Federal Court  Cour fédérale

Date: 20180223

Docket: IMM-2398-17

Citation: 2018 FC 208

Ottawa, Ontario, February 23, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JATINDER SINGH HANJRA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of a member of the Immigration Appeal Division of the Immigration and Refugee Board [the IAD] dated May 16, 2017 [the Decision], which directed the Minister of Citizenship and Immigration [the Minister] to provide it with an unredacted appeal record, including a portion of the record which the Minister asserted was covered by informer privilege.

[2] As explained in greater detail below, this application is allowed, because I have found that the IAD erred both in finding that it is entitled to access information over which informer privilege is claimed and in finding that it was required to review the redacted information in the present case to confirm the existence of the privilege.

II. Background

[3] The Respondent, Jatinder Singh Hanjra, sponsored his wife, Amandeep Virk, to come to Canada from India, but his application was refused because the visa officer [the Officer] was not satisfied that the marriage was genuine or that it was not entered into primarily for the purpose of acquiring permanent residency. Mr. Hanjra appealed and, in the context of that appeal, the Minister provided an appeal record in which a portion of the Officer's notes, as maintained in the Global Case Management System [GCMS] of Citizenship and Immigration Canada [CIC], had been redacted. The IAD wrote to the parties, asking Mr. Hanjra if he objected to the redaction and explaining that, if he did object, the IAD would require the Minister to provide an unredacted copy of the record to the IAD only and to make an application to the IAD only, explaining the basis for the redaction.

[4] Mr. Hanjra advised the IAD through his counsel that he did object to the redaction. He took the position that, as a result of the redaction, the appeal record was incomplete and the IAD should exclude the appeal record provided by the Minister. The Minister advanced the position that the redacted portion could not be disclosed to the IAD because it was protected by informer privilege, as it captured information which had been provided through a telephone tip line administered by the Canada Border Services Agency [CBSA], called the Border Watch Toll-Free

Line [the Border Watch Line]. The Minister also submitted that the information was irrelevant because it was not relied on by the Officer and would not be relied on by the Minister in the appeal.

[5] The IAD then issued the Decision, explained in more detail below, ordering the Minister to provide it with the redacted material so that it could assess whether the information was irrelevant or protected by informer privilege. The Minister filed the within application for judicial review of the Decision and also provided the IAD with a Certificate dated June 2, 2017, objecting to the disclosure of the redacted material pursuant to s 37 of the *Canada Evidence Act*, RSC 1985, c C-5 [the CEA]. The Minister asks the Court to determine that objection in a related application, in Court file T-848-17 [the Section 37 Application].

III. The IAD Decision

[6] The IAD concluded that, for the Minister to redact the contents of an appeal record based on informer privilege, the IAD must be satisfied that the privilege applies to the information which the Minister seeks to withhold. The Minister could not be permitted to unilaterally redact the appeal record, as this would allow one of the litigants to act as the arbiter of the relevance and admissibility of evidence.

[7] The IAD observed that when a spousal sponsorship application is refused because of concerns about the genuineness of the marriage and the purpose for which it was entered into, the visa officer's notes are always included in the record for any appeal of such a refusal, as

these notes play a central role in the adjudication of the appeal because they reveal the officer's underlying reasoning.

[8] The IAD identified the following as the issues it was required to determine:

A. Is a tip made to the Border Watch Line covered by informer privilege?

B. If so, does the law of informer privilege entitle the Minister to unilaterally determine whether the privilege applies, or is that a matter for the IAD to decide?

C. If not, does the Minister's assertion that the redacted information is not relevant and will not be relied upon by the Minister in a hearing justify withholding the information?

[9] The IAD explained that informer privilege is a class privilege which attaches to information because of the context in which it is provided, rather than the content of the information, and is absolute in scope save for the "innocence at stake" exception, which is applicable only to criminal law. The Board considered informer privilege to apply when (1) the communicator requests confidentiality and (2) there is a corresponding promise of confidentiality by the recipient of the information, either express or implied.

[10] The IAD accepted that the information provided publicly about the Border Watch Line provides an explicit promise of confidentiality and anonymity to informers. However, it was still concerned with the question of whether the informer expected the tip to be treated confidentially.

The IAD considered the expectation of confidentially to be a condition precedent to the application of the privilege and held that not all information provided to a tip line is automatically subject to informer privilege. It therefore concluded that it needed to see the redacted information itself to determine whether "an evaluation of all of the circumstances of the case ultimately leads to a conclusion that it is more likely than not that the informer has an expectation of confidentiality."

[11] In its analysis, the IAD saw its role as similar to that of a trial judge. It concluded that a unilateral assertion of informer privilege by the Minister is not beyond its scrutiny and that it was in the position to determine whether privilege applies. It supported this conclusion with the fact that there are provisions in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], which equip the IAD with the power to examine evidence in the absence of a party and to determine how that evidence is to be handled (ss 86 and 166). Further, it relied on the fact that the IAD has control of its own processes and has the power to determine what constitutes the record before it (ss 162 and 174).

[12] The IAD also distinguished case law relied on by the Minister, for the proposition that the law prohibits disclosure of the privileged material to the IAD, on the basis that these cases dealt with the disclosure of evidence to a third party in a proceeding rather than to the decision-maker in the proceeding.

[13] Finally, addressing the Minister's argument based on relevance, the IAD considered the preparation and disclosure of an appeal record in proceedings before it to be fundamentally

different from the ordinary preparation and disclosure of evidence. The latter depends on the litigation strategy of the party, while the production of an appeal record for the IAD is governed by Rule 4(1) of the *Immigration Appeal Division Rules*, SOR/2002-230. The IAD considered the mandatory language of Rule 4(1) to impose on the Minister an obligation to disclosure all material documents, regardless of what the Minister intends to rely on. It concluded that the test for relevance was an objective one which, in the case of dispute between the parties, was to be determined by the IAD.

[14] The IAD concluded that the questions of whether informer privilege applied and whether the information at issue was relevant could be determined only by the IAD and only with the benefit of reviewing the redacted information, although this was to be done without disclosing the information to Mr. Hanjra. The IAD therefore ordered that the unredacted record be provided to it so that it could make these determinations.

IV. Evidence Before the Court

[15] While the Respondent, Mr. Hanjra, was served with the Notice of Application in this matter, he has not filed a Notice of Appearance or a Respondent's Record. Mr. Hanjra was provided with a copy of the Order setting the date for the hearing of the application, but he informed the Registry Officer by telephone on the day of the hearing that he would not be attending. The Court therefore proceeded with the hearing in Mr. Hanjra's absence, as contemplated by Rule 38 of the *Federal Courts Rules*.

[16] The Minister argued this application and the Section 37 Application concurrently, relying on the affidavit evidence contained in the Application Records filed by the Minister in the two proceedings. Counsel for the Minister also advised the Court that he had brought to the hearing a copy of a Confidential Affidavit of Laura Soskin, a paralegal with the Department of Justice, dated February 2, 2018, which attached an unredacted copy of the GCMS notes, including the portion over which informer privilege was claimed [the Confidential Affidavit]. The Minister's counsel advised the Court that he was prepared to provide it with a copy of the Confidential Affidavit, with the benefit of an Order protecting the affidavit's confidentiality. The Court accordingly received the Confidential Affidavit, which has been accepted for filing on a confidential basis under an Order dated February 9, 2018. The Minister did not rely on the Confidential Affidavit in argument.

[17] As the present application involves judicial review of the IAD's decision, and as neither the Continental Affidavit nor the unredacted GCMS notes were before the IAD, I am not taking that evidence into account in my review of the Decision. The role of that evidence in the Section 37 Application is discussed in the decision I am issuing separately for that matter.

V. Issues

[18] The Minister's arguments can be addressed through the analytical framework of the following issues:

A. Is the application for judicial review premature?

B. What is the standard applicable to the Court's review of the Decision?

C. Did the IAD err in its Decision?

VI. Analysis

A. *Is the application for judicial review premature?*

[19] The Minister's submissions acknowledge that the Decision represents an interlocutory ruling by the IAD and that interlocutory rulings by an administrative tribunal are not ordinarily subject to judicial review, at least not prior to the end of the tribunal's proceeding. However, in reliance on *Canada (Minister of Public Safety and Emergency Preparedness) v Kahlon*, 2005 FC 1000 [*Kahlon*], the Minister argues that special circumstances exist in this case, such that this application is not premature.

[20] In *Kahlon*, at paragraphs 10 to 16, Justice Tremblay-Lamer held that it was not premature for the Court to review a decision by the Refugee Protection Division not to quash a summons which would have required an immigration officer to produce the immigration file of the refugee claimant's daughter. The application raised privacy concerns surrounding information in the file, and the Court held that, if disclosure was permitted to occur, the privacy interests would be completely lost, which no subsequent remedy could undo.

[21] I agree that a comparable analysis applies in the present case. The Minister's arguments include the position that the IAD is outside the "circle of privilege" and is not entitled to access the information over which informer privilege is claimed. If the IAD appeal were to proceed, with the Minister producing to it the unredacted GCMS notes as ordered in the Decision, and if

the Court were to subsequently conclude in a judicial review of the IAD's final appeal decision that the IAD had not been entitled to review the privileged material, there would be no way to undo that breach of the privilege. I therefore find that the Minister's application is not premature.

B. *What is the standard applicable to the Court's review of the Decision?*

[22] The Minister submits that the Decision is reviewable on a standard of correctness, arguing that this parallels the analysis which the Court must undertake in the Section 37 Application, in which no deference is owed to the IAD. The Minister relies on the decision in *Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766 [*Arar*]. That case did not consider s 37 but involved an application to determine whether certain information could be disclosed under the somewhat comparable process prescribed by s 38.04 of the CEA in the case of information potentially injurious to international relations, national defence or national security. At paragraphs 30-32 of *Arar*, this Court held that no deference should be afforded to the findings of the Commission of Inquiry whose report gave rise to the application.

[23] I agree with the Minister that correctness is the standard applicable to the Court's review of the Decision in the present application. In *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 [*Alberta*], the Supreme Court of Canada considered an argument by the Information and Privacy Commissioner of Alberta that certain statutory language empowered it to order production to it of records or information to substantiate a claim of solicitor-client privilege. At paragraphs 19 to 27, Supreme Court reasoned that this was a question to which the standard of correctness applied, as it was of central importance to the legal

system as a whole and outside the Commissioner's specialized area of expertise. Although the present case involves informer privilege rather than solicitor-client privilege, a similar question arises surrounding the statutory entitlement of the IAD to access the privileged information, to which question I consider the standard of correctness to apply.

[24] The arguments raised by the Minister, as will be canvassed in more detail below, also engage a question surrounding the appropriate process to be followed by the IAD, when considering a claim of informer privilege, including whether review of the document over which privilege is claimed is necessary to determine the existence of the privilege. Such process questions were considered by the Federal Court of Appeal in *Canada (Attorney General) v Quadrini*, 2011 FCA 115 [*Quadrini*], again in the context of solicitor-client privilege. The Court held at paragraph 45 of *Quadrini* that determinations of questions of law relating to privilege claims, by the Public Service Labour Relations Board [PSLRB], are subject to review on a standard of correctness.

[25] I note that the Minister also referred the Court to the decision in *A. v Drapeau*, 2012 NBCA 73, in which the New Brunswick Court of Appeal applied the standard of reasonableness to an appeal from a decision of the New Brunswick Securities Commission, ruling that certain information was not subject to informer privilege. However, I find that this decision is distinguishable, as it involved review of the Securities Commission's finding of whether privilege was applicable in a circumstance where the Commission already had access to the information concerned, not questions surrounding the process to be employed by a tribunal in considering a privilege claim including whether the tribunal can access the information.

[26] I will therefore apply the standard of correctness to my review of the Decision.

C. *Did the IAD err in its Decision?*

[27] The Minister argues that the IAD erred in finding that that the Minister's assessment of irrelevance did not dispose of the issue whether to allow the redactions; in finding that it is entitled to access information over which informer privilege is claimed; and in finding that it was required to review the redacted information in order to confirm that it was covered by the privilege. It is useful first to review jurisprudence that bears upon these arguments.

(1) Jurisprudence

[28] Beginning with the nature of informer privilege, the Supreme Court of Canada provided the following summary in its recent decision in *R. v Durham Regional Crime Stoppers Inc.*, 2017 SCC 45 [*Durham*] at para 11:

> [11] Informer privilege is a common law rule that prohibits the disclosure of an informer's identity in public or in court. As a class privilege, informer privilege is not determined on a case-by-case basis. It exists where a police officer, in the course of an investigation, guarantees confidentiality to a prospective informer in exchange for information: *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389, at para. 36; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 105. The privilege acts as "a complete and total bar" on any disclosure of the informer's identity, subject only to the innocence at stake exception: *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, at para. 30. All information which might tend to identify the informer is protected by the privilege: *ibid.* The privilege belongs both to the Crown and to the informer and neither can waive it without the consent of the other: *ibid.*, at para. 25.

[29] Turning to authorities relevant to the process to be employed by an administrative tribunal when presented with a privilege claim, I note that, while some of these authorities relate to solicitor-client privilege rather than informer privilege, I find no reason to distinguish them on that basis. In *Quadrini*, the Federal Court of Appeal was sitting in a judicial review of a decision of the PSLRB which had ordered the Canada Revenue Agency [CRA] to provide it with affidavit evidence establishing the nature of documents which CRA refused to disclose based on solicitor-client privilege. In so ordering, the PSLRB reached a conclusion that it had the authority to decide whether the documents were privileged. The Court did not arrive at a decision as to whether the PSLRB had such authority, as it concluded that the tribunal had erred in the process it had followed in considering CRA's privilege claim. The Court explained the appropriate process as follows:

> [30] Whether or not a tribunal has the legal authority to determine if documents are subject to solicitor-client privilege, it may conduct a preliminary screening, without inspecting them or issuing an order that would breach the privilege if validly claimed. A bare assertion of privilege should not be allowed to automatically derail the conduct of a proceeding if the tribunal has no authority to decide the validity of the claim, any more than a tribunal with authority to decide a privilege claim should inspect the document the moment a party challenges the validity of the claim.
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> [31] If a tribunal is not satisfied on the basis of the information available to it that the documents in question are capable of being the subject of a valid claim for solicitor-client privilege, it can admit them or order their production. If the tribunal is not satisfied that the documents may be relevant to issues in dispute before it, it will exclude them or not order their production on this ground. In either case, the tribunal's rulings would be subject to appeal or judicial review.
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> **(i) nature of the communication**
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> [32] It may be apparent from the surrounding circumstances whether or not a communication could possibly fall within a category to which legal privilege could attach. If it does not meet

this threshold, the tribunal may call for its production or admit it into evidence, subject to an appeal or an application for judicial review by the party claiming privilege. If, on the other hand, it is plausible to think that the communication may be privileged, the tribunal will proceed to the next stage and ask if it may be relevant to the issues in dispute before it.

[…]

(ii) relevance

[36] To be admissible in legal proceedings, evidence must be relevant to the subject matter of the proceeding, a principle that applies to proceedings before both courts and adjudicative administrative tribunals. If the decision-maker is not satisfied that the document is relevant, it should be excluded and no order made for its production.

[37] In the present case, the Board may order the production of documents "that may be relevant" (paragraph 40(1)(h) of the Act). When privilege is claimed for documents, an assessment of relevance at the initial screening stage must take into account the fact that neither the decision-maker nor the party seeking to adduce it or obtain its production has seen the material in question. Nonetheless, the party seeking production must establish a realistic possibility that the documents may be relevant to an issue in dispute in proceedings before the Board. Mere speculation as to their possible relevance is not sufficient.

[38] The applicable law is accurately described in *MacMillan Bloedel Ltd. v. British Columbia* (1984), 16 D.L.R. (4th) 151 (B.C. S.C.) (*MacMillan Bloedel*). In that case, McLachlin J. (as she then was) stated that the relevance of documents for which Crown privilege (as public interest privilege was then known) is claimed should be determined, at least in a preliminary manner, before the court examines them to determine the validity of the claim for privilege.

[39] For the purpose of this preliminary screening exercise, the Judge adopted the classic test of relevance on discovery in *Cie. Financière & Commerciale du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 at 63 (Eng. C.A.) as including every document

> …which it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring …

> > [it] either to advance his own case or to damage the case of his adversary.
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> McLachlin J. went on to say (at 156) that if documents satisfied this test of relevance at the screening stage, and were not shown to be inadmissible on some other ground, the court would determine their actual relevance on inspecting them.
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> [40] *MacMillan Bloedel* was addressing the procedure to be followed by courts when a claim for Crown privilege is raised in a proceeding before a court. However, in my opinion, McLachlin J.'s analysis is equally applicable to claims for solicitor-client privilege in proceedings, regardless of the adjudicative forum where they are made. Thus, administrative tribunals should conduct an initial screening for relevance, regardless of whether they have the legal authority to determine the validity of claims for privilege: see *Ontario (Human Rights Commission) v. Dofasco Inc.* (2001), 57 O.R. (3d) 693 at para. 57 (C.A.).
>
> [41] If the document is found not to be relevant, it will be unnecessary for a tribunal to refer the matter to the Court to determine the privilege claim, assuming that it does not have the authority to do so itself. So, too, a tribunal with power to determine privilege claims will not need to inspect the document for this purpose if it is clearly irrelevant. As the Court said in *Blood Tribe* (at para. 17):
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> > Even courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue.
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> [42] A tribunal with legal authority to decide privilege claims has not completed its task when, after inspecting the documents, it concludes that they are indeed relevant. It may not order production of the documents until it is also satisfied that none of the limited exceptions to the general rule precluding the production of material containing legal advice applies: see *Smith v. Jones*, [1999] 1 S.C.R. 445 at para. 74; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C. R. 445 at paras. 34-38.

[30] In the result, the Court in *Quadrini* concluded that the PSLRB had erred by assuming the relevance of the documents for which privilege was claimed. However, for

purposes of the present matter, what is most significant is the guidance provided by the Federal Court of Appeal as to the process to be followed by an administrative tribunal when confronted with a privilege claim, which I would summarize as follows:

A. Regardless of whether a tribunal has legal authority to determine if a document is privileged, it may conduct a screening, without inspecting the document;

B. The first stage of the screening is to assess whether the document could possibly fall within a privileged category. If not, the tribunal can order its production. If it may fall within a privileged category, the tribunal should proceed to the second stage of screening;

C. The second stage of screening is to assess whether the document may be relevant to the issues in dispute. The test for relevance is whether it is reasonable to suppose the document (which has not yet been inspected by the tribunal) contains information which may directly or indirectly enable the party requesting it to advance its own case or to damage the case of its adversary. If the document does not satisfy this test for relevance, the tribunal will not order its production.

[31] This direction that the tribunal should conduct a preliminary assessment of relevance and privilege, before inspecting the document, is consistent with other authorities to the effect that even courts will decline to review solicitor–client documents to ensure a claim of privilege is properly asserted unless there is evidence or argument establishing the necessity of doing so to

fairly decide the issue (see *Alberta* at para 68; *Privacy Commissioner of Canada v Blood Tribe Department of Health*, 2008 SCC 44 [*Blood Tribe*] at para 17). Moreover, while this point is not expressly addressed in *Quadrini*, I read *Alberta* and *Blood Tribe* as supporting the Minister's contention that it is unnecessary for a tribunal to move beyond the screening stage or preliminary assessment, and inspect a document to determine a privilege claim, if there is no basis to contest the assertion of privilege. In *Alberta*, the Information and Privacy Commissioner of Alberta ordered production to it of certain records or information to substantiate a claim of solicitor-client privilege. While the Supreme Court concluded that the governing legislation did not empower the Commissioner to do this, it also found in the alternative at paragraphs 67 to 70 that, even if the Commissioner had such authority, the case was not one where it was appropriate to exercise that authority, as there was no evidence or argument suggesting that solicitor-client privilege had been erroneously claimed.

[32] To the same effect, the Minister also relies on *R. v Leipert*, [1997] 1 SCR 281 [*Leipert*], a case which dealt specifically with informer privilege and the potential application of the "innocence at stake" exception. At paragraph 33 of *Leipert*, the Supreme Court of Canada explained that, when an accused seeks disclosure of privileged information on the basis of this exception, the accused must first show some basis to invoke the exception, following which the Court may then review the information to determine whether it is in fact necessary to prove the accused's innocence. The inference is again that inspection of the document over which privilege is claimed is unnecessary in the absence of a basis to question the claim.

[33] As noted above, the screening process is applicable regardless of whether a tribunal has legal authority to determine a privilege claim. However, where the outcome of the claim cannot be determined through the screening, it is necessary to consider whether the tribunal has such authority. This question was the subject of the decision of the Supreme Court of Canada in *Blood Tribe*, which considered whether the Privacy Commissioner of Canada had such authority under the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5. The Court's decision, that the Privacy Commissioner is not entitled to access documents subject solicitor-client privilege, is summarized at paragraph 2:

> [2] Section 12 *PIPEDA* gives the Privacy Commissioner express statutory authority to compel a person to produce any records that the Commissioner considers necessary to investigate a complaint "in the same manner and to the same extent as a superior court of record" and to "receive and accept any evidence and other information... whether or not it is or would be admissible in a court of law". She therefore argues that, as is the case with a court, she may review documents for which solicitor-client privilege is claimed to determine whether the claim is justified. I do not agree. The Privacy Commissioner is an officer of Parliament vested with administrative functions of great importance, but she does not, for the purpose of reviewing solicitor-client confidences, occupy the same position of independence and authority as a court. It is well established that general words of a statutory grant of authority to an office holder such as an ombudsperson or a regulator, including words as broad as those contained in s. 12 *PIPEDA*, do not confer a right to access solicitor-client documents, even for the limited purpose of determining whether the privilege is properly claimed. That role is reserved for the courts. Express words are necessary to permit a regulator or other statutory official to "pierce" the privilege. Such clear and explicit language does not appear in *PIPEDA*. This was the view of the Federal Court of Appeal and I agree with it. I would dismiss the appeal.

[34] I will now apply the principles derived from the above jurisprudence to the Decision, taking into account the arguments advanced by the Minister.

(2) Did the IAD err in finding that that the Minister's assessment of irrelevance did not dispose of the issue whether to allow the redactions?

[35] The Minister argued before the IAD and now before the Court that the redacted portion of the GCMS notes was irrelevant because it was not relied on by the Officer and would not be relied on by the Minister in the appeal. In advancing this position, the Minister emphasized that the appeal to the IAD was a hearing *de novo* of the substantive issue of the *bona fides* of Mr. Hanjra's marriage and was therefore not restricted to the information available to the Officer. In rejecting these submissions, the IAD relied on authorities confirming that, where there is a dispute as to what documents are relevant for purposes of constituting the record before a court, it is the court that is the arbiter of relevance (see *Nguesso v Canada (Minister of Citizenship and Immigration)*, 2015 FC 102 [*Nguesso*] at para 89; *Bermudez v Canada (Minister of Citizenship and Immigration)*, 2015 FC 639 [*Bermudez*] at para 19).

[36] I am unable to conclude that the IAD erred in its treatment of the relevance of the redacted portion of the GCMS notes. In my view, it correctly extrapolated from the conclusions in *Nguesso* and *Bermudez* that it, as the tribunal deciding the appeal, was required to be the arbiter of what was relevant for purposes of the appeal record. Moreover, it correctly referenced the principle expressed at paragraph 89 of *Nguesso* that any document that was before the decision-maker when it made its decision is presumed relevant. Indeed, this Court identified in paragraph 93 of *Nguesso* that relevance in a judicial review is not restricted to documents that actually influenced the administrative tribunal's decision but extends to all materials that were before the decision-maker.

[37] My conclusion on this issue is not altered by the fact that the process before the IAD is a *de novo* appeal, rather than a judicial review. The significance of this process is that both parties can introduce additional evidence to supplement the record that was before the Officer. However, this does not alter the presumption that the record that was before the Officer is relevant. The redacted passage that was the subject of the IAD's decision is an excerpt from the Officer's own notes, to which such a presumption must surely apply. As observed by the IAD, when a spousal sponsorship application is refused because of concerns about the genuineness of the marriage and the purpose for which it was entered into, the visa officer's notes are always included in the record for any appeal of such a refusal, as these notes play a central role in the adjudication of the appeal because they reveal the officer's underlying reasoning. Consistent with the principles derived from the jurisprudence canvassed above, the IAD considered the Minister's relevance argument without inspecting of the document. Taking into account the test for relevance explained in *Quadrini*, I find that the IAD correctly rejected the Minister's position that it could dispose of the issue before it based on the Minister's assertion that the material was not relevant.

(3) Did the IAD err in finding that it is entitled to access information over which informer privilege is claimed?

[38] However, in my view the IAD erred in concluding that it has the authority to inspect the information over which informer privilege is claimed, in order to determine whether or not the privilege applies. In reaching its conclusion, the IAD relied on provisions of IRPA which it considered equipped it to determine whether informer privilege justifies the redaction of an appeal record. The IAD explained these provisions as follows:

> [39] Two separate provisions of the *Act* allow for circumstances in which the IAD can examine evidence in the absence of a party to an appeal and determine how that evidence is to be handled. First, the Minister can apply under section 86 for non-disclosure of information in an appeal where issues of national security or potential harm to an individual are engaged. Where the scope of the IAD's authority under section 86 is unclear (Does it apply, for example, where an IAD appellant is a citizen of Canada?), and the section 86 process is complex, the *Act* allows for a process that would enable the IAD to assess the extent to which information that is relevant to an appeal should be withheld from a party to an appeal.
>
> [40] Second, section 166 gives the IAD power to determine whether some parts or all of an appeal should be conducted in the absence of the public and in the absence of a party or witness in an appeal. The provisions governing confidentiality in section 166 (and subsection 166(d) in particular) are less complex than the section 86 process and can be triggered by a larger range of criteria. They are worded broadly enough to enable the IAD, if required, to deal with matters on an *ex parte* basis and to craft orders governing access to documents in accordance with the laws relating to privilege.

[39] I accept that the sections of IRPA cited by the IAD provide it with machinery that could be used to review documentation, over which a privilege claim is asserted by one party, without disclosing that documentation to the other party or to the public. However, the availability of such a process does not meet the requirement prescribed by *Blood Tribe*, that there must be express statutory language if a tribunal's enabling statute is to be interpreted as entitling it to access privileged information. I note that the IAD also referred to the powers provided to it under sections 162 and 174 of IRPA, concluding that ceding control of the content of the appeal record to the parties would undermine these powers which enable it to control its own process. Sections 162 and 174 provide as follows:

Sole and exclusive jurisdiction

162 (1) Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.

Compétence exclusive

162 (1) Chacune des sections a compétence exclusive pour connaître des questions de droit et de fait — y compris en matière de compétence — dans le cadre des affaires dont elle est saisie.

Procedure

(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

Fonctionnement

(2) Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité.

[…]

[…]

Court of record

174 (1) The Immigration Appeal Division is a court of record and shall have an official seal, which shall be judicially noticed.

Cour d'archives

174 (1) La Section d'appel de l'immigration est une cour d'archives; elle a un sceau officiel dont l'authenticité est admise d'office.

Powers

(2) The Immigration Appeal Division has all the powers, rights and privileges vested in a superior court of record with respect to any matter necessary for the exercise of its jurisdiction, including the swearing and examination of witnesses, the production and inspection of documents and the enforcement of its orders.

Pouvoirs

(2) La Section d'appel a les attributions d'une juridiction supérieure sur toute question relevant de sa compétence et notamment pour la comparution et l'interrogatoire des témoins, la prestation de serment, la production et l'examen des pièces, ainsi que l'exécution de ses décisions.

[40] Again, my conclusion is that these provisions fall short of the express, clear, and unambiguous statutory language that *Blood Tribe* explained is necessary to entitle an administrative tribunal to access privileged material. The statutory analysis in *Blood Tribe* was summarized in the subsequent decision of the Supreme Court of Canada in *Lizotte v Aviva Insurance Co. of Canada*, 2016 SCC 52 at paragraph 59 as follows:

> [59] *Blood Tribe*, on which much of the argument in this appeal was focused, was to the same effect. In it, the issue was whether solicitor-client privilege had been abrogated or diluted by a statutory provision that authorized an administrative investigator to compel a person to produce any records the investigator considered necessary to investigate a complaint "in the same manner and to the same extent as a superior court of record" and to "receive and accept any evidence and other information... that the [investigator] sees fit, whether or not it is or would be admissible in a court of law" (s. 12 *PIPEDA*, now s. 12.1 (S.C. 2010, c. 23, s. 83)). The Court held that the provision at issue was insufficient to abrogate solicitor-client privilege: "Open-textured language governing production of documents [does] not... include solicitor-client documents" (para. 11 (emphasis deleted)). Instead, the legislature must use "clear and explicit language" to abrogate solicitor-client privilege (para. 2). The Court stated that the privilege "cannot be abrogated by inference" and added that any provisions that allow incursions on the privilege must be interpreted restrictively (para. 11).

[41] In my view, the subsection of IRPA that could best support an argument that Parliament intended the IAD to be permitted to access privileged material is s 174(2), which confers upon the IAD all the powers, rights, and privileges of a superior court, including those in relation to the production and inspection of documents. However, this language is still general in nature and cannot be characterized as expressly, explicitly, or unambiguously conferring on the IAD the authority to access privileged information.

[42] I note that the Supreme Court's analysis in *Blood Tribe* also took into account factors such as the fact that, unlike a court, the Privacy Commissioner does not have the power to adjudicate disputed claims over legal rights and may become adverse in interest to a party whose documents the Commissioner wishes to access (paragraphs 22 to 23). In these respects, the IAD's role is arguably more akin to that of a court than the role of the Privacy Commissioner is. However, *Blood Tribe* also considered whether the Commissioner had alternative effective remedies to have privilege claims verified and concluded at paragraph 33 that such a remedy was afforded by s 18.3(1) of the *Federal Courts Act*, RSC 1985, c F-7, which provides as follows:

Reference by federal tribunal	**Renvoi d'un office fédéral**
18.3(1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.	**18.3 (1)** Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure.

This remedy is equally available to the IAD. Indeed, in its written representations to the IAD in support of its privilege claim, the Minister expressly submitted that it was open to the IAD to employ s 18.3(1) to refer the matter to the Federal Court for determination.

[43] Taking into account both the analysis of the language of IRPA and these additional factors that were considered by the Supreme Court in *Blood Tribe*, my conclusion is that the IAD is not within what the Minister describes as the "circle of privilege" and is not entitled to access information over which a claim of informer privilege is asserted, even for the purpose of assessing that claim. As such, I find that the IAD erred in concluding that it was entitled to

access the redacted information in the GCMS notes and in ordering the Minister to provide it with same.

(4) Did the IAD err in finding that it was required to review the redacted information to confirm the existence of the privilege?

[44] In addition to my conclusion above, that the IAD did not have the authority to order production to it of an unredacted copy of the GCMS notes, I find that the IAD erred in concluding that it was necessary to review this document in order to address the privilege claim. This error appears to have resulted from the IAD's understanding of the test for the application of informer privilege. After reviewing the nature of the privilege, the IAD stated that the privilege is triggered where the communicator requests confidentiality and there is a corresponding promise of confidentiality (either express or implied) by the recipient of the information. Applying this analysis to the Minister's claim of privilege for the information received through the Border Watch Line, the IAD concluded that the legal test for informer privilege is likely met when a tip is made to the Border Watch Line and the informer expects the tip to be treated confidentially. As a result of this conclusion, the IAD found that it could not assess the claim of privilege without reviewing the substance of the tip to evaluate whether the informer had an expectation of confidentiality.

[45] In my view, the jurisprudence applicable to informer privilege does not support the IAD's understanding of the test as requiring demonstration of two separate elements, i.e. an expectation of confidentiality on the part of the informer and a promise of confidentiality by the recipient. The IAD relied on paragraph 18 of *R. v Named Person B*, 2013 SCC 9 [*Named Person*], in which

the Supreme Court provided the following explanation of the circumstances in which the privilege arises:

> [18] In *R. v. Barros*, [2011] 3 S.C.R. 368, this Court held that "not everybody who provides information to the police thereby becomes a confidential informant" (para. 31). The Court was clear, however, that "the promise [of protection and confidentiality] need not be express [and] may be implicit in the circumstances" (para. 31, citing *Bisaillon v. Keable*, [1983] 2 S.C.R. 60). The legal question is whether, objectively, an implicit promise of confidentiality can be inferred from the circumstances. In other words, would the police conduct have led a person in the shoes of the potential informer to believe, on reasonable grounds, that his or her identity would be protected? Related to this, is there evidence from which it can reasonably be inferred that the potential informer believed that informer status was being or had been bestowed on him or her? An implicit promise of informer privilege may arise even if the police did not intend to confer that status or consider the person an informer, so long as the police conduct in all the circumstances could have created reasonable expectations of confidentiality.

[46] It is correct to derive from this passage that not everybody who provides information to the police, who were the recipients of the information at issue in that case, thereby becomes a confidential informant. However, the Supreme Court's explanation focuses upon whether or not the police had made a promise of protection and confidentiality. In noting that the promise need not be explicit, the Court proceeded to explain circumstances in which that the privilege may result from an implicit promise. This is to be assessed objectively and may be based on the conduct of the police or evidence from which it can be inferred that the potential informer reasonably believed he or she was the recipient of informer status. While the above passage speaks of reasonable expectations of confidentiality, I read that reference as related to the objective nature of the analysis. I do not read it as mandating a conjunctive analysis, in which a court or other decision-maker assessing a privilege claim must consider whether there was both a

promise of confidentiality and an expectation of confidentiality. I particularly do not regard it necessary to consider the informer's expectations as a separate element of the test when there has been an explicit promise of confidentiality on the part of the police or whatever other law enforcement authority received the information from the informer.

[47] Turning to other authorities, I note that *Iser v Canada (Attorney General)*, 2017 BCCA 393 [*Iser*], does state at paragraph 27 that there are two preconditions to the existence of informer privilege. However, the Court explained that these conditions are, first, that the informer provided information to an investigating authority and, second, that the informer provided the information under an express or implied guarantee of protection and confidentiality. I also note that, in *Iser,* the British Colombia Court of Appeal relied on *R. v Barros*, 2011 SCC 51 [*Barros*] at para 31, in which the Supreme Court stated:

> 31 Of course, not everybody who provides information to the police thereby becomes a confidential informant. In a clear case, confidentiality is explicitly sought by the informer and agreed to by the police. As noted in *Basi*, at para. 36:
>
> > The privilege arises where a police officer, in the course of an investigation, guarantees protection and confidentiality to a prospective informer in exchange for useful information that would otherwise be difficult or impossible to obtain.
>
> *Bisaillon*, however, added that the promise need not be express. It may be implicit in the circumstances:
>
> > The rule gives a peace officer the power to promise his informers secrecy <u>expressly or by implication</u>, with a guarantee sanctioned by the law that this promise will be kept even in court, and to receive in exchange for this promise information without which it would be extremely difficult for him to carry out his duties and ensure that the criminal law is obeyed. [Emphasis added; p. 105.]

[48] *Barros* refers to confidentiality being explicitly sought by the informer and confirmed by the police. However, it describes that as a "clear case", which I do not interpret to prescribe a requirement that there be both an explicit request for confidentiality and explicit promise of same, as this would be not be consistent with the jurisprudence which clearly contemplates that an implicit promise of confidentiality is sufficient to support the application of informer privilege.

[49] The evidence provided by the Minister to the IAD in support of the privilege claim included an affidavit sworn by the CBSA officer who manages the Border Watch Line, which described the purpose of that service and the manner in which it is publicly advertised, as well as the fact that the information in the redacted portion of the GCMS notes had been received through the Border Watch Line. The IAD reviewed this evidence and found that both the Minister's website and the CBSA website provide an explicit promise of confidentiality to informers using the Border Watch Line. With the benefit of this evidence of an explicit promise of confidentiality, I find that it was an error for the IAD to conclude that the test for informer privilege required it to probe further for confirmation that the informer expected the tip to be treated confidentially.

[50] The evidence before the IAD supported a conclusion that informer privilege applied to the redacted portion of the GCMS notes. I appreciate that it is theoretically possible that the redacted information would demonstrate in some way that the informer who called the Border Watch Line in this particular instance did not require his or her information or identity to be treated confidentially. However, such a possibility is purely speculative, without any foundation

in evidence or argument. In my view, the present case falls within the same sort of circumstances as were addressed in *Alberta*. Even if the IAD were within the circle of privilege, given the evidence of the context in which the information was provided, it was unnecessary for the IAD to move beyond the screening stage or preliminary assessment and inspect the document to determine the privilege claim in the absence of any basis to contest the assertion of privilege.

[51] There are of course circumstances in which an informer privilege claim cannot be determined without reviewing the information over which the privilege is asserted. In such circumstances, in the case of an administrative tribunal which is not entitled to review privileged material, it will be necessary to refer the matter to a court. However, as noted by the Supreme Court in *Durham*, challenges to informer privilege claims can give rise to several different forms of prejudice, including lengthening and complicating the proceeding. These concerns militate in favour of a tribunal adjudicating the claim, without reviewing the information, where circumstances permit it to do so. The present case represents an example of such circumstances, as the evidence of the context in which the information was provided supports a claim for privilege and there is no basis to challenge that claim.

VII. Conclusion

[52] Having found reviewable errors on the part of the IAD, my Judgment will set aside the decision. However, it is not necessary for the IAD to revisit the privilege question. My finding is that the IAD should have upheld the Minister's assertion of privilege. As well, for related reasons given in my decision in the Section 37 Application, I have determined that the excerpt

from the GCMS notes is subject to informer privilege and should not be disclosed. The IAD is therefore in a position to proceed with the appeal.

VIII. Certified Question

[53] The Minister takes the position that, if it prevails in this judicial review application, no question should be certified for appeal, because the result will have been based on the application of established principles to the particular circumstances of this case. However, the Minister proposes the following questions for certification in the event it is unsuccessful:

A. Is information received on the Border Watch Line administered by Canada Border Services Agency, which makes an explicit promise of confidentiality, protected by informant privilege?

B. If yes, are members of the Immigration and Refugee Board in the "circle of privilege" allowing them to access information protected by informant privilege?

[54] Notwithstanding that the Minister has prevailed in this application, I have considered whether either of these questions is appropriate for certification. My conclusion is that they are not. While the first question is one of general application, it is not a question that the Court answered or was required to answer in the present case. The issues arising out of the Decision under review did not relate to whether the Border Watch Line supports the application of informer privilege to information received through that service, which the IAD did not dispute, but rather whether the IAD was permitted or required to examine the information to determine whether the privilege applies. Therefore, the first question raised by the Minister would not be determinative of an appeal in this matter and is not appropriate for certification.

[55] The second question was answered by the Court in this matter and is one of general application that would extend beyond this particular matter. However, its answer would not be determinative of an appeal. Even if it were to be found on appeal that the IAD is within the circle of privilege, this would not produce a different result in this matter. The Decision was set aside based not only on the conclusion on that issue but also based on the conclusion that, in the particular circumstances of this case, even if the IAD was within the circle of privilege, there was no requirement for it to review the information over which privilege was asserted in order to address the privilege claim. As such, this question is also not appropriate for certification for appeal.

JUDGMENT IN IMM-2398-17

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the decision of the IAD dated May 16, 2017 is set aside, and the matter is remitted to the IAD for the continuation of the appeal in accordance with the Court's Reasons.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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