Federal Court  Cour fédérale

Date: 20191212

Docket: T-1140-18

Citation: 2019 FC 1596

Saskatoon, Saskatchewan, December 12, 2019

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

DALE KOHLENBERG

Applicant

and

ATTORNEY GENERAL OF CANADA
AND MINISTER OF JUSTICE

Respondent

JUDGMENT AND REASONS

(Delivered from the bench in Saskatoon, Saskatchewan on December 11, 2019)

[1] This is an application for a review under section 41 of the *Access to Information Act*, RSC 1985, c A-1 [the Act], in respect of a decision made by the Department of Justice not to disclose a document requested by the Applicant, on the basis of solicitor-client privilege. The Applicant made a complaint to the Information Commissioner, who dismissed the complaint.

[2] The Applicant is a lawyer. He is employed by the Department of Justice. He has an outstanding grievance with his employer with respect to his job description and classification. In the context of that grievance, his employer gave him directions as to the process for putting certain information into evidence in the grievance process. To "test the integrity" of this process, the Applicant made an identical request for access to information to two departments, Justice and INAC. While the request pertained to a number of documents, only one is in dispute before me. It is a letter from a solicitor acting on behalf of a First Nation to an agency of the Saskatchewan government. INAC disclosed the document to the Applicant. Justice refused, invoking solicitor-client privilege. After the Applicant initiated this application, Justice reversed course and disclosed the document, although it purported to do so without waiving solicitor-client privilege.

[3] The Attorney General argues that the matter is now moot, because the Applicant is now in possession of the document he was seeking to obtain. I agree. The purpose of an application for review pursuant to section 41 of the Act is to decide whether a document ought, or ought not to be disclosed. Once the document is disclosed, the application normally becomes moot: *Albatal v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 32 at paragraph 2; *Dagg v Canada (Industry)*, 2010 FCA 316 at paragraph 14.

[4] The Applicant nevertheless argues that his rights would be affected by the result of this application. This is because the Department of Justice is still asserting that the document is covered by solicitor-client privilege. The Applicant's manager instructed him not to use documents in possession of the Department, including documents covered by solicitor-client privilege, in the context of his grievance unless they were obtained through an access to

information request and that failure to do so might result in disciplinary action. The Applicant says that this leaves him in an uncertain position with respect to the use he may make of the document.

[5] With respect, I think this concern is misplaced. Once a document is released pursuant to the Act, the requester may use it for any purpose. Indeed, at the hearing of this application, counsel for the Attorney General conceded that the Applicant could use the document without restriction and that he could mention that he obtained it from INAC and Justice. Given that concession, the Applicant's fear of disciplinary action should he use the document appears to be entirely speculative.

[6] Thus, I conclude that the matter is moot.

[7] Nevertheless, in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, the Supreme Court of Canada stated that a court has discretion to hear a matter that has become moot. It highlighted three factors that are relevant to the exercise of that discretion: (i) the existence of an adversarial context; (ii) the concern for judicial economy; and (iii) the obligation for the Court to be aware of its proper role as the adjudicative branch of the State.

[8] While I have no doubt that there is an adversarial context between the parties, rendering a decision on the merits would not be the best use of this Court's resources.

[9] It is often said that a court may hear a moot case when the issue is otherwise evasive of review. However, issues of solicitor-client privilege are not evasive of review. There is already a substantial body of case law on the matter.

[10] I must also be mindful of the narrow scope of the application before me. The Act is not concerned with the motive for seeking disclosure nor with any underlying dispute that may exist between the parties. An application under the Act does not empower me to conduct an exhaustive review of the relationship between the parties. I would be overstepping the bounds of my role if I were to give directions to the parties with respect to matters that fall within the purview of the grievance process. Any issues of procedural fairness arising within the grievance process should be addressed by decision-makers in that process, or by this Court if and when it is called upon to review decisions made in the course of the grievance process.

[11] For those reasons, this application is dismissed.

[12] Given the circumstances, costs will be awarded in the amount of $3000, inclusive of disbursements and taxes.

JUDGMENT in T-1140-18

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed and costs will be awarded in the amount of $3000, inclusive of disbursements and taxes.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1140-18
STYLE OF CAUSE:	DALE KOHLENBERG v ATTORNEY GENERAL OF CANADA AND MINISTER OF JUSTICE
PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
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JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	DECEMBER 12, 2019

APPEARANCES:

Dale Kohlenberg	FOR THE APPLICANT (ON HIS OWN BEHALF)
Stephen Kurelek	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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