Federal Court  Cour fédérale

Date: 20160428

Docket: T-2490-14

Citation: 2016 FC 479

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 28, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

SOLIMAN FAHMY

Applicant

and

BANK OF MONTREAL

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Soliman Fahmy, the applicant, has been in dispute with Bank of Montreal (BMO), the respondent, for almost three years. Part of the dispute has been brought before our Court.

[2] The application is under section 14 of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 [the Act]. Subsection 14(1) of the Act reads as follows:

14 (1) A complainant may, after receiving the Commissioner's report or being notified under subsection 12.2(3) that the investigation of the complaint has been discontinued, apply to the Court for a hearing in respect of any matter in respect of which the complaint was made, or that is referred to in the Commissioner's report, and that is referred to in clause 4.1.3, 4.2, 4.3.3, 4.4, 4.6, 4.7 or 4.8 of Schedule 1, in clause 4.3, 4.5 or 4.9 of that Schedule as modified or clarified by Division 1 or 1.1, in subsection 5(3) or 8(6) or (7), in section 10 or in Division 1.1.	**14 (1)** Après avoir reçu le rapport du commissaire ou l'avis l'informant de la fin de l'examen de la plainte au titre du paragraphe 12.2(3), le plaignant peut demander que la Cour entende toute question qui a fait l'objet de la plainte — ou qui est mentionnée dans le rapport — et qui est visée aux articles 4.1.3, 4.2, 4.3.3, 4.4, 4.6, 4.7 ou 4.8 de l'annexe 1, aux articles 4.3, 4.5 ou 4.9 de cette annexe tels qu'ils sont modifiés ou clarifiés par les sections 1 ou 1.1, aux paragraphes 5(3) ou 8(6) ou (7), à l'article 10 ou à la section 1.1.

[3] Clearly, this statutory provision is not straightforward. Regardless, the applicant, who does not have legal representation, has relied on this subsection to make his case regarding the quality of the disclosures he allegedly received of his personal information from BMO.

I. The facts

[4] It appears that the dispute between the applicant and BMO began on Saturday, May 4, 2013. At the time, Mr. Fahmy was dealing with two BMO branches. On May 4, 2013, Mr. Fahmy went to the branch in Dollard-des-Ormeaux to make a US dollar term deposit of several thousands of dollars. When he made this deposit, BMO claims that its agent had Mr. Fahmy sign a document entitled "Maturity Instructions." The document bears the letterhead "BMO Bank of Montreal, Mortgage Corporation" and indicates on its face that several thousands

of dollars were transferred from a US dollar account held by the applicant to create what is presented as a 270-day term deposit. At the hearing, it was confirmed that the source of funds for the term deposit had indeed been an account held by Mr. Fahmy.

[5] It also appears that a US dollar term deposit receipt was issued for the amount of the term deposit and for a period commencing on May 3, 2013, and ending on January 28, 2014. It indicated the interest rate to be paid.

[6] Soon after returning home, Mr. Fahmy realized that he might have signed the wrong document on May 4; the account numbers allegedly indicated contained both numbers and letters, but he did not recall his account numbers containing letters.

[7] What followed was a series of events that led to BMO's returning to Mr. Fahmy in the ensuing days the amount deposited on May 4, 2013, and, later, to its terminating its business relationship with the applicant. Mr. Fahmy quickly sought to obtain a copy of the document signed on May 4. On May 24, 2013, BMO faxed him what it claims is the only document he signed on May 4, that is, the aforementioned document entitled "Maturity Instructions." Mr. Fahmy was convinced that he had signed a different document, but he cannot recall the title; the best he could do was provide a very rough outline. In my opinion, the outline provides no information that would help trace the document's origin or understand its contents. In effect, the applicant claims that he signed a different document than the one BMO says that he signed.

[8] In a letter written on May 20, 2013, and sent to the BMO Ombudsman, Mr. Fahmy describes the document as follows:

> [TRANSLATION]
>
> The problem that isn't resolved is that the agent had me sign a credit authorization on two accounts without explaining the contents of the document to me or giving me a copy, saying that they were my accounts, but that is false. . . .

This description was also in the demand letter sent to BMO on July 2, 2013, by a lawyer retained by Mr. Fahmy. The sentence in question reads:

> [TRANSLATION]
>
> On that occasion, Mr. Mavrigiannakis apparently had our client sign a document that, as our client understood it, was a credit authorization on two bank accounts.

[9] The lawyer's choice of words is qualified, to say the least; he avoided making affirmative statements. Moreover, he did not specify what might constitute a credit authorization on two bank accounts in the context of a transaction that did not involve Mr. Fahmy's credit. Indeed, the applicant was making a deposit at BMO from an account held at BMO.

[10] Between May 20 and July 2, 2013, BMO decided to terminate its business relationship with Mr. Fahmy. According to a letter sent by Mr. Fahmy to the BMO Ombudsman on June 12, 2013, the former was notified of the decision over the phone on June 11. In any event, following the June 11 conversation, a letter was sent on June 18 confirming that the banking relationship was to be terminated on July 26, 2013. It states: [TRANSLATION] "On July 26, 2013, we will suspend all activity on your bank accounts with us and transfer your investments to the

banking institution of your choice." But there was a problem: Mr. Fahmy had registered retirement savings plan (RRSP) investments with BMO. In her June 18 letter, Ms. Eid writes: [TRANSLATION] "According to our records, some of your RRSP investments have a maturity date as late as February 28, 2016. Since these are registered investments, the transfer will have to be made when they mature by your new financial institution by way of a request to Bank of Montreal."

[11] The July 2 letter to BMO demanded two things: First, that BMO send within 48 hours all the documents signed by Mr. Fahmy between May 1 and May 10, 2013, and, second, that the term investments be immediately [TRANSLATION] "unfrozen and redeemable, with interest up to the date when the funds become available, without penalty." In the summer of 2013, the lawyer and BMO's legal department communicated a number of times to discuss extensions in response to the demand letter. Finally, the response given on October 2, 2013, was that BMO had no other documents besides those sent to Mr. Fahmy in May 2013. It made no mention of the status of the RRSP deposits. Moreover, there is no indication in the record that the lawyer retained by Mr. Fahmy took further action. The applicant continued pursuing the matter, through legal and other means, without the assistance of counsel.

[12] I have no doubt that Mr. Fahmy attempted in the summer of 2013 to receive a copy of the document he thinks he signed on May 4, 2013. Nor do I doubt that the "Maturity Instructions" document, which clearly bears his signature, does not match his recollection of what he signed. The demands made by his lawyer on July 2, 2013 were clear and unequivocal.

[13] However, the same cannot be said of the situation concerning the RRSP investments. There is, of course, the July 2 demand letter, which apparently went without a response. On September 4, 2013, Mr. Fahmy wrote to the President and Chief Executive Officer, Personal and Commercial Banking at BMO Financial Group. In this letter, he clearly asks: [TRANSLATION] "Provide me with official copies of all my RRSP investments." What is unclear is what happened afterwards. The respondent claims that it sent a sizeable bundle of documents on September 17, 2013, in response to the September 4 letter. It included a letter from a representative of the respondent stating that copies of the requested documents regarding the RRSP investments held at BMO were enclosed therewith. Four types of documents were enclosed, some 20 pages in all. The documents are identified as follows:

> [TRANSLATION]
>
> - A list of the value of your RRSP investments as of September 12, 2013 (document A)
> - The particulars of each of your RRSP investments, i.e. Nos. 0029 to 0037 (document B)
> - The most recent annual statement of your RRSP account (January 7, 2012, to January 4, 2013) and the previous one (July 2, 2011, to January 6, 2012) (document C)
> - Two confirmations of transactions in your account on January 11, 2012, and February 27, 2013 (document D)

Whereas BMO claims, on the face of the September 17, 2013 letter, that it sent everything by courier, Mr. Fahmy claims that he did not receive anything. After complaining to the Office of the Privacy Commissioner of Canada [the OPC], he was sent another bundle of documents on June 13, 2014. As I understand it, the documents were sent at the suggestion of the OPC

investigator and were the same documents that were supposedly sent on September 17, 2013, and that allegedly never made it to Mr. Fahmy.

[14] In response to the bundle mailed on June 13, Mr. Fahmy wrote to BMO on June 27, 2014, once again demanding the documents signed between May 1 and May 10, 2013, along with [TRANSLATION] "copies of all the confirmations of RRSP GIC transactions, in accordance with the federal regulations of November 1, 2011." The letter expresses dissatisfaction with the twenty-some-page bundle; the applicant felt that only the category D documents corresponded, in part, to what he wanted.

[15] It is unclear what information Mr. Fahmy was looking for. It is also unclear in what respect his disappointment with the information mailed to him would justify an application under section 14 of the Act.

[16] In response to the disappointment expressed by Mr. Fahmy, BMO wrote to him on September 11, 2014. In its letter, BMO reiterates that it has no other documents pertaining to the period from May 1 to May 10, 2013, besides those already provided. Regarding the RRSP, it writes: [TRANSLATION] "All of your RRSP and GIC documents were mailed to you on June 13, 2014." That same day, BMO sent another letter to Mr. Fahmy. It states: [TRANSLATION] "We will provide you with access to your file, which you will be able to consult at our Dollard-des-Ormeaux branch." Mr. Fahmy never did this, despite the invitation. On September 22, 2014, he wrote back to BMO reiterating his grievances and indicating that the September 11 response was not sent within the statutory time limit.

II. The complaint

[17] As has been pointed out, the Federal Court's jurisdiction depends on a report from the Privacy Commissioner. Therefore, a complainant may apply to the Federal Court only after receiving the Commissioner's report. Subsection 11(1) of the Act reads as follows:

11 (1) An individual may file with the Commissioner a written complaint against an organization for contravening a provision of Division 1 or for not following a recommendation set out in Schedule 1.	11 (1) Tout intéressé peut déposer auprès du commissaire une plainte contre une organisation qui contrevient à l'une des dispositions de la section 1 ou qui omet de mettre en œuvre une recommandation énoncée dans l'annexe 1.

Mr. Fahmy filed his complaint on November 12, 2013.

[18] In the complaint, he asks for the personal information in his file at BMO. Specifically, he requests:

> [TRANSLATION]
>
> 1. all the documents signed at BMO's DDO branch, and
>
> 2. official and detailed copies of all my RRSP GICs, in accordance with the federal regulations of November 1, 2011.

[19] The Privacy Commissioner completed his report on October 31, 2014. A minor correction was made to the report on November 18, 2014. The Commissioner deemed that three formal access requests had been made—in writing, pursuant to the Act—to BMO. The first was the July 2, 2013 demand letter. The second was the July 24, 2013 letter addressed to the BMO

Ombudsman and requesting copies of the documents signed by the applicant between May 1 and May 10, 2013. The third was the September 4, 2013 letter explicitly requesting official copies of all the applicant's RRSP investments.

[20] The Commissioner found a violation of principle 4.9, known as the Individual Access principle, because the Act expressly provides that a federal work, undertaking or business—in this case BMO, which meets the statutory definition—must respond to a request for personal information not later than 30 days after receipt of the request. If 30 days are not enough, the time limit may be extended, but for a maximum of 30 days. Moreover, such extension must be justified, and it has been established that BMO did not seek an extension in this case. Lastly, under section 8 of the Act, if the organization fails to respond within the time limit, the organization is deemed to have refused the request.

[21] The Commissioner determined that despite reasonable efforts by BMO, there is insufficient evidence to conclude that other documents besides those identified by BMO were signed between May 1 and May 10, 2013. However, the Act specifically provides that the response must be provided within 30 days. The Commissioner found that this requirement had not been satisfied regarding the July 2, 2013 demand letter. As mentioned, BMO did not respond until October 2, well after the expiry of the 30-day time limit. Regarding the so-called RRSP documents, the Commissioner merely notes that BMO sent new copies of these documents. The final conclusion is rather cursory, with the Commissioner simply writing: [TRANSLATION] "The complaint is well-founded and resolved." It is my understanding that the complaint was deemed

resolved because the Commissioner notes: [TRANSLATION] "We are satisfied that BMO has now responded to the complainant's access requests."

III. Analysis

A. *The alleged violations*

[22] It bears noting that an application under section 14 of the Act is not for a review of the Commissioner's report. The jurisprudence is consistent: the matter is to be dealt with in a summary manner, but the proceeding is akin to a *de novo* action. What limits the issue is the fact that the Court can hear only matters in respect of which the complaint was made or that are referred to in the Commissioner's report. Thus, Mr. Fahmy is complaining once more that BMO has not given him access to personal information, specifically the documents he allegedly signed in May 2013, and his RRSP investment documents.

[23] There is also no doubt that the burden of proof rests with Mr. Fahmy. He must establish a violation of the Act.

[24] The Court allowed Mr. Fahmy to explain the exchange of correspondence, which is fairly extensive in regards to the form that may or may not have been signed in May 2013. Regarding the RRSP documents, the applicant had obvious difficulty explaining his complaint and how it related to the Act. In other words, the applicant may have grievances to present under other provisions of federal statutes dealing with banking legislation and regulations. However, clearly,

such grievances cannot be the subject of a section 14 application in the case at bar. If there is a complaint to be made that falls within the scope of the Act, it has not been demonstrated.

[25] It was not easy to determine what Mr. Fahmy was complaining about and what he was seeking in Federal Court. His Notice of Application goes from examining BMO's stubbornness in not disclosing the requested personal information to examining how the respondent can claim not to have the [TRANSLATION] "transaction confirmation records" in his [TRANSLATION] "electronic file at BMO." He also wanted explanations regarding the so-called false document signed on May 4, 2013.

[26] After reviewing the applicant's affidavit and memorandum of fact and law, hearing his testimony before this Court, and receiving his submissions, I have a clearer picture of the situation. At the hearing, I asked Mr. Fahmy whether my summary and expression of what he had presented to the Court corresponded to what he intended to submit. He confirmed that this was the case.

[27] In this case, the application arose from two separate series of events. First, there was the May 4, 2013 incident where Mr. Fahmy wished to make a US dollar deposit. To this day he is convinced that BMO's agent committed forgery by putting his signature, or something that resembles it, on a document that he allegedly did not sign. He remembers signing a different form. He made an outline of it, but the total lack of detail renders it useless to our deliberations.

[28] The incident on Saturday, May 4, is what created the imbroglio that the Court is faced with. Mr. Fahmy, convinced that forgery was committed, has suspicions about his bank, despite the fact that his deposit was returned to him in full in the ensuing days. Mr. Fahmy then took it to the next level by complaining to the BMO Ombudsman on May 20, 2013.

[29] In that complaint, he claims that the document signed on May 4 was [TRANSLATION] "a credit authorization on two accounts that do not belong to him." What exacerbated his suspicions soon after May 4 was his impression of having signed a document with account numbers that contained letters, whereas his account numbers at BMO supposedly contained only numbers.

[30] It is difficult to understand why BMO would have the applicant sign a credit authorization, which is what the applicant has been claiming since May 20, 2013. Mr. Fahmy made a deposit; he did not take out a loan. The respondent's two affiants testified to that effect (see the affidavit of Karine Eid, paragraphs 16, 17 and 18, and the affidavit of Steven Mavrigiannakis, paragraphs 10 and 11). The applicant's written examination of the two affiants did not call into question the unequivocal submissions.

[31] This reference to a credit authorization is in the demand letter written to the respondent by the lawyer then retained by the applicant (see paragraph 8 above).

[32] The Court noted the issues raised with the demand letter. At the hearing, the applicant described the document rather as some sort of transfer from an account—an account that was not his, because the number supposedly contained one or multiple letters—to an account at BMO.

[33] In any event, it is up to Mr. Fahmy to prove that the document BMO claims was signed on May 4, 2013, was falsified. However, the weight of the evidence is clearly with the respondent.

[34] Therefore, the "Maturity Instructions" document is, on its face, simply a document confirming that the person making the deposit directs that principal and interest be paid at maturity into an account of their choice; it is not disputed that the account belongs to Mr. Fahmy. The amount indicated in the document is correct, and the term of the deposit is that agreed upon. This is the document that was faxed to the applicant on May 24, 2013. This document does not constitute a risk to the applicant in any way, and I still fail to see how it might have threatened anything.

[35] The only other document filed in evidence in connection with the May 4 transaction is the US dollar term deposit receipt that was issued. It is not disputed that the receipt contains the correct information about the deposit, the same information in the "Maturity Instructions" document. I note in particular that the receipt specifically states: [TRANSLATION] "The Bank agrees to pay the holder, in US dollars, the capital of the investment at maturity or, if the holder so requests, before maturity." The interest is treated in the same manner.

[36] The evidence presented by the respondent is sound to the effect that [TRANSLATION] "a credit authorization on two accounts" was not required for a deposit. In fact, I am not sure what a credit authorization on two accounts is. As mentioned, the outline that the applicant made of this so-called authorization is of no help in identifying or describing it. Moreover, since the "Maturity

Instructions" document, which is for internal use at BMO, does not constitute a risk to the applicant (see the affidavit of Steven Mavrigiannakis, paragraph 7), it seems unlikely that it would have motivated the respondent to have the applicant sign a different document. I cannot imagine that the respondent's agents would create a false document of this type because of it. I also accept that the benefit of having the applicant sign a credit authorization on two accounts—regardless of what that means—has not been established, and it is less than likely that the respondent would have done it for a deposit made by its own client. In other words, no evidence of possible existence has been presented; it is less likely still that such a document would have even been presented.

[37] Nevertheless, the applicant's belief led to the deterioration of the relationship between the parties. After the complaint was filed with the BMO Ombudsman on May 20, the relationship continued to deteriorate up until the decision to terminate on June 11, 2013. On June 18, 2013, the decision was made official in a letter informing the applicant of the suspension of services, effective July 26, 2013. Mr. Fahmy was given the opportunity to transfer his assets to another financial institution. This is what triggered the second series of events.

[38] In the June 18, 2013 letter, BMO's agent refers to RRSP investments with BMO (see paragraph 10 above).

[39] At the hearing, Mr. Fahmy said that he had feared that BMO would [TRANSLATION] "confiscate" his RRSP investments given the termination of their business relationship. The

applicant provided no basis for believing this, especially since such conduct obviously would have constituted a criminal offence.

[40] The applicant also testified that he had not wanted to transfer these RRSP investments to another institution without redeeming them (given the tax consequences, of course). What is more, the evidence presented by the applicant shows that he was assisted by an accountant in June 2013. And yet, it was confirmed at the hearing that he had chosen not to seek advice from this accountant on this matter. However, the June 18 letter is ambiguous because it can be construed as requiring that the deposit remain with BMO until maturity. It is rare for a dispute to escalate without both parties contributing to the escalation.

[41] At any rate, the applicant sent a third letter (the first two were sent on May 20 and June 13) to the BMO Ombudsman on July 24, 2013. In it, Mr. Fahmy expresses his fear of losing his RRSP investments as a result of the termination of his relationship with BMO. His request reads as follows:

> [TRANSLATION]
>
> Since the Bank of Montreal refuses to give me copies of the documents signed at the bank or the investment documents it is required to issue, and since BMO sent me by fax a document I never signed as well as a letter informing me of the closure of my accounts, including my RRSP account, and the termination of our business relationship, I ask that all my RRSP investments be available in full with interest and without penalty for transfer to another bank and that I be provided with copies of all the documents signed at BMO between May 1 and May 10, 2013.

[42] The very next day, the Ombudsman Office declared itself without jurisdiction. The respondent gave no indication of a follow-up but rather referred the applicant to the Ombudsman for Banking Services and Investments.

[43] The July 2, 2013 demand letter was mostly about the documents signed by Mr. Fahmy in early May 2013, but it also dealt with the RRSP investments set to mature in January and February 2016. The letter demands that the investments be [TRANSLATION] "immediately unfrozen and redeemable, with interest up to the date when the funds become available, without penalty." The subject matter of the demand letter does not appear to fall within the scope of the Act. Furthermore, based on the demand letter, the applicant did not seem concerned about the tax aspect as long as he got his money back.

[44] In any event, the demand letter was not dealt with speedily during the summer, with the parties communicating with each other to request various extensions. As mentioned, on October 2, 2013, BMO responded to the request for copies of the documents signed between May 1 and May 10, 2013. No mention was made of the RRSP investments. The response dealt with the May 4 transaction, stating that there were [TRANSLATION] "no other documents pertaining to your client Mr. Fahmy besides those given to him on that date."

[45] Before receiving the above response to his demand letter, Mr. Fahmy wrote to the BMO Chairman of the Board on August 26, 2013, and to the President and Chief Executive Officer, Personal and Commercial Banking on September 4, 2013. While the August 26 letter largely dealt with the May incident, it also expresses concern about the RRSP investments. In both the

August 26 letter and the much shorter letter of September 4, the applicant requests: [TRANSLATION] "copies of my RRSP investments" and [TRANSLATION] "official copies of all RRSP investments."

[46] On November 12, 2013, the applicant filed a complaint with the OPC under section 11 of the Act. In his complaint, Mr. Fahmy requests: [TRANSLATION] "the personal information in my file at BMO, specifically: 1. All the documents signed at BMO's DDO branch and 2. Official and detailed copies of all my RRSP GICs, in accordance with the federal regulations of November 1, 2011."

[47] In my view, the OPC was correct in considering these three requests from the applicant, which could qualify as requests under the Act: the July 2 demand letter, the July 24 letter to the BMO Ombudsman, and the September 4 letter. The August 26 letter overlaps with the July 2 demand letter. The OPC found a violation of principle 4.9 of the Act, which concerns individual access to personal information held by a government institution. The response to the May and July 2013 requests (and that of August 26) regarding the documents surrounding the May 4, 2013 incident was not given until October 2, 2013, that is, outside the time limited by section 8 of the Act. This constitutes a violation of the Act.

[48] As for the September 4, 2013 request, the OPC's report is more ambiguous. It notes that the respondent indicated having given its response on September 17, 2013, but the applicant claims not to have received it, which is why the same documents were sent (again, according to

the respondent) on June 13, 2014. The OPC was satisfied that BMO had [TRANSLATION] "now responded to the complainant's access requests."

[49] The applicant was not satisfied. For my part, I fear that the problem largely stems from a misunderstanding of the scope of the Act. That a party would misunderstand the scope of the Act is hardly surprising. As the Federal Court of Appeal notes in *Englander v. TELUS Communications Inc.*, 2004 FCA 387, [2005] 2 FCR 572 [*Englander*]:

> 43 The PIPED Act is also a compromise as to form, as is amply demonstrated by the recital of its historical background. Schedule 1 is an exact replica of Part 4 of the CSA Standard adopted in 1995, which Standard in turn was based on the OECD Guidelines adopted in 1980 and to which Canada had adhered in 1984. Both the CSA Standard and the OECD Guidelines are the product of intense negotiations between competing interests, which proceeded on the basis of self-regulation and which did not use or purport to use legal drafting.
>
> . . .
>
> 45 The Court is sometimes left with little, if any guidance at all. Clause 4.3, for example, requires knowledge and consent "except where inappropriate." Clause 4.3.4 sets up a standard of "sensitivity of the information," only to add that "any information can be sensitive, depending on the context." Clause 4.3.5 then goes on to say that "[i]n obtaining consent, the reasonable expectations of the individual are also relevant."
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> 46 All of this to say that, even though Part 1 and Schedule 1 of the Act purport to protect the right of privacy, they also purport to facilitate the collection, use and disclosure of personal information by the private sector. In interpreting this legislation, the Court must strike a balance between two competing interests. Furthermore, because of its non-legal drafting, Schedule 1 does not lend itself to typical rigorous construction. In these circumstances, flexibility, common sense and pragmatism will best guide the Court.

[50] Regarding Mr. Fahmy's RRSP guaranteed investment certificates (GICs), I have determined, not without some difficulty, that the applicant felt he was entitled to receive certain documents for each of his RRSP investments. He believes that the Act entitles him to do so because the documents might contain personal information.

[51] The Act provides for access to personal information held by a federal work, undertaking or business (section 2 of the Act); it does not entitle individuals to receive copies of each and every document that may contain such information. And yet, that is what the applicant is requesting.

[52] The obligation under the Act when it comes to individual access is to inform the individual of 1) the existence, 2) use, and 3) disclosure of his or her personal information.

Still under principle 4.9, the individual shall be given access to that information upon request. It can then be amended if it is not accurate or complete.

[53] This Act does not serve the same purpose as access to information legislation. For example, the *Access to Information Act*, R.S.C., 1985, c. A-1 provides a right of access to government records:

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	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

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.	et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.

The Act under study appears to have a much different purpose. It seeks to protect the right of privacy in this modern age, while recognizing the need of federal works, undertakings and businesses to collect, use and disclose personal information. As inappropriate disclosure of personal information can have deleterious effects on individuals, the Act sets out rules to avoid these effects:

3 The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.	3 La présente partie a pour objet de fixer, dans une ère où la technologie facilite de plus en plus la circulation et l'échange de renseignements, des règles régissant la collecte, l'utilisation et la communication de renseignements personnels d'une manière qui tient compte du droit des individus à la vie privée à l'égard des renseignements personnels qui les concernent et du besoin des organisations de recueillir, d'utiliser ou de communiquer des renseignements personnels à des fins qu'une personne raisonnable estimerait acceptables dans les circonstances.

[54] Therefore, the Act does not provide for access to a given document; rather, it entitles individuals to be informed of the existence, use and disclosure of their personal information. This seems to me to be consistent with the prescriptions of the Federal Court of Appeal. If the Court is to be guided by flexibility, common sense and pragmatism, as prescribed by the Federal Court of Appeal in *Englander*, it must be concluded that the obligations under the Act are not on par with those regarding access to government information. The evidence has shown that Mr. Fahmy felt entitled to receive any documents that might contain personal information, thus construing a privacy protection statute as some sort of access to documentation statute. If, indeed, there is federal legislation that would allow Mr. Fahmy to receive statements or other records from a bank, as he seems to suggest in his requests and as he states very directly and specifically in the November 12, 2013 complaint (*Vanderbeke v. Royal Bank of Canada*, 2006 FC 651), it might be by virtue of other federal regulations. Regarding his RRSP GICs, the applicant referred several times to the federal regulations of November 1, 2011. But he cannot obtain copies of bank records under the Act he has invoked.

[55] The respondent claims it sent Mr. Fahmy a bundle of documents on September 17, 2013, in response to his September 4, 2013 letter, wherein he asks: [TRANSLATION] "Provide me with official copies of all my RRSP investments." As the applicant claimed he had not received it, the same documents were sent on June 13, 2014. On June 27, 2014, Mr. Fahmy responded, dissatisfied. He wanted specific documents. Whereas the November 12, 2013 complaint speaks of [TRANSLATION] "official and detailed copies of all my RRSP GICs, in accordance with the federal regulations of November 1, 2011," this letter says he wants [TRANSLATION] "copies of all the confirmations of RRSP GIC transactions, in accordance with the federal regulations of

November 1, 2011." Clearly, the applicant was asking for very specific documents rather than asking about the existence or use of his personal information.

[56] BMO responded to the June 27, 2014 letter with two letters on September 11, 2014. In one, the respondent reiterates that it responded to the request. In the other, BMO invites Mr. Fahmy to consult his file at the bank.

[57] I mentioned earlier that, despite having an accountant, Mr. Fahmy had not seen fit to check whether his RRSP investments could be rolled over to another financial institution to avoid the tax consequences of redeeming his investments. He did not take advantage of BMO's invitation to consult his file.

[58] Even though the demand letter asks for all documents signed between May 1 and May 10, 2013, and the July 24, 2013 letter addressed to the BMO Ombudsman requests [TRANSLATION] "copies of all the documents signed at BMO between May 1 and May 10, 2013" without making any mention of the Act, the Court accepts that these letters, despite their wording, could be understood as requesting the personal information acquired on those dates. Nor has the respondent argued otherwise. Therefore, the response given outside the time limit, on October 2, 2013, does constitute a violation, as found by the Commissioner in his report. However, the Court has not been convinced that the applicant signed another document besides the one entitled "Maturity Instructions." The respondent had no reason to forge an internal document that simply confirms where the funds placed on a term deposit will go at maturity. The applicant has provided no persuasive evidence that another document was signed. His initial

claim that it was [TRANSLATION] "a credit authorization on two accounts" is not plausible for a deposit, not to mention that it is unclear what constitutes a credit authorization on two accounts. What is more, the applicant did not claim the same at the hearing. It follows that the late response given on October 2, 2013, and consistently maintained by the respondent, to the effect that no other documents besides the "Maturity Instructions" document had been signed, is a complete response.

[59] If the September 4, 2013 request for [TRANSLATION] "official copies of all my RRSP investments" did indeed qualify as a request for access to personal information, which the Court doubts in light of principle 4.9, it could have been responded to within the 30-day time limit provided for in subsection 8(3) of the Act. However, the respondent has failed to establish that it mailed its response on September 17, or that its response was received. It follows that the only evidence in the record is the receipt of the bundle on or around June 13, 2014, outside the time limit.

[60] Concerning the RRSP documents, the OPC's report is equivocal. Though it found a violation in relation to the request regarding the period of May 1 to May 10, no conclusive determination was made regarding the July 24 request; the OPC simply noted that the documents had been sent and said it was satisfied that the response had been given.

[61] Even if the request as formulated does not fall within the scope of the Act, which is not argued, the fact is that no proof has been provided that BMO's response was given within the time limit. The absence of a conclusive determination by the OPC in no way precludes this Court

from finding a violation on this basis. An application made under section 14 of the Act was declared *de novo* in *Englander*:

> 48 As found in *Forum des maires*, therefore, the hearing under subsection 14(1)of the Act is a proceeding *de novo* akin to an action and the report of the Commissioner, if put in evidence, may be challenged or contradicted like any other document adduced in evidence. I may add a further argument in support of this finding: according to section 15 of the Act, the Commissioner may appear as a "party" at the hearing. To show deference to the Commissioner's report would give a head start to the Commissioner when acting as a party and thus could compromise the fairness of the hearing. The *Official Languages Act* contains a similar provision, subsection 77(1).

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[63] As I have attempted to demonstrate, the applicant perceives in the wording of principle 4.9 a broader right than what is actually afforded. Thus, in his Notice of Application, he invokes a number of provisions to cover practically all the principles set out in the Act. Of the 10 principles, only principles 4.1 (accountability), 4.3 (consent) and 4.8 (openness) go unmentioned.

[64] Under section 14 of the Act, a complainant may "apply to the Court for a hearing in respect of any matter in respect of which the complaint was made, or that is referred to in the Commissioner's report." Both the complaint and the report dealt with access to personal information, an obligation described in principle 4.9. It seems inappropriate to me to expand the proceeding to include matters that were not complained of or not referred to in the report (*Nammo v. TransUnion of Canada Inc.*, 2010 FC 1284, at paragraphs 25 to 26). In any event, the applicant has provided no satisfactory evidence regarding these other provisions. In fact, he sought to make an argument in relation to principle 4.3, one of the principles not mentioned in the Notice of Application. I will comment on the argument made regarding principle 4.3, not to suggest that it may have been admissible despite its not being included in the Notice of Application, but rather to illustrate the confusion regarding the scope of the Act and the principles set out therein.

[65] The applicant raised the alternative argument that principle 4.3 had been violated, if the Court accepted that he had indeed signed the "Maturity Instructions" document, because he had never consented to his term investment's ending up with Bank of Montreal Mortgage Corporation.

[66] Principle 4.3 sets out when consent is required. As I understand the argument, the applicant claims he never consented to Bank of Montreal Mortgage Corporation's using the funds placed on a term deposit with BMO. First, the "Maturity Instructions" document is simply an indication that the funds will be paid into the applicant's account at maturity. The applicant suspects that the funds deposited with BMO will be used by Bank of Montreal Mortgage

Corporation. As seen earlier, the respondent's receipt is clear to the effect that the funds are paid to the holder by the Bank with which the contractual relationship exists. But more important to the issue before us, the consent referred to in principle 4.3 has nothing to do with the use of deposited funds. Principle 4.3 deals with a completely different kind of use, that is, use of personal information:

4.3 Principle 3 - Consent	**4.3 Troisième principe — Consentement**
The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.	Toute personne doit être informée de toute collecte, utilisation ou communication de renseignements personnels qui la concernent et y consentir, à moins qu'il ne soit pas approprié de le faire.

[67] Consent is required for the collection, use or disclosure of personal information. What the applicant is talking about is the assignment of funds within the BMO family of companies. We are no longer talking about the use of personal information in a manner that recognizes individuals' right of privacy (section 3 of the Act). Mr. Fahmy confused the use of funds (I would point out that the contractual relationship is between BMO and the applicant) with the use of personal information, which is to be safeguarded by the federal work, undertaking or business to take into account the right of privacy. As I indicated at the hearing, an applicant may use the Act for such purposes as he sees fit; his motivation is irrelevant. But the applicant cannot transform the Act for his purposes, purposes that the Act does not recognize. The applicant must operate within the framework of what the Act allows, not what he wants the Act to allow.

[68] The Court therefore finds that the outcome of the application under section 14 is no better for the applicant than that of the November 2013 complaint. In my view, it is unfortunate that a

rather trivial matter culminated in the bringing of three proceedings by the applicant before this Court, this being the first one heard.

B. *Remedies*

[69] The applicant concedes that he suffered no pecuniary loss; he got his term deposit back; he never chose to redeem his RRSP guaranteed investment certificates prior to maturity. Moreover, the entire dispute could have been defused a lot sooner. There were missed opportunities on both sides to stop things from escalating. In the end, nobody wins when a misunderstanding gets out of hand.

[70] As the reasons for judgment show, the applicant has failed to demonstrate that he is entitled to a remedy under section 16 of the Act. In this, I agree with the OPC that BMO responded to the access requests. In my view, the matter is settled.

[71] The applicant wanted the Court to:

- examine BMO's stubbornness in not disclosing the requested personal information,
- determine why the requested RRSP GIC documents are not in BMO's system,
- order BMO to explain why the investment documents are not indicated on the account statement issued by the respondent,
- order BMO to hand over what he really signed on May 4, 2013, and
- sanction BMO for the many alleged violations, including BMO's alleged refusal to provide explanations or investigate the commission of forgery.

[72] The Court declines to act on these requests, which, moreover, show that the applicant is availing himself of the Act to transform it into a tool that deviates from the purpose of the Act.

[73] Since the Act specifically provides that damages may be awarded, the applicant testified and argued that he was entitled to $60,000, plus disbursements of $10,000. No evidence has been provided regarding the disbursements, and the claimed damages are much greater than those awarded by our Court in *Chitrakar v. Bell TV*, 2013 FC 1103, the case cited by the respondent. In that case, the Court found the federal institution's conduct to be reprehensible, going as far as failing to appear in this Court (paragraph 18). Moreover, Bell violated the Act by using Mr. Chitrakar's personal information without his consent. That is why the Court decided to award damages and exemplary damages. That situation is completely different from the one under study.

[74] In *Girao v. Zarek Taylor Grossman Hanrahan LLP*, 2011 FC 1070, my colleague, Mr. Justice Mosley, provided a useful summary of the jurisprudence on awarding damages under the Act.

[75] I note the importance placed on the fact that damages should be awarded only in the most egregious situations (see also *Townsend v. Sun Life Financial*, 2011 [*sic*] FC 550, at paragraph 32). The seriousness or egregiousness of the breach are factors to consider. In this case we are dealing with a response to a request for personal information that had already been reported to the applicant as non-existent. The Act was violated because of the delay in responding. In the other case, the information may have been provided in a timely manner, but

this could not be convincingly established, so this is another violation for delaying in providing access.

[76] Unlike most of the matters heard by this Court under the Act, there was no disclosure—malicious or not—of personal information. Quite the contrary. Here, the applicant sought to use the Act for purposes that are outside the intended scope of the Act. No damages are due. The required relationship between the breach and damages has not been established, in light of the true nature of the breaches, which are not of a very serious or violating nature (*Randall v. Nubodys Fitness Centres*, 2010 FC 681, at paragraph 56).

IV. Summary and conclusion

[77] This case can be summarized as follows:

a) The applicant has not established that the May 4, 2013 document was forged in any way.

b) The Act does not entitle the applicant to request copies of any documents that might contain personal information.

c) The respondent failed to provide access to personal information in a timely manner and therefore violated the Act, as determined by the OPC.

d) In the circumstances, there is no need for a remedy, including damages.

e) There shall be no order as to costs.

[78] It is hoped that the parties will find a solution to their dispute. I imagine that it was in this spirit that the respondent informed the Court that it no longer sought costs in the event that it succeeded. In view of the conclusion that the Court has come to, the applicant was unsuccessful in this application because the outcome remains much as the OPC determined (*Waxer v.*

J.J. Barnicke Limited, 2009 FC 169, at paragraph 58). The respondent's decision not to seek costs was a noble gesture that should help resolve the dispute. No costs are awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the application under section 14 of the *Personal Information Protection and Electronic Documents Act* is dismissed. No costs will be awarded.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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