaint was not well-founded. In her Report of Findings, she first addressed the documents withheld by CIC pursuant to section 26 of the Act, which provides that:

26. The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) about an individual other than the individual who made the request, and shall refuse to disclose such information where the disclosure is prohibited under section 8.	26. Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) qui portent sur un autre individu que celui qui fait la demande et il est tenu de refuser cette communication dans les cas où elle est interdite en vertu de l'article 8.

[25] She stated "[o]ur review of the information at issue confirmed that the exempted information was not the complainant's information" (public affidavit of John Warner, appeal book volume 1, tab 6).

[26] Continuing on to section 27 of the Act, which permits a government institution's head to decline to disclose material covered by solicitor-client privilege, the Assistant Privacy Commissioner advised that she carefully reviewed the matter and confirmed CIC's decision not to disclose the documents at issue based on either solicitor-client or litigation privilege.

[27] On July 6, 2010, Mr. Leahy commenced his application for judicial review pursuant to section 41 of the Act. Section 41 reads:

Any individual who has been refused access to personal information requested under subsection 12(1) may, if a complaint has been made to the	L'individu qui s'est vu refuser communication de renseignements personnels demandés en vertu du paragraphe 12(1) et qui a déposé ou fait

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.	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.

[28] Subsequently, Mr. Leahy was provided with additional records as follows:

- October 29, 2010: 22 pages
- February 23, 2012: 2 pages
- March 23, 2012: 11 pages

The Judgment of the Federal Court

[29] After setting out the various contentions advanced by Mr. Leahy both in his notice of application and his memorandum of fact and law, the Applications Judge reviewed the background facts. He then set out the issues before the Court and summarized the parties' written submissions.

[30] The Applications Judge went on to discuss the standard of review to be applied when reviewing decisions under sections 26 and 27 of the Act. Relying upon the decision of our Court in *Blank v. Canada (Minister of Justice)*, 2010 FCA 183, 409 N.R. 152 (*Blank*), a case which dealt with the standard of review to be applied to the review of a claim of solicitor-client privilege under section 23 of the *Access to Information Act*, R.S.C., 1985, c. A-1 (ATIA), he concluded that the

Court must apply the correctness standard to review whether the withheld information falls within the section 26 or 27 exemptions, and the standard of reasonableness to the discretionary refusal to release exempted information. (See *Blank*, at paragraph 16).

[31] The remaining issues as rephrased by the Applications Judge were:

1. Did the respondent err by limiting the scope of the request?
2. Did the respondent err by limiting the access request to a specific period of time?
3. Did the respondent err by delaying disclosure past the statutory required time-frame?
4. Did the respondent err by exempting certain information from disclosure pursuant to section 26 of the *Privacy Act*?
5. Did the respondent err by exempting certain information from disclosure pursuant to section 27 of the *Privacy Act*?

[32] On appeal to this Court, Mr. Leahy takes particular issue with the Applications Judge's findings on questions 1, 4 and 5).

[33] Regarding the first issue, the Applications Judge found that given the appellant's failure to provide more specific information when invited to do so, the decision to limit the terms of the Privacy Request was correct (reasons for judgment at paragraph 46). Moreover, it was also correct not to include material under the control of other governmental institutions because the Privacy Request had been directed only to CIC (reasons for judgment at paragraph 49).

[34] Regarding the second issue concerning the period covered by the Privacy Request, the Applications Judge held that "[a]n end date to the disclosure period is necessary in order for

disclosure to be completed in a timely fashion. Were the end date of disclosure to be the date that disclosure is made, then the process of completing consultations might never end" (reasons for judgment at paragraph 52). Mr. Leahy does not directly attack this finding, and he made no written or oral submissions on this issue. Instead, as explained below, he seeks an order compelling disclosure of records created between January 1, 2007 (the start date referenced in the Privacy Request) and the date disclosure is made.

[35] We have not ordered that any disclosure be made. In light of the nature of the remedy we order, and in the absence of submissions from the parties on the issue of the period properly covered by the Privacy Request, it is not necessary or appropriate for us to deal with this issue.

[36] Mr. Leahy does not address the third issue concerning the lateness of the response to the Privacy Request. In any event, paragraph 58 of the reasons below serves as a full answer to the question posited:

> This judicial review only relates to the refusal to allow access to certain exempted material which was refused under sections 26 and 27 of the Act. There is no need to review the respondent's delay in disclosure and deemed refusal of information which was subsequently disclosed on February 19, 2009.

[37] As to the fourth issue and CIC's asserted exemptions under section 26 of the Act, the Applications Judge stated: "I have reviewed the materials and determined that each instance correctly involves the personal information of a third party" (reasons for judgment at paragraph 60).

[38] Finally, the Applications Judge turned his mind to the materials allegedly exempt from disclosure pursuant to section 27 of the Act. Relying on the decision of the Supreme Court of Canada in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319 (*Blank SCC*), he found that the solicitor-client privilege protection under section 27 of the Act includes both legal advice (or solicitor-client) privilege and litigation privilege (reasons for judgment at paragraph 63). This finding is not contested.

[39] This being said, after the Applications Judge stated that he had reviewed the documents at issue in light of the principles applicable to solicitor-client privilege, he found that "[t]he vast majority of the documents under review deal with the seeking and rendering of legal advice. […] These communications were made by counsel acting in their capacity as lawyers, not in another capacity providing policy advice" (reasons for judgment at paragraph 72). The Applications Judge also found that privilege had not been waived as the "information sharing was to remain confidential and [that it] was never shared with third parties outside of the Client Department of Citizenship and Immigration" (client) (reasons for judgment at paragraph 72). In the case of information sharing between non-lawyers, it was found to "[fit] comfortably within the 'continuum of communication' between the Department of Justice and members of its client" (reasons for judgment at paragraph 72).

[40] The Applications Judge also looked at the documents exempted from disclosure by CIC based on litigation privilege. He held that litigation between the parties was not only apprehended but had materialized as several of the actions initiated by Mr. Leahy against the respondent were

pending at the time of disclosure and shared a common thread. These documents met the test set out in *Blank SCC* (reasons for judgment at paragraph 75).

[41] The Applications Judge also found that there were no documents which CIC should have severed and partially disclosed (reasons for judgment at paragraph 78).

[42] Finally, the Applications Judge addressed Mr. Leahy's submission that solicitor-client privilege does not apply where the communication has the purpose of furthering unlawful conduct or where the party seeking disclosure can demonstrate an actionable wrong by the other party. He wrote:

> However, the burden to demonstrate a claim of wrongdoing rests with the applicant […] and he has not met this burden in this case. He has not demonstrated any unlawful conduct or actionable wrong on the part of the respondent.
>
> (reasons for judgment at paragraph 79)

[43] In the end, the Applications Judge held that CIC correctly found that the withheld information fell within sections 26 and 27 of the Act and that its discretionary decision not to disclose the exempt material was reasonable. Therefore, the Applications Judge dismissed Mr. Leahy's application for judicial review with costs to the respondent.

The Procedural Issue

[44] The record on this appeal initially consisted of:

i. an appeal book, in two volumes, containing, among other things, the public affidavit of the CIC deponent (Mr. John Warner) and copies of the documents released to Mr. Leahy; and

ii. a confidential appeal book, in eight volumes, containing, among other things, the confidential affidavit sworn by Mr. Warner and copies of the documents not disclosed to Mr. Leahy.

[45] A confidentiality order issued by the Federal Court permitted the respondent to file in that court both a confidential affidavit and a confidential record containing the documents which CIC had not released to Mr. Leahy. Rule 152(3) of the *Federal Courts Rules* provides that a confidentiality order issued by the Federal Court continues for the duration of any appeal of the proceeding. Thus, the Federal Court confidentiality order continued to have effect and it permitted the respondent to file the confidential appeal book in this Court.

[46] Subsequent to the filing of the appeal books, the appellant filed his memorandum of fact and law. The respondent Minister then filed two memoranda of fact and law, one confidential and one not confidential. The confidential memorandum of fact and law was filed pursuant to the direction of Justice Layden-Stevenson.

[47] The contents of the confidential record were problematic. We discuss below the inadequacy of the evidentiary record. For the purpose of the procedural issue, the contents of the confidential record were problematic because the confidential affidavit of Mr. Warner contained information that

demonstrably was not confidential and the confidential memorandum of fact and law similarly contained information and submissions that were not confidential in nature.

[48] Accordingly, on February 7, 2012, the Court issued a direction that stated in relevant part:

> The Court makes the following requests of the parties in advance of the hearing of the appeal now scheduled for February 27, 2012:
>
> […]
>
> 3. The confidential memorandum of fact and law filed by the respondent contains information and submissions which are not confidential in nature. Counsel for the respondent is requested to remedy this forthwith, and in any event by no later than February 16, 2012. This will require the respondent to file either a redacted version of the confidential memorandum of fact and law or an amended confidential memorandum of fact and law that does not contain information or submissions which can be provided in the public hearing. It will also require the respondent to file either an amended public memorandum of fact and law or a supplementary public memorandum of fact and law that contains all of the information and submissions the respondent wishes to advance that can be addressed in the public hearing.

[49] In response, counsel for the respondent filed a public supplementary memorandum of fact and law and an amended confidential memorandum of fact and law.

[50] When the appeal came on for hearing on February 27, 2012, the Court expressed its view that the amended confidential memorandum of fact and law continued to contain information and submissions which were not confidential in nature.

[51] As the Court explained at that time, an overbroad claim of confidentiality is wrong at law for at least two reasons.

[52] First, it is a fundamental principle that proceedings of Canadian courts are open and accessible to the public. The open court principle extends to the affidavit evidence and the written submissions filed on judicial review. Any restriction on the presumption of openness should only be permitted when:

> (a) such a restriction is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutory effects of the restriction outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of each party to a fair and public hearing, and the efficacy of the administration of justice.
>
> (*Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332 at paragraphs 22 to 31)

There is no justification for placing non-confidential information or submissions in a confidential document. To do so violates the open court principle.

[53] Second, fairness requires that a party know the case to be met. An overbroad claim to confidentiality that prevents the opposite party from knowing as much as possible about the evidence and the submissions made to the Court improperly impairs the opposite party's ability to respond to the case. Put simply, an overbroad claim of confidentiality is inconsistent with the duty of procedural fairness.

[54] For these reasons, on February 27, 2012, the Court adjourned this application on the following terms:

> 1. The hearing of this appeal is adjourned. The appeal is now set down for hearing at 180 Queen Street West, 7th Floor, Toronto, Ontario, commencing at 9:30 a.m., on Thursday, April 26, 2012, for a duration not to exceed 2 hours and 30 minutes.
>
> 2. The respondent shall, on or before March 23, 2012, serve and file a supplementary appeal book containing a redacted version of the confidential affidavit of John Warner.
>
> 3. The respondent shall, on or before March 23, 2012, serve and file redacted and unredacted versions of his amended memorandum of fact and law. The unredacted version of the amended memorandum of fact and law shall not exceed 45 pages in length. Any references to the confidential appeal books will be by reference to the ATIP numbers as found in volumes 1 to 4 of the confidential appeal books.
>
> 4. The appellant may serve and file, on or before April 12, 2012, a supplementary memorandum of fact and law. The supplementary memorandum of fact and law shall respond to any new matters raised in the respondent's redacted amended memorandum of fact and law, and shall not exceed 10 pages.
>
> 5. The costs of this appearance are reserved, to be dealt with following the hearing of the appeal.

[55] In consequence, the respondent served and filed a properly redacted public version of the confidential affidavit of John Warner and both public redacted and confidential unredacted versions of his memorandum of fact and law. The appellant then filed a supplementary memorandum of fact and law.

[56] In future, we would encourage counsel for government institutions to consider the use of redacted and unredacted affidavits and memoranda of fact and law in applications of this type. In

the present case, this enabled the appellant to receive the maximum disclosure of the evidence and submissions, while still protecting information alleged to be exempt from disclosure.

[57] Having dealt with the procedural issue, we now turn to the positions of the parties on the substantive issues.

Positions of the Parties

[58] On appeal to this Court, the appellant initially raised six grounds of complaint with regards to the reasons below. In a nutshell, the appellant argued that the respondent wilfully refused to comply with its statutory obligations and arbitrarily limited its search to the National Headquarters. As a result, he disagreed with the Applications Judge's finding as to the Privacy Request's scope and his conclusions pertaining to the section 26 and 27 exemptions.

[59] In particular, Mr. Leahy made the following two arguments:

(1) The Applications Judge "failed in his duty when he upheld the exemptions despite not identifying who actually exempted the material or citing to any evidence that an informed Minister asserted privilege" (appellant's memorandum of fact and law at paragraph 21). He "abdicated his judicial responsibility by deferring to the unknown bureaucrat who claimed the exemption" (appellant's memorandum of fact and law at paragraph 22). He also did not look into the manner in which the discretion was exercised;

(2) The Applications Judge misapplied *Blank SCC* and erred by finding there to be no evidence of illegal activity on the part of CIC.

[60] In his supplemental submissions Mr. Leahy argued that:

> [The Applications Judge] failed to identify (a) who made the decision to withhold, (b) whether that person was authorized to make that decision, (c) who asserted privilege, (d) whether that person (who should be the Minister himself) was properly informed before doing so and (e) whether consideration was given to releasing the material despite its being privileged. He did not do so because no such evidence was ever adduced.

[61] The appellant sought various remedies, including once again the disclosure of materials held by the Immigration and Refugee Board, an independent government institution listed separately in the Act's schedule. The orders sought are:

a. an order compelling the respondent to disclose all materials, documents, items, etc. contained in any and all files, under whatever name and located in any of the respondent's entities, including the [Immigration and Refugee Board], be they located in Ottawa, in any local Canadian agency/bureau/board/centre/office, etc. or in any post abroad, wherein Mr. Leahy is the subject, object or is referenced and which item was recorded from January 2007 until the date the disclosure is made;

b. an order prohibiting the respondent from asserting privilege over any such item relating to (a) any improper conduct, (b) any effort (i) to deprive Mr. Leahy or his firm, Forefront Migration Ltd., of any client, or (ii) to separate them from a client; (c) to impede Mr. Leahy from earning a living; or (d) any effort to treat their clients unfavourably owing to Mr. Leahy's assistance;

c. an order imposing a sixty-day deadline for full disclosure and a penalty of $500/- per day thereafter until full disclosure occurs; and

d. an order of costs to the applicant in an amount of no less than $10,000.

[62] CIC, for its part, entirely supported the legal and factual findings of the Applications Judge. At the hearing of this appeal, the panel members raised concerns about the lack of evidence with respect to (a) the identity of the person or persons properly authorized to exempt documents under the Act or to release them despite their confidential content; and (b) the manner in which the discretion to disclose information was exercised.

[63] Addressing these concerns, counsel for the respondent fairly conceded that the evidence on the issue of delegation could have been clearer but that inferences could be drawn from the evidence. Initially, we were asked to infer from the fact that Ms. McManus signed the letter transmitting the documents released under the Act that she was the decision-maker. Later, we were asked to infer from the statement in Mr. Warner's affidavit "I was the officer who had final carriage of the applicant's request under s. 12 of the Privacy Act" that Mr. Warner had made the decision.

[64] Counsel for the respondent also relied upon the Delegation Order signed by the then Minister pursuant to section 73 of the Act, by which she authorized the officers and employees of CIC whose positions were set out in an attached schedule to carry out those of her powers, duties or functions under the Act that were listed therein (joint book of authorities at tab 6).

[65] Counsel for the respondent went on to concede that there was no evidence before the Court to show that the decision-maker was properly instructed about the required elements of solicitor-client or litigation privilege and that the evidence was silent as to the manner in which the discretion to release or not release information was exercised. Counsel for the respondent acknowledged that

on the basis of the affidavit evidence one could not tell whether the discretion to release information was informed by the proper legal principles. Nor was there evidence concerning the steps taken to keep the information confidential. Once again, counsel for the respondent invited the Court to infer from the content of documents at issue that they arose within the context of a legal matter and were kept confidential.

[66] Having reviewed the positions of the parties, we will turn to a general overview of the Act and its basic architecture, emphasizing the interpretative principles applicable to sections 26 and 27. Then, we will discuss where it vests decision making power and briefly describe how documents are classified within government departments.

Overview of the Act

a) Access generally

[67] Access to information and the concomitant value of privacy have been addressed legislatively across Canadian jurisdictions. While these regimes vary slightly, as a general matter, each bestows a right to access government information, enunciates a series of exceptions to this right and outlines the procedural aspects of managing access requests. Many jurisdictions appoint Commissioners to oversee enforcement and spell out dispute resolution mechanisms.

[68] Most provincial statutes address access to information and privacy in the same statute. In contrast, at the federal level, access and privacy rights are spread across the ATIA and the Act, collectively the "Access Statutes" (they were considered together by Parliament as Bill C-43 and

enacted simultaneously as Schedules I and II to S.C. 1980-81-82-83, c. 111). Thus, either the ATIA or the Act may come into play depending on the specific circumstances of a case. Nevertheless, the Access Statutes are meant to be a "seamless code" and must be construed harmoniously according to a "parallel interpretation model": *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, [1997] S.C.J. No. 63 at paragraphs 45 and 51; *Canada (Information Commissioner) v. Canada (Canadian Transportation Accident Investigation and Safety Board)*, 2006 FCA 157, [2007] 1 F.C.R. 203 at paragraph 35; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at paragraph 22. Accordingly, principles developed in the case law under ATI A are relevant to the interpretation and application of the Act.

[69] The ATIA provides a general right to access government institutions' records (section 4). This is designed to reflect the general principle of open access to government information: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at paragraph 16. The dividing line between the Access Statutes is the "personal information" definition in the Act. Pursuant to subsection 19(1) of the ATIA, personal information is subject to a mandatory exemption from disclosure unless it accords with the Act. Very broadly, personal information is information about an identifiable individual that is recorded in any form (see section 3 of the Act.). This Court has held that "personal information" must be given a broad and generous interpretation: *Canadian Transportation* at paragraph 34.

[70] An application to obtain personal information must be made under the Act, as it provides access rights separate from those under the ATIA. In this case, it is common ground that Mr. Leahy is seeking information about himself and so he properly applied under the Act.

b) Architecture of the Act

[71] The Act's purposes are twofold: to protect personal information held by government institutions and to provide individuals with a right to access information about themselves (section 2). To achieve these ends, the Act obliges the government institutions listed in its schedule (together with certain Crown corporations (section 3)) to limit the collection, use and disclosure of personal information, and gives citizens and permanent residents the right to access personal information about themselves in the government's hands.

[72] The right to access personal information in the government's control is contained in section 12, partially reproduced above. Section 12, however, is subject to sections 18 to 28, which exempt the government from its duty to disclose in a variety of circumstances. These exemptions fall into two categories. Some are based on the type of personal information involved. In these instances, information is exempt from disclosure if it falls into the prescribed class: see, *e.g.*, section 21 (international affairs and national defence) and section 22 (law enforcement or investigations). The exemptions at issue in this appeal, third-party personal information (section 26) and solicitor-client privilege (section 27), fall into this category. Others require the institution to be satisfied that disclosure would result in a particular consequence, for example, a threat to the safety of individuals (section 25).

[73] Unlike the Act, the ATIA purpose provision (section 2) specifically references the necessity that access exceptions be "limited and specific". The Federal Court has held that the two purpose provisions have "the same general effect": *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board),* [1997] F.C.J. No 1812, 140 F.T.R. 140 at paragraph 34. Given that one of the Act's objectives is to provide individuals with access to personal information about themselves, courts have generally interpreted exceptions narrowly: *Lavigne v. Canada (Office of the Commissioner of Official Languages),* 2002 SCC 53, [2002] 2 S.C.R. 773 at paragraph 30. Exceptions should be limited and specific, and it is incumbent on the government to justify the secrecy: *Commissioner of the Royal Canadian Mounted Police* at paragraph 21. In effect, there is a reverse onus on the government to show that personal information sought by an individual is *not* subject to disclosure: *Canadian Association of Elizabeth Fry Societies v. Canada (Minister of Public Safety Canada),* 2010 FC 470, [2011] 3 F.C.R. 309 at paragraph 51; see also section 47 of the Act. Any ambiguity in the exemptions must be interpreted in favour of access: *Rubin v. Canada (Minister of Transport),* [1997] F.C.J. No. 1614, 221 N.R. 145 (F.C.A.) at paragraph 24.

[74] A corollary of the fact that access exceptions must be limited is that only authorized delegates may deny disclosure. The process of properly delegating decision-making authority under the Act will be discussed below.

[75] Judicial resolution of access disputes under the Act is a two-step process. If access is denied, the applicant may, as Mr. Leahy did, complain to the Privacy Commissioner who is appointed under the Act (section 53). While the Privacy Commissioner has broad investigatory powers (section 34),

her remedial powers are limited to making non-binding findings and recommendations addressed to government institutions' heads (section 35; see also *Murdoch v. Canada (Royal Canadian Mounted Police*), 2005 FC 420, [2005] 4 F.C.R. 340). If an access request has been refused, a complainant may bring an application for judicial review in the Federal Court within 45 days of the Privacy Commissioner releasing her investigative report (section 41). Lodging a complaint with the Privacy Commissioner is a condition precedent to applying for judicial review (*Cunha v. Canada (Minister of National Revenue – M.N.R.)*, [1999] F.C.J. No. 667, 164 F.T.R. 74 at paragraph 9) and, as a remedy, the Court is limited to ordering disclosure of material wrongly withheld*: Connolly v. Canada Post Corp*., [2000] F.C.J. No. 1883, affirmed 2002 FCA 50, [2002] F.C.J. No. 185. The procedure for such applications is set out in section 51.

c) Section 26: third-party personal information

[76] While the thrust of the appeal is the exemption asserted by CIC pursuant to section 27, it is worthwhile noting that section 26 embodies the principle that, while an individual has the right to access information about themselves, this right does not extend to information about others. Section 26 has two aspects: a mandatory exemption from disclosure if disclosure is prohibited under section 8 of the Act and a discretion to decline disclosure.

[77] In *Mislan v. Canada (Minister of Revenue)*, [1998] F.C.J. No. 704, 148 F.T.R. 121, Justice Rothstein described section 26 as follows at paragraph 13:

> Under section 26 the right of the person making the request under subsection 12(1) to access his or her own personal information is subject to the requirement on, or the exercise of discretion by, the head of the government institution not to disclose information about another person.

[78] Additionally, and significantly, when relying on section 26, the government institution must satisfy the Court that it conducted a discretionary balancing of the competing interests involved which is imported by virtue of paragraph 8(2)(*m*) of the Act (*Cemerlic v. Canada (Solicitor General)*, 2003 FCT 133, [2003] F.C.J. No. 191 at paragraph 33), which reads:

8. (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed	8. (2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :
[…]	. . .
(*m*) for any purpose where, in the opinion of the head of the institution,	*m*) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :
(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or	(i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée,
(ii) disclosure would clearly benefit the individual to whom the information relates.	(ii) l'individu concerné en tirerait un avantage certain.

d) Section 27: solicitor-client privilege

[79] The thrust of the appeal is the exemption asserted by CIC under section 27. Section 27 reads:

27. The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) that is subject to solicitor-client privilege.	27. Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) qui sont protégés par le secret professionnel qui lie un avocat à son client.

[80] Section 27 exempts material covered by solicitor-client privilege from disclosure. In *Blank SCC*, the Supreme Court confirmed that the ATIA's analogous provision also applied to material covered by litigation privilege. Since the two statutes must be applied as a seamless code, it follows that the Act must also cover material subject to litigation privilege: *Elomari v. Canadian Space Agency*, 2006 FC 863, [2006] F.C.J. No. 1100 at paragraph 34.

[81] As the exemption is discretionary its application, in effect, results in two decisions amenable to judicial review: first, whether the material sought is in fact privileged under common law principles (*Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89, [1998] F.C.J. No. 794 (C.A.) at paragraph 23) and, second, whether the discretion to decline disclosure was reasonably exercised (*Canadian Jewish Congress v. Canada (Minister of Employment and Immigration) (T.D.)*, [1996] 1 F.C. 268, [1995] F.C.J. No. 1456 at paragraph 23).

[82] The common law on solicitor client privilege and litigation privilege is most complex and is constantly evolving. Those making decisions about whether a document falls within the exemption under section 27 of the Act must understand and apply this common law.

e) Decision-making authority under the Act

[83] Responsibility for administering the Act is split between the "designated minister" and the head of the government institution: sections 3 and 3.1 of the Act. For present purposes, it is sufficient to note that the heads of government institutions are listed in the *Privacy Act Heads of*

Government Institutions Designation Order, SI/83-114, and handle day-to-day management of personal information and access requests. In the case of CIC, the responsible Minister is the head.

[84] Significantly, heads decide whether to decline disclosing personal information based on an exemption. As judicial reviews under the Act are limited to situations where applicants have been refused access (section 41), as a practical matter, the decision-maker being reviewed in the Federal Court will always be the head or their authorized delegate. Pursuant to section 73 of the Act, the head may, by order, designate one or more employees to perform any of their functions under the Act. Such designations must be by valid order, and officials cannot implicitly assume a right to act in the head's name: *Communauté urbaine de Montréal (Société de transport) v. Canada (Minister of Environment)*, [1987] 1 F.C. 610, [1986] F.C.J. No. 712 (T.D) at paragraph 21.

[85] Heads must table an annual report to Parliament outlining their administration of the Act (section 72). *Treasury Board Implementation Bulletin No. 107* (the "Bulletin") outlines the mandatory content of these reports. Notably, the Bulletin requires institutions to file a copy of the delegation order indicating what powers the head has delegated and to whom.

[86] The practical result is this: to determine who made a particular decision under the Act, an applicant must locate the institution's annual privacy report and review the delegation order. In the case of CIC, decisions are delegated to entire classes of employees according to the nature of the particular decision to be made under the Act. Decisions to exempt information from disclosure under section 26 may be made by any "access to information and privacy officer" (classified as a

PM-03) within the Ministry. To refuse disclosure based on section 27, however, the decision-maker must be an "access to information and privacy administrator" (classified as a PM-04) (see joint book of authorities at tab 6 for the relevant delegation order.)

[87] This being said, we noted at the hearing that most documents were stamped "Protected" and sought further information from counsel for the respondent regarding the classification of protected information. As such, a few remarks about documents classification are in order.

f) Documents Classification

[88] It appears that within government departments, information is classified according to internal security and information management policies. These include the *Security Organization and Administration Standard* (Security Policy) and the *Guidelines for Employees of the Government: Information Management Basics* (Guidelines), and collectively (Policies).

[89] The initial dividing line between confidential and non-confidential information is whether it is "classified" or "protected". Pursuant to the Guidelines, classified information relates to national interests and concerns defence or broad issues such as political and economic stability. Protected information relates to sensitive personal, private and business information. The following chart illustrates these categories and their various classifications (collectively, Classifications):

Classified information	**Protected information**
Top secret: A very limited amount of compromised information could cause ***exceptionally grave injury*** to the national	**Protected C:** Compromise of a very limited amount of information could result in ***exceptionally grave injury***, such as loss of life.

interest.	
Secret: Compromise could cause ***serious injury*** to the national interest.	**Protected B**: Compromise could result in ***grave*** injury, such as loss of reputation or competitive advantage.
Confidential: Compromise could cause ***limited injury*** to the national interest.	**Protected A**: Compromise could result in ***limited injury***.

[90] The Classifications are meant to loosely mirror the exemptions in the Access Statutes. At section 4.3, the Security Policy describes this relationship as follows:

> […] Identifying sensitive information relates directly to the exemption and exclusion criteria of the Access to Information Act and Privacy Act, which establish the legal authority for the information departments may refuse to the public.
>
> Parliament has determined the information described in the exemption criteria to be important either to preserving the national interest or to protecting other interests for which the government assumes an obligation.
>
> […]
>
> In identifying information in need of additional safeguards, departments are not required to determine definitively whether specific items would actually be exempt under these Acts. […] Rather, departments should be satisfied that various types of information could reasonably be expected to qualify for exemption. […]
>
> The present security system is based on the notion that the government should not be using human and financial resources on additional safeguards for information unless it falls within the exemption or exclusion criteria of the Access to Information Act and the Privacy Act.

[91] The connection between the Classifications and the Access Statutes is readily apparent. For example, classified information is more likely to be exempt from disclosure under section 21 of the Act and section 15 of the ATIA (international affairs and defense). Protected information will almost inevitably be personal information as defined in the Act and thus subject to the restrictions in

section 8. However, the Classifications themselves are not referenced in the Access Statutes. In fact, by its very terms, the Security Policy recognizes that:

> A decision to deny access to a record, or any part of it, must be based solely on the exemption provisions of the Acts as they apply at the time of the request. A decision to deny access must not be based on security classification or designation, however recently it may have been assigned. [emphasis added]
>
> (section 12.4)

[92] Additionally, this Court has recognized that Treasury Board policies are not binding and are, at best, an aid to interpretation: *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 270, [2003] 1 F.C. 219 at paragraph 37. Consequently, the Policies and a document's classification are only tangentially relevant to a reviewing court's role and are of limited legal significance. The fact that a document was classified in a particular manner cannot dictate its treatment under the Access Statutes or in court proceedings.

f) The role of the courts in access applications

[93] Having provided an overview of the Act, it is apposite to note briefly the role of the courts in applications brought under the Act or the ATIA. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 the Court wrote at paragraph 1:

> Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance.

[94] The function of a reviewing court is to adjudicate disputes, insuring that a proper balance is struck between these two competing values. Courts must ensure appropriate government accountability, while at the same time protecting democratic values and effective governance.

[95] We now turn to consideration of the substantive issues.

Consideration of the Substantive Issues

a) The standard of review

[96] As explained above, the Federal Court held that the correctness standard of review applies to the decisions under sections 26 and 27 of the Act that the information sought falls within the statutory exemptions. It held that the reasonableness standard of review applies to exercises of discretion not to release information that falls within these exemptions.

[97] The Federal Court went on, without any analysis, to apply the correctness standard of review to the decision to limit the scope of the Privacy Request (reasons for judgment at paragraphs 46 and 47).

[98] With respect to the decisions under sections 26 and 27 of the Act, we agree that correctness is the standard for decisions that the information falls within these statutory exemptions: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, cited above, at paragraph 59; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal*

Canadian Mounted Police), cited above, at paragraph 19. Although these cases concerned decisions under the ATIA, the Act is similarly worded and structured.

[99] We also agree that the reasonableness standard of review applies to exercises of discretion not to release information that falls within these exemptions. Such decisions, heavily fact-based with a policy component, normally warrant deference: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[100] However, as will be seen, in this case the standard of review is immaterial to the decisions under sections 26 and 27 of the Act. As explained below, the evidentiary record before us is so thin that we cannot properly assess whether the decisions were correct or reasonable. Among other things, we cannot tell from the record who applied the exemptions to the documents, what definition of those exemptions was used, and what consideration was given to the exercise of discretion. Without that basic information, we cannot assess the correctness or the reasonableness of the decisions made. In short, this Court has been prevented from discharging its role on judicial review.

[101] With respect to the remaining issue, as explained above, Mr. Leahy asserts that the scope of the Privacy Request was improperly limited because:

i. CIC limited the Privacy Request to documents located at its National Headquarters; and

ii. The Applications Judge allowed CIC to exclude documents in the possession of the Immigration and Refugee Board.

[102] The first question required the CIC decision-maker to consider whether Mr. Leahy had provided sufficiently specific information about the location of the requested information so as to make the information reasonably retrievable. This is again a heavily fact-based question that warrants deference: *Dunsmuir*, cited above.

[103] The second question required the Judge to interpret the Act. This is a question of law which the Judge was required to decide correctly: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paragraph 8.

b) Alleged reviewable errors by CIC

(i) The scope of the Privacy Request

[104] We first consider Mr. Leahy's submission that CIC committed reviewable errors concerning the scope of the Privacy Request. As mentioned above, he asserts that there were two errors.

[105] The first asserted error is said to be CIC's error in limiting the scope of the Privacy Request to documents located at its National Headquarters.

[106] Paragraph 12(1)(*b*) and subsection 13(2) of the Act require a person requesting access to personal information to provide sufficiently specific information on the location of the information so that the government institution can reasonably retrieve the information.

[107] On receipt of the Privacy Request CIC took the position that Mr. Leahy had failed to provide sufficiently specific information about the location of the requested information to render it reasonably retrievable. CIC then gave Mr. Leahy the opportunity to provide more specific information. Mr. Leahy's reply is quoted at paragraph 19 above.

[108] Mr. Warner provided evidence that:

> 8. In assessing the applicant's reply, Mr. Maynard determined that the applicant had not provided the information requested. He noted in the ATIP tracking system that "according to the Act, the request, 'shall provide sufficient detail to enable an experienced employee of the institution, with a reasonable effort to identify the record' and locate what he is looking for. To suggest that we go to all 92 Visa posts is unreasonable." Hence it was determined that the scope of the search would be restricted to the National Headquarters.
>
> […]
>
> 10. The Privacy request was therefore framed as follows:
>
> > *I (Timothy Leahy) am requesting copies of all items, emanating from, or received by, CIC and pertaining to me, directly or indirectly. My request encompasses correspondence, emails, telephone messages and any other recorded items. The initial time frame is from 1 January 2007, until May 16, 2008.*
>
> 11. On June 2, 2008, this Request was sent to International Region (IR), Immigration branch (IMM), Operational Management and Coordination (OMC), Case Management (CMB) and Department Secretariat. International Region was tasked with this request as they are responsible for the operations of the overseas visa offices. Immigration Branch is involved in any policy decisions affecting the processing of applications both in Canada and overseas. OMC is responsible for program delivery, while CMB is responsible for providing advice and guidance in the processing of high profile or contentious cases and managing all litigation involving the Department. Departmental Secretariat is responsible for all official correspondence sent out by the department. Attached as exhibit "B" is a copy of the call out notice for the Request.
>
> […]

> 26. As noted above, the scope of the Request was determined after the applicant was advised that the original description was too broad. The original request covered every Citizenship and Immigration office around the world, including over 80 overseas missions, 43 CIC offices in Canada, 4 Case Processing Centres, along with CIC National Headquarters. Within the immigration database, the Field Operation Support System (FOSS), there are in excess of 5,000,000 million lines of text. Similarly, there is a separate Computer Assisted Immigration Processing System (CAIPS) database at every visa office around the world. Running queries in this number of offices and on this many databases to locate any reference to the applicant was considered unreasonable.
>
> (Affidavit of John Warner, volume 1 Appeal Book at Tab 6)

[109] In our view, given Mr. Leahy's failure to provide more specific information, CIC's decision to limit the scope of the Privacy Request was reasonable. As for the extent to which CIC limited the Privacy Request, Mr. Warner's affidavit demonstrates that the decision fell within a range of possible outcomes that was defensible on the facts and the law.

[110] The second asserted error is said to be the Judge's error in allowing CIC to exclude from the scope of the Privacy Request documents in the possession of the Immigration and Refugee Board.

[111] Subsection 13(2) of the Act requires a request for access to be made to the government institution that has control of the information.

[112] Specifically, subsection 13(2) of the Act states:

13. (2) A request for access to personal information under paragraph 12(1)(*b*) shall be made in writing to the government institution that has control	13. (2) La demande de communication des renseignements personnels visés à l'alinéa 12(1)*b*) se fait par écrit auprès de l'institution fédérale de qui relèvent

of the information and shall provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution. [emphasis added]	les renseignements; elle doit contenir sur leur localisation des indications suffisamment précises pour que l'institution puisse les retrouver sans problèmes sérieux. [Non souligné dans l'original.]

[113] The Judge found CIC did not err by excluding information possessed by the Immigration and Refugee Board because:

> 49 The IRB operates separately from CIC and is also considered a separate government institution under Schedule 3 of the *Privacy Act*. As the applicant directed his section 12 access request only to the Department of Citizenship and Immigration, it was correct for the respondent to limit the disclosure to that institution.

[114] In our view, the Applications Judge's interpretation of the Act was correct. The phrase "government institution" used in subsection 13(2) of the Act is defined in section 3 as follows:

"government institution" means	« institution fédérale »
(a) any department or ministry of state of the Government of Canada, or <u>any body or office, listed in the schedule</u>, and	a) Tout ministère ou département d'État relevant du gouvernement du Canada, ou <u>tout organisme, figurant à l'annexe</u>;
(b) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the Financial Administration Act. [emphasis added]	b) toute société d'État mère ou filiale à cent pour cent d'une telle société, au sens de l'article 83 de la Loi sur la gestion des finances publiques. [Non souligné dans l'original.]

[115] The Immigration and Refugee Board is a body listed in the schedule to the Act. As such, any request for documents in its control should have been made directly to the Immigration and Refugee Board.

(ii) CIC's decisions under sections 26 and 27 of the Act

[116] We now turn to Mr. Leahy's submissions that CIC's decisions under sections 26 and 27 of the Act were subject to reviewable error. As mentioned above, the evidentiary basis before us is inadequate to determine this issue.

[117] The role of the reviewing court on judicial review is well-known. It is to enforce the rule of law: *Dunsmuir* at paragraphs 27 to 33. Broadly speaking, this means that the reviewing court must ensure that the administrative decision-maker has embarked upon the task entrusted to it and has carried it out in a legally acceptable way.

[118] The standard of review dictates how exacting the Court should approach its role. Under the standard of review of correctness, the Court ensures that the law has been correctly ascertained and applied to the correct facts of the case. Under the standard of review of reasonableness, the Court accords the administrative decision-maker deference, allowing it to reach outcomes within a range of acceptability and defensibility on the facts and the law.

[119] Under either the reasonableness or correctness standard of review, the reviewing court needs basic information to carry out its role. For example, who was the administrative decision-maker and what was taken into account in reaching a decision not to release information? Unless that is known, the reviewing court cannot assess whether the administrative decision-maker has embarked upon the task entrusted to it and has carried it out in a legally acceptable way. In correctness review, the reviewing court must have sufficient information in the record in order to reach its own decision.

[120] For these reasons and perhaps others, the Supreme Court has insisted that the decisions of administrative decision-makers, viewed in light of the record before them, must be transparent and intelligible: *Dunsmuir, cited above,* at paragraph 47.

[121] If the reasons for decision are non-existent, opaque or otherwise indiscernible, and if the record before the administrative decision-maker does not shed light on the reasons why the administrative decision-maker decided or could have decided in the way it did, the requirement that administrative decisions be transparent and intelligible is not met: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at paragraphs 14 and 15 (adequacy of reasons is to be assessed as part of the process of substantive review and is to be conducted with due regard to the record ; *Public Service Alliance of Canada v. Canada Post Corp*., 2011 SCC 57, [2011] 3 S.C.R. 572 and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 (within limits, the decision can be upheld on the basis of the reasons that could have been given).

[122] Any reviewing court upholding a decision whose bases cannot be discerned would blindly accept the decision, abdicating its responsibility to ensure that it is consistent with the rule of law.

[123] In this case, the decision letter, signed by Ms. McManus, merely asserts the exemptions that apply. No further reasons are given. The record consists of a relatively thin affidavit, documents that have been produced to the appellant, and documents that have been withheld from the appellant.

[124] This material does not provide us with the basic information we need in order to discharge our role. There are several examples.

[125] First, as explained above, under the Act, it is the "head" of the institution or his or her authorized delegate who is to decide whether exemptions apply and, if so, whether the information should nevertheless be produced to the requester. The record shows that a number of people were involved in reviewing and assessing the documents and making recommendations and that the decision letter was signed by Ms. McManus. The record is silent as to who made the relevant decisions and no satisfactory inference may be drawn from the record.

[126] There is no problem with the decision-maker seeking the assistance of others and considering their recommendations. But in the end, under the statute, the "head" or their authorized delegate is to make the decision.

[127] But in this case, we do not even know who the decision-maker was.

[128] Second, we are told that information has been withheld on the basis of solicitor-client privilege and litigation privilege. But nowhere in the record is there any indication of what the decision-maker thought these concepts meant. Did the decision-maker properly understand these concepts? We do not know.

[129] Related to this is the involvement of others to review the documents and make recommendations to the decision-maker. Were these persons properly instructed concerning the requirements of solicitor-client privilege and litigation privilege?

[130] Third, it is entirely appropriate for the reviewing court to examine the documents that have been withheld, draw appropriate inferences and use those inferences to assess whether the decision-maker made any reviewable error. But those inferences can take the reviewing court only so far.

[131] For example, in this case, some of the documents said to be covered by solicitor-client privilege appear to concern legal advice. However, more information is necessary. Were the documents maintained in confidence? Were the authors, the recipients, or both lawyers?

[132] Other documents do not appear to concern legal advice, and the record is silent as to which, if any, documents are said to attract litigation privilege.

[133] Fourth, under the Act, the decision-maker must assess whether any of the exemptions to disclosure apply to the information sought. But that is not the end of the analysis. Even though an exemption applies, the decision-maker nevertheless can exercise his or her discretion to disclose the material: *Attaran v. Canada (Minister of Foreign Affairs)*, 2011 FCA 182, [2011] F.C.J. No. 750.

[134] At a minimum, the reasons or the record should show that the decision-maker was aware of this discretion to release exempted information and exercised that discretion one way or the other.

[135] In this case, there is nothing in the reasons or the record on this point.

[136] These deficiencies in the information provided to the Federal Court rendered it impossible for the Federal Court or this Court to carry out their respective roles.

[137] In this case, the Crown vigorously maintained that there was no reviewable error in the decisions. This may be so, but this Court cannot decide the matter. In the circumstances of this case explained above, with such little information in the reasons and the record, that is equivalent to an assertion that this Court should just accept the decisions, not test them. In effect, the Crown's submission is "trust us, we got it right." Acceptance of that submission is inconsistent with our role on judicial review.

c) Postscript

[138] We wish to emphasize that our decision will not change how government institutions go about satisfying requests for information, assuming that those requests are conducted in accordance with the Act.

[139] Instead, our decision affects only in a relatively small way how decision letters might be drafted, the possible content of any supporting affidavit, and the record that might be placed before the reviewing court.

[140] During oral argument, we described to counsel for the respondent the sort of information, discussed in these reasons, a reviewing court needs in order to discharge its role. We indicated that it is customary in cases like this, as happened in this case, for sensitive information to be placed in a confidential record. We asked whether there would be some practical obstacle, undue burden or other negative consequence associated with the provision of information of the sort discussed in these reasons. Counsel for the respondent identified none.

[141] To reiterate, all that is needed is sufficient information for a reviewing court to discharge its role. In cases like this, this can be achieved by ensuring that there is information in the decision letter or the record that sets out the following: (1) who decided the matter; (2) their authority to decide the matter; (3) whether that person decided both the issue of the applicability of exemptions and the issue whether the information should, as a matter of discretion, nevertheless be released; (4) the criteria that were taken into account; and (5) whether those criteria were or were not met and why.

[142] In many cases, in perhaps no more than a few lines, the decision letter can address items (1), (2) and (3).

[143] Similarly, it is an easy matter for the decision letter to address item (4). This could be accomplished by referring to a single case that sets out the criteria, or to an internal policy statement or instructional document used by the decision-maker and those making recommendations to the decision-maker. Normally, reviewing courts do not take judicial notice of internal policy statements

or instructional documents, so if these are relevant, they should be identified and appended to the supporting affidavit.

[144] As for item (5), this may be evident from the documents themselves which have not been disclosed to the requester but which have been included in a confidential record, or from any annotations made on the documents when information is expunged which appear in the public record. On occasion, a supporting affidavit can be sworn. It can supply additional information that is not evident in the record and known to the decision-maker. For example, with respect to the documents said to be covered by solicitor-client privilege in this case, the affidavit should have identified which persons are lawyers and dealt with whether the confidentiality of the documents was maintained.

[145] In this regard, counsel should be mindful of the limitations of supporting affidavits on judicial review. They cannot be used as an after-the-fact means of augmenting or bootstrapping the reasons of the decision-maker. They may point out factual and contextual matters that are not evident elsewhere in the record that were obviously known to the decision-maker. They can also provide the reviewing court with general orienting information, such as how the request for information was handled, how the documents were gathered, and how the task of assessment was conducted. See generally *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255, [2009] 2 F.C.R. 576 at paragraphs 45 to 47; *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 425 N.R. 341 at paragraphs 40 to 42;

Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22, 428 N.R. 297.

Conclusion

[146] As expressed above, it may be that some or all of the documents were properly withheld from Mr. Leahy. We are unable to render a decision on this view of the paucity of evidence before us. In that circumstance, it would be inappropriate to order the disclosure of any document. Instead, we remit to a different decision-maker for redetermination in accordance with these reasons the matter of whether exemptions apply to all or part of the documents at issue and, if so, whether a discretion should be exercised in favour of release.

[147] For these reasons, the appeal will be allowed and the judgment of the Federal Court is set aside. Making the judgment that the Federal Court should have made, the application for judicial review is allowed and the matter of whether exemptions apply to all or part of the documents and, if so, whether a discretion should be exercised in favour of release is remitted for redetermination by a different decision-maker in accordance with these reasons. The appellant is entitled to costs

both here and in the Federal Court, such costs to include the costs of the February 27, 2012 appearance in this Court.

"Eleanor R. Dawson"
J.A.

"Johanne Trudel"
J.A.

"David Stratas"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-302-11
STYLE OF CAUSE:	Timothy Edw. Leahy v. The Minister of Citizenship and Immigration
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 26, 2012
REASONS FOR JUDGMENT OF THE COURT BY:	Dawson J.A. Trudel J.A. Stratas J.A.
DATED:	September 4, 2012

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