Federal Court Cour fédérale

Date: 20191003

Docket: T-516-19

Citation: 2019 FC 1256

Ottawa, Ontario, October 3, 2019

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

THE CHAIRPERSON OF THE CANADIAN TRANSPORTATION AGENCY

Respondent

ORDER AND REASONS

[1] The Applicant, Dr. Gábor Lukács, brings this motion seeking to strike out three paragraphs of the Public Affidavit of Ms. Patrice Bellerose, sworn on July 26, 2019. The Public Affidavit was served on the Applicant on July 31, 2019 in the context of the Applicant's Application for Judicial Review of the decision of the Respondent to withhold certain records, which the Applicant requested pursuant to the *Privacy Act*, RSC 1985, c P-21.

[2] For the reasons that follow the motion is dismissed.

I. Overview/Background

[3] The Applicant seeks Judicial Review of the decision of the Delegate of the Chairperson of the Canadian Transportation Agency [CTA]. The Delegate provided some records to the Applicant in response to his request pursuant to the Privacy Act and refused to provide other records. In his Notice of Application, the Applicant argues, among other things, that the Delegate erred by: withholding records marked "s. 12 (1) (b)"; and, fettering his /her discretion or failing to apply his/her discretion with respect to exemptions pursuant to sections 26 and 27 of the *Privacy Act.*

A. *The Affidavit at Issue*

[4] The Public Affidavit of Ms. Patrice Bellerose was sworn on July 26, 2019. The Affidavit was served on the Applicant and the Affidavit of Service was filed in the Court on August 1, 2019. The Affidavit and exhibits attached have not yet been filed in the Court.

[5] Ms. Bellerose attests that she is the Director of the Secretariat, Registrar Services and Information Management of the Enabling Services Branch of the CTA. She attests that her responsibilities include managing the protection and release of information under the *Privacy Act*. She explains that due to her role and responsibilities she has personal knowledge of the matters deposed to, or that based on her information and belief she attests that the matters deposed to are true.

[6] Ms. Bellerose's affidavit provides a chronology of events, beginning with the Applicant's request in September 2016 for records, the Applicant's dissatisfaction with the records that were provided to him , the Applicant's complaint to the Office of the Privacy Commissioner [the OPC], the OPC's recommendations to the Canadian Transportation Agency [CTA] [the Respondent or the Agency], the Agency's follow up to the OPC's recommendations, including the provision of additional records previously withheld from the Applicant, and the Applicant's Application for Judicial Review to this Court. The Affidavit also refers to several exhibits, which are not yet filed with the Court.

[7] The Applicant seeks to strike paragraphs 9, 25 and 26 of the Public Affidavit, which state:

> Para 9 − That same day, the Applicant indicated verbally he would file a complaint before the Office of the Privacy Commissioner of Canada (OPC) (**Exhibit "D"**).
>
> [Exhibit D is a copy of an email dated November 22, 2016 from an employee of the Agency, Ms. H, to others within the Agency indicating that the Applicant had orally advised that he would be making a complaint to the OPC.]
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> Para 25 − As for the remainder of the pages specifically mentioned by the Applicant, the Agency did not err in withholding the records marked "s. 12(1)(b)" as the information they contain do not pertain to the Applicant, and as such are not required to be disclosed.
>
> Para 26 − Further, the Respondent correctly exercised its discretion not to disclose records in accordance with sections 26 and 27 of the *Privacy Act*.

B. *A Confidential Affidavit Will be Filed*

[8] By Order dated September 4, 2019, the Court granted the Respondent's motion to file a confidential affidavit with exhibits. The Court found that a confidential affidavit is necessary to ensure that the information sought to be protected remains protected pending the determination of the Application for Judicial Review. The confidential affidavit will be filed on or about October 4, 2019. It is expected that the confidential affidavit and exhibits will be a significant part of the record before the Court to inform the Court's determination of whether the Respondent correctly applied the exemptions in the Act and whether the Respondent reasonably exercised its discretion in withholding some records.

II. The Applicant's Submissions

[9] The Applicant submits that paragraph 9 offends Rule 81(1) of the *Federal Courts Rules* [the Rules] because it is hearsay and irrelevant. He submits that paragraphs 25 and 26 also offend Rule 81(1) because they are opinions, arguments and/or legal conclusions.

[10] The Applicant submits that he should not be prejudiced by inadmissible evidence. He submits that if paragraphs 25 and 26 are struck from Ms. Bellerose's affidavit, he will not seek to cross-examine her, but otherwise he will be compelled to do so. He adds that the Court should not tolerate any transgression of its Rules.

[11] The Applicant acknowledges that the Court should exercise its discretion to strike an affidavit sparingly, but submits that the affidavit does not comply with Rule 81(1) or the Court of

Appeal's guidance in *Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18, [2010] FCJ No. 194 [*Quadrini*], on the proper content of an affidavit.

[12] The Applicant argues that affidavits proffering legal opinions on the substantive issues the Court must decide are inadmissible (*Canada (Board of Internal Economy) v Canada (Attorney General)* 2017 FCA 43 at para 30, 412 DLR (4th) 336 [*BIE*]). He submits that he will be compelled to cross-examine Ms. Bellerose, otherwise he will be assumed to have accepted paragraphs 25 and 26 as fact. He further submits, relying on *Leahy v Canada (Minister of Citizenship and Immigration*) 2012 FCA 227 [*Leahy*] at paras 133-137, that if paragraphs 25 and 26 of the Affidavit stand, without cross-examination there will be a gap in the evidentiary record, in particular, regarding who exercised the discretion whether to disclose records that were otherwise exempt.

[13] With respect to paragraph 9, the Applicant argues that Ms. Bellerose's statement is inadmissible hearsay which is neither reliable nor necessary. He submits that he could not meaningfully cross-examine Ms. Bellerose on this hearsay. The Applicant further submits that whether he stated his intention to bring a complaint is not relevant. He adds that the Respondent has offered no explanation for failing to provide an affidavit from Ms. H if this evidence is important.

III. The Respondent's Submissions

[14] The Respondent submits that striking out an affidavit at an interlocutory stage is an exceptional remedy (*BIE* at para 8). The Respondent argues that unless striking the affidavit will

cause the Applicant material prejudice or will impair the orderly progress of the Application, the proper approach is for the Applicant to contest the affidavit or parts thereof at the hearing of the Application (*Armstrong v Canada (Attorney General)*, 2005 FC 1013 at paras 34 and 40, [2005] FCJ no. 1270 [*Armstrong*]).

[15] The Respondent submits that paragraphs 25 and 26 are statements of the position of the affiant but that the Court will determine whether the Agency acted correctly or reasonably.

[16] The Respondent argues that *BIE* does not support the Applicant's position. The affiant, Ms. Bellerose, is not a legal expert and is not providing a legal opinion, rather she is re-stating the Agency's position. The Respondent submits that this is standard practice, and at worst, it is an irregularity.

[17] The Respondent submits that, unlike *BIE*, where the Court struck the affidavit at a preliminary stage, the Applicant would not be forced to cross-examine the affiant or to retain his own expert to counter any opinion. The Respondent adds that it is not prejudicial to the Applicant to cross-examine the affiant. Further, the orderly hearing of the Application would not be impaired by leaving the affidavit intact.

[18] With respect to paragraph 9, the Respondent submits that Rule 81(1) is not a complete bar to hearsay and it is not a bar to the acceptance of evidence on information and belief. Evidence on information and belief is synonymous with evidence admissible under an exception to the hearsay rule (*Cabral v Canada (Citizenship and Immigration)* 2018 FCA 4 at para 32,

[2018] FCJ No 21 (QL) [*Cabral*]). The Respondent submits that paragraph 9 is reliable given that Ms. Bellerose is the supervisor of Ms. H, who communicated with the Applicant and that Ms. Bellerose is in a position to know the information is true. The Respondent further submits that paragraph 9 is necessary because it explains the next steps in the chronology, in particular paragraph 10, which indicates that further records were provided by the CTA to the Applicant following this communication. A separate affidavit from Ms. H would be a waste of time.

[19] The Respondent argues that the Applicant has not demonstrated how he would be prejudiced – beyond stating that he cannot meaningfully cross- examine Ms. Bellerose on paragraph 9 − by leaving his concerns about paragraph 9 to the hearing of the Application.

IV. The Relevant Rules and Jurisprudence

[20] Rules 3 and 81 are relevant to the issues in this motion. These Rules state:

3 These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.	**3** Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.
[…]	[…]
81 (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.	**81 (1)** Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les

	faits, avec motifs à l'appui.
(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.	**(2)** Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

[21] The jurisprudence provides guidance regarding the content of affidavits and the discretion to strike an affidavit or parts thereof.

[22] In *Quadrini* at para 18, the Court of Appeal set out some general rules regarding affidavits:

> As a general rule, the affidavit must contain relevant information which would be of assistance to the Court in determining the application. As stated by our Court in *Dwyvenbode v. Canada (Attorney General)*, 2009 FCA 120, the purpose of an affidavit is to adduce facts relevant to the dispute without gloss or explanation. The Court may strike affidavits, or portions of them, where they are abusive or clearly irrelevant, where they contain opinion, argument or legal conclusions, or where the Court is convinced that admissibility would be better resolved at an early stage so as to allow the hearing to proceed in a timely and orderly fashion (*McConnell v. Canadian Human Rights Commission*, 2004 FC 817, affirmed 2005 FCA 389).

[23] More recently in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 116 at para 31, 280 ACWS (3d) 229 [*Tsleil-Waututh*] in the context of addressing the exceptions to the general rule that the evidence on the record for the reviewing court is limited to the evidence on

the record before the decision-maker, the Court of Appeal commented on *Quadrini*, noting at para 37:

> A number of the applicants cited *Quadrini v. Canada Revenue Agency*, 2010 FCA 47 (F.C.A.) and its admonition in para. 18 that facts should be presented without "gloss or explanation." This phrase should not be read out of context. *Quadrini* warns against controversial argumentation that steps over the line of permissibility. Sometimes a good, admissible summary of what took place below can contain explanations. But an affidavit is not supposed to be a memorandum of fact and law.
>
> [My emphasis]

[24] Although the issue before the Court in *Tsleil-Waututh* differed from the issue before this Court, the clarification of *Quadrini* remains applicable.

[25] In *BIE*, the Court of Appeal allowed the Respondent's appeal of the Federal Court's decision upholding the Prothonotary's decision to refuse to strike an affidavit tendered by the Applicant. The Court of Appeal struck the whole affidavit.

[26] The Court of Appeal found that the affidavit at issue was not limited to facts but "riddled" with opinions (*BIE* at para 21). The Court of Appeal added that it could not be "credibly contended" that the affidavit was a factual brief which provided neutral information, noting that it read like a legal opinion (at para 23). The Court of Appeal concluded that the affidavit was inadmissible pursuant to Rule 81(1) and did not fall within the exception for expert affidavits.

[27] The Court of Appeal noted the relevant principles, in particular that the discretion to strike an affidavit should be exercised only in exceptional circumstances, noting at para 29:

> 29 It is well-established, as noted by both the Prothonotary and the Judge, that the discretion to strike an affidavit or part of it should be exercised sparingly and only in exceptional circumstances. In *Armstrong*, for example, upon which the Prothonotary relied extensively, the Court stated that the discretion to strike an affidavit should be exercised only "where it is in the interest of justice to do so, for example or in cases where a party would be materially prejudiced where not striking an affidavit or portions of an affidavit would impair the orderly hearing of the application" (at para. 40). This approach was reiterated by this Court in *Gravel* (at para. 5) in the following terms:
>
> > […] In the first decision, the judge hearing the case acknowledged that it has been established in the case law of this Court that on judicial review, motions to strike all or part of an affidavit should only be brought in exceptional circumstances, especially when the element to be struck out is related to the relevancy of the evidence: see *Canadian Tire Corp. Ltd. v. P.S. Partsource Inc.*, 2001 FCA 8. The reason is quite simple: applications for judicial review must quickly proceed on the merits, and the procedural impacts of the nature of a motion to strike are to delay unduly and, more often than not, needlessly, a decision on the merits.

[28] The Court of Appeal found that the admissibility of the affidavit at issue had to be addressed at the early stage for two reasons (*BIE* at paras 30-31). First, the affidavit was "so clearly out of bounds and replete with legal opinion that it ought to be stopped in its tracks", and it was tendered to provide an expert legal opinion on the issue the Court would consider. Second, it was in the interests of justice to intervene early because the appellants would be materially prejudiced and the orderly hearing of the application would be impaired if the affidavit were not struck. The Court of Appeal explained, at para 32, that if the affidavit were allowed to stand, the

appellants may be required to retain their own expert to file a responding affidavit, which could distract the Court with a redundant debate about which expert is more credible and reliable, thereby lengthening an otherwise expeditious proceeding.

[29] In *Sawridge Band v Canada*, [2000] FCJ No 192, 95 ACWS (3d) 20 [*Sawridge Band*], the Court considered the motion of the intervenor to strike out an affidavit filed by the plaintiffs. The Court found that it had no doubt that the affidavit was improper, noting that it was replete with conclusory and argumentative allegations "almost all of them being on matters of law as to which the deponent is not apparently qualified" (at para 5). Despite this finding, the Court dismissed the motion to strike the affidavit, noting at para 6:

> 6 That said, I have not been persuaded that the affidavit should be struck. In my view, in a sane modern procedure, irregularities in proceeding should not be made the subject of motions and should not require the Court to give orders striking out or correcting such irregularities unless the party attacking the irregularity can show that it [*sic*] suffer some sort of prejudice as a result thereof. I put that point squarely to counsel for the interveners [*sic*] and the only prejudice he was able to suggest to me that his clients might suffer was that the Court, when it hears the main motion, might be induced to believe that these highly tendentious allegations in the affidavit were uncontested matters of fact. I think that counsel is ascribing to the Court a degree of gullibility which I hope he is not justified in doing. Accordingly, absent any showing of prejudice and notwithstanding that almost all of the affidavit is irregular and should not be before the Court, I have no grounds that would justify me in striking it out. Counsel for the interveners [*sic*] admits readily that virtually every paragraph of the affidavit is proper argument and can properly be made by counsel for plaintiffs and indeed has been made by counsel for plaintiffs in his written submissions in support of the main motion. I am therefore going to dismiss the motion to strike the affidavit.

[30] With respect to the Applicant's concern about the implications of not cross-examining the affiant, in *Exeter v Canada (Attorney General)*, 2015 FCA 260, 260 ACWS (3d) 700, the Court of Appeal clearly stated at para 9:

> 9 The fact that counsel for the Attorney General did not cross-examine Ms. Exeter on her affidavit is not an admission as to the truth of the contents of the affidavit: *Zheng v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1311, [2007] F.C.J. No. 1686 at paragraph 13.

[31] In *Zheng*, cited above, the Court stated, at para 13:

> 13 There is no requirement to cross-examine a deponent on his or her affidavit and no deemed admissions flow from a failure to cross-examine.

[32] To summarize, the principles from the jurisprudence that guide the determination of this motion, in particular, whether paragraphs 25 and 26 should be struck are:

- As a general rule, an affidavit must contain relevant information that would assist the court in determining the application (*Quadrini*);

- An affidavit should set out the relevant facts "without gloss or explanation", which means without "controversial argumentation that steps over the line of permissibility" (*Quadrini, Tsleil-Waututh*);

- The Court *may* strike an affidavit, or parts thereof, where it is clearly irrelevant, abusive, contains opinion, argument or legal conclusions or where its admissibility is better resolved at an early stage to permit the application to proceed in an orderly and timely manner (*Quadrini*);

- However, the discretion to strike an affidavit should be exercised sparingly and only in exceptional circumstances, i.e., where it is in the interest of justice to do so, where a party would be materially prejudiced, or where not striking an affidavit would impair the orderly hearing of the application. *(BIE, Armstrong, Sawridge Band)*;

- There is no requirement to cross-examine an affiant; the failure to cross-examine does not result in an admission of the truth of the allegations (*Exeter*, *Zheng*)

[33] With respect to paragraph 9, the jurisprudence provides guidance on the scope of affidavits on information and belief. Rule 81(1) permits such affidavits on motions, other than motions for summary judgment or summary trial, where the grounds for the belief are stated. In *Cabral*, the Court of Appeal explained, at para 32, that the jurisprudence of the Court of Appeal and the Federal Court "has interpreted information and belief as used in this context as being synonymous with hearsay such that evidence which is admissible under an exception to the hearsay rule does not offend the prohibition in Rule 81(1)".

[34] In *O'Grady v Canada (Attorney General)*, 2016 FC 9)[*O'Grady* FC], the Court noted the relevant principles at paras 18-21, including that the jurisprudence has confirmed that in some circumstances an affiant may rely on hearsay evidence and evidence made on belief. The Court concluded that the affiant, who was the Director General of the group responsible for the data cited, was in a position to know that the facts sworn in her affidavit were true. The Court noted at para 19:

> 19 The Supreme Court of Canada developed a principled approach to the admissibility of hearsay evidence, which has been adopted by the Federal Court of Appeal in *Éthier v Canada*, [1993]

> 2 FC 659, 63 FTR 29 and by the Federal Court in *Twentieth Century Fox Home Entertainment Canada Limited v Canada (Attorney General)*, 2012 FC 823, 414 FTR 291 [*Twentieth Century Fox*] regarding the admissibility of hearsay evidence given by way of affidavit. In *Twentieth Century Fox*, Justice Phelan held that an affiant is in a position to know that the facts are true where evidence is "corporate" in nature in that the affiant acts in a supervisory capacity and is responsible for his subordinates (at para 22).

[35] In *O'Grady v Canada (Attorney General)* 2016 FCA 221, [*O'Grady FCA*], the Court of Appeal dismissed the appeal and agreed that the affidavits were admissible and that based on the affiant's responsibilities, she was in a position to depose to the statements without having personal knowledge (at para 10). The Court of Appeal made one clarification, finding, at para 11;

> [11] Whether or not evidence is within an affiant's personal knowledge under Rule 81(1) bears on the admissibility of the affidavit. However, whether an adverse inference should be drawn from otherwise admissible evidence is a matter better left for the application judge, who has the benefit of the complete record and the arguments of counsel. To this extent, we would clarify the reasons given by the Judge. The question of what inference, adverse or otherwise, is to be drawn remains open to the application judge hearing this matter on the merits.

V. The Impugned Paragraphs Will Not Be Struck

[36] I am not persuaded that the paragraphs at issue should be struck for several reasons.

[37] The Applicant relies on *Quadrini* and *BIE* in support of his submission that the paragraphs at issue should be struck because they set out an opinion, argument or a legal conclusion. However, *Quadrini* set out a general rule which must be considered along with the jurisprudence that has provided additional guidance. Moreover, the paragraphs at issue are very

different from those that the Court of Appeal found to offend Rule 81 (1) in *BIE*. They are not "riddled" or "replete" with opinions. Ms. Bellerose is not an expert witness and is not providing a legal opinion, rather she stated her view that the CTA did what it was tasked to do; provide records and withhold other records in accordance with the Act. It would be surprising for the CTA to take any other position. The paragraphs do not set out facts which will be determinative of the Application.

[38] The Court reads paragraphs 25 and 26 − in the context of the Affidavit as a whole and taking into account Ms. Bellerose's description of her role and responsibilities − as her assertion that the CTA did its job. The Court does not view Ms. Bellerose's assertion as a fact which determines whether the CTA correctly applied the exemptions and exercised its discretion reasonably; that is the matter for the Court to determine.

[39] At the hearing of this motion, the Court suggested to the Applicant that the deletion of a few words in paragraphs 25 and 26, i.e., "did not err" and "correctly" could alleviate his concerns because the remaining words would clearly not suggest any opinion or even any position and could not be argued to touch on the issue to be determined by the Court. The paragraphs would simply be an assertion of what the CTA did. However, the Applicant rejected this approach, reiterating that he would still be compelled to cross-examine Ms. Bellerose, which would cause him prejudice and impede the orderly disposition of his Application.

[40] Contrary to the Applicant's view, no prejudice arises from his possible choice to cross-examine the affiant on paragraphs 9, 25 and 26. The Applicant would or should have

contemplated that affidavit(s) would be filed by the Respondent and that the Applicant may want to cross-examine the affiant(s). As the Respondent notes, the Applicant is an experienced litigant. The Applicant has the option to cross-examine the affiant within the proper bounds of cross-examination whether or not the paragraphs at issue are struck.

[41] Also contrary to the Applicant's submission −that if he does not cross-examine Ms. Bellerose on the paragraphs at issue he will be taken to agree with the content and the Court will regard the paragraphs at issue as uncontroverted facts − this is not the law (*Exeter, Zheng*).

[42] The orderly hearing of the Application would not be impaired in any way by not dealing with the Applicant's concerns about the affidavit at this point. As noted above, the hearing cannot be scheduled until the Respondent files the confidential affidavit and exhibits.

[43] Moreover, even if paragraphs 25 and 26 were read as expressing an opinion or argument, this would not justify striking the paragraphs. As noted in *Tseil-Waututh*, the general rule in *Quadrini* "warns against controversial argumentation that steps over the line of permissibility". The paragraphs at issue are not controversial argumentation and they do not "step over the line".

[44] The paragraphs at issue do not come close to the problems noted in *Sawridge Band*, where the Court found the affidavit to be clearly improper, yet found that there were no grounds to strike the affidavit, given that there was no prejudice demonstrated. The Applicant raises the same concern that the Court dismissed in *Sawridge Band*, explaining that the Court is not so

"gullible" as to take the affiant's statement as determinative of the very issue to be determined by the Court in the application.

[45] The Applicant also relies on *Leahy* to argue that if he does not cross-examine Ms. Bellerose on paragraphs 25 and 26 to inquire, among other things, who exercised the discretion to withhold records, there will be an evidentiary gap. The Court is not persuaded that *Leahy* applies to the issues in this motion or supports the Applicant's position that he will be prejudiced by the inclusion of paragraphs 25 and 26. The Applicant's argument is confusing because if the paragraphs at issue are struck, which is what the Applicant seeks in this motion, the same alleged evidentiary gap the Applicant anticipates could arise.

[46] In *Leahy*, the Court of Appeal focussed on the record before the Court on judicial review, which is not the issue on this motion. The Federal Court of Appeal allowed the appeal of the Court's decision, which dismissed the application for judicial review of a decision made by Citizenship and Immigration Canada, which had withheld documents from the Applicant pursuant to the *Privacy Act*. The Court of Appeal considered whether the respondent had provided a sufficient evidentiary record to permit the Court to review the decision.

[47] The Court of Appeal noted the principles in *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47, [2008] 1 SCR 190 , and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14 and 15, [2011] 3 SCR 708, among others, and explained at para 121:

> If the reasons for decision are non-existent, opaque or otherwise indiscernible, and if the record before the administrative decision-

> maker does not shed light on the reasons why the administrative decision-maker decided or could have decided in the way it did, the requirement that administrative decisions be transparent and intelligible is not met […].

[48] The Court elaborated on the contents of a sufficient record in subsequent paragraphs and explained why the record before it did not provide the basic information required to discharge its role on judicial review (*Leahy* at paras 125-137).

[49] The Applicant points, in particular, to paras 133-137 of *Leahy*, where the Court of Appeal noted that reasons for a decision of the type at issue should show that the decision-maker was aware of the discretion to release exempted information. These paragraphs confirm what is not disputed; that the decision maker must assess whether the exemptions in the *Privacy Act* apply and then must determine whether to disclose the material, regardless of whether an exemption applies. The Court on judicial review must determine, based on the record before it, whether the decision maker correctly and/or reasonably did so. If a record is insufficient, a Court may find that it is not possible to determine whether the decision is correct or reasonable and, if so, that the matter must be redetermined.

[50] The Applicant also relies on paras 141-144 in *Leahy,* which fall under the heading "Postscript". In the postscript, the Court of Appeal provides guidance to the respondent about what the Court needs in order to discharge its role on judicial review and describes the basic information at para 141:

> 141 To reiterate, all that is needed is sufficient information for a reviewing court to discharge its role. In cases like this, this can be achieved by ensuring that there is information in the decision letter or the record that sets out the following: (1) who decided the

> matter; (2) their authority to decide the matter; (3) whether that person decided both the issue of the applicability of exemptions and the issue whether the information should, as a matter of discretion, nevertheless be released; (4) the criteria that were taken into account; and (5) whether those criteria were or were not met and why.

[51] While this is helpful future guidance for the Respondent, *Leahy* does not change the jurisprudence regarding striking out of an affidavit, which is the issue in the present motion. The Applicant seeks to remove paragraphs from the affidavit; he is not arguing that the record before the Court is inadequate, nor could he because the record is not yet before the Court. It is premature for the Court to consider the contents of the record sufficient to permit the Court to determine the Application for Judicial Review. Paragraph 9 of the Affidavit, which is Ms. Bellerose's statement that the Applicant indicated his intention to file a complaint, and the email attached from Ms. H, which supports this information, does not run afoul of Rule 81(1). In accordance with *O'Grady* (FC), the affiant, Ms. Bellerose, given her supervisory duties, was in a position to know the status of the Applicant's request for records and his interaction with employees of the CTA in her Secretariat. She was in a position to know that an employee in the Secretariat was told by the Applicant that he intended to make a complaint and she was, therefore, in a position to state that the facts sworn on information and belief were true. In the circumstances, it was not necessary to provide an affidavit of Ms. H who directly communicated with the Applicant. That would have been an unnecessary waste of resources. Moreover, the fact that a complaint was ultimately made to the OPC is not in dispute.

[52] Contrary to the Applicant's submission that paragraph 9 was included to cast him in a poor light as being quick to complain, the inclusion of paragraph 9 is part of the chronology to

set the stage for the subsequent paragraph that states that further records were provided to the Applicant.

[53] In accordance with *O'Grady* (FCA), whether any inferences should be drawn from paragraph 9 is a matter to be addressed at the determination of the Application. Similarly, the weight to attach to this or other evidence is a matter to be determined at the Application (*BIE* at para 26).

VI. Conclusion

[54] Bearing in mind that the Court's discretion to strike affidavits or parts of an affidavit should be exercised sparingly and only in exceptional circumstances, the Court finds that no such exceptional circumstances are present. The Applicant has not demonstrated that he will be prejudiced. His choice to cross-examine the affiant is not a prejudice to him, and his choice not to cross-examine will not lead to any deemed admission of the facts in the affidavit. As noted at the hearing of the motion, the Court is cognizant of the issues in the underlying Application for Judicial Review, which the Court will determine.

[55] The Court does not read paragraphs 25 and 26, as setting out an opinion or an argument. The Court is aware of the issues that only the Court must determine. However, even if paragraphs 25 and 26 were read as suggesting an opinion rather than a position of the affiant, the statements are not "controversial argument that steps over the line" (*Tsleil-Waututh).* Even if the Court were to find that the paragraphs set out an opinion or argument, as in *Sawridge Band*,

where the Court found that while the affidavit was clearly improper, there were no grounds to strike it, there are no such grounds in the present case.

[56] Paragraph 9 does not offend Rule 81(1). As noted above, Ms. Bellerose's statement is based on her belief given her supervisory duties. Moreover, the fact of the complaint is not disputed. Nothing would be gained by an affidavit from Ms. H or by cross-examining Ms. Bellerose.

VII. Costs

[57] The Applicant submits that this motion was necessary because the Respondent unreasonably refused his informal request to remove the paragraphs at issue, which forced him to bring this motion which has wasted resources and time. The Applicant suggests that the Court should consider that there is an imbalance of resources between him as a self-represented litigant seeking access to his personal information and the Respondent as head of a government institution. The Applicant also submits that the Respondent's characterization of these and other proceedings brought by the Applicant, where costs have been awarded against him, cast him in a poor light or suggest that his conduct was not appropriate. The Applicant submits that this characterization is unfounded and inappropriate and should support an award of costs, forthwith, against the Respondent.

[58] The Respondent submits that it should be awarded the costs of this motion because this motion was unnecessary; the Applicant could and should have deferred his concerns about parts of the affidavit until the hearing of the Application. The Respondent adds that the Application

should be a relatively routine matter, yet there have been several contentious preliminary issues. The Respondent notes that the Applicant, although self-represented is an experienced litigant.

[59] The Applicant has not been successful on this motion. Following the general approach of costs following the event, costs could be awarded against him. However, costs are in the discretion of the Court and, in the present circumstances, the Court declines to award costs of this motion.

[60] However, I do not agree that the Respondent has unlimited resources, as the Applicant contends, or that this should be a factor in favour of sparing the Applicant from a cost order. In some cases, parties may be more amenable to some "give and take" to advance the Application, which avoids additional motions. In the present case, there is clearly tension between the parties and an apparent lack of confidence on the part of the Applicant in both the Respondent and the Court's ability to see through the tension and objectively read the affidavit and address the issues in the Application. The Respondent was not under any obligation to simply agree to remove the paragraphs at issue upon the Applicant's request. The Court directed that not all disagreements can be resolved informally or through case management, and that if the Applicant pursued this issue, a motion would be required. The Applicant then brought this motion, necessitating a formal response by the Respondent. The Court's suggestion to bring the motion is a factor in declining to award costs against the Applicant.

ORDER in file T-516-19

THIS COURT ORDERS that the Applicant's motion to strike paragraphs 9, 25 and 26 is dismissed. There is no order for costs.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-516-19
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v THE CHAIRPERSON OF THE CANADIAN TRANSPORTATION AGENCY
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 19, 2019
REASONS FOR ORDER AND ORDER:	KANE J.
DATED:	OCTOBER 3, 2019

APPEARANCES:

Dr. Gabor Lukacs	REPRESENTING HIMSELF
Kevin Shaar Gabrielle Fortier	FOR THE RESPONDENT

SOLICITORS OF RECORD:

	FOR THE APPLICANT
Canadian Transportation Agency Legal Service Directorate Gatineau, Québec	FOR THE RESPONDENT