Federal Court  Cour fédérale

Date: 20210113

Docket: T-2181-18

Citation: 2021 FC 47

Ottawa, Ontario, January 13, 2021

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

SHELDON BLANK

Applicant

and

THE MINISTER OF JUSTICE

Respondent

ORDER AND REASONS

I. Overview

[1] This is an appeal under Rule 51 of the *Federal Courts Rules*, SOR/98-106 [the *Rules*] brought by the Applicant from an order dated April 29, 2020 made by a Prothonotary sitting as a Case Management Judge. The Prothonotary dismissed the Applicant's motion under Rules 317 and 318 (Rule 317/318 motion) in which he sought an order requiring the Minister of Justice and the Attorney General of Canada to send a certified copy of all records generated by the material

gathering process that were not part of the records produced in response to the request, regardless if they were deemed irrelevant, that were not in the possession of the Applicant but are in the possession of the Minister of Justice and the Attorney General of Canada to the Applicant and to the Registry.

[2] The Applicant indicated in his Rule 317/318 motion that 454 pages did not form part of the current request because they had already been produced. The Applicant is seeking approximately 1050 pages that were generated in the material gathering process but were not received from the Respondent in the response to his access request.

[3] The Prothonotary determined that the issue to be decided was whether the records sought by the Applicant were producible under Rule 317.

[4] For the reasons which follow, the Applicant's appeal is dismissed with costs to be paid to the Respondent. The Prothonotary made no error of law in her analysis nor did she commit any palpable and overriding error in regard to the facts that affects the outcome of this motion. The hearing before the Prothonotary was not procedurally unfair and the Applicant has not proven that the Prothonotary displayed bias against him.

II. **Preliminary Issue**

[5] The parties and the Court agree that the style of cause should be amended in accordance with subsection 41(5) of the *Access to Information Act*, RSC, 1985, c A-1 [the *ATIA*] to remove the Attorney General of Canada as a party. This change will be ordered, effective immediately.

III. **Background Facts**

[6] For ease of reference and to simplify reading, all legislation referred to is in the attached Appendix.

[7] The Applicant's Rule 317/318 motion sought an order requiring the Respondent to send a certified copy of all records generated by the material gathering process in the period between May 1, 2003 to May 1, 2004 that were not in the possession of the Applicant but were in the possession of the Respondent.

[8] The materials were sought in the Applicant's Access Request #A-2010-00690, which was filed on August 12, 2010 and requested:

> All records from Paul Gavrel to anyone else and all records from anyone else to Paul Gavrel dealing with the prosecution of Sheldon Blank and/or Gateway Industries Ltd. This is not limited to but includes all communications and records of those communications with [seven named people].
>
> This includes but is also not limited to consultations and records of those consultations with regard to the Roles and Responsibilities document. The time period for this request is May 1st, 2003 - May 1st, 2004.

[9] The Applicant received responses to the Access Request on November 1, 2010, January 12, 2011, May 14, 2014 and October 16, 2018. The Applicant states that the October 16, 2018 response completed the Respondent's response to his Access Request.

[10] On November 10, 2010, after the first round of information was released, the Applicant filed a complaint with the Office of the Information Commissioner [OIC].

[11] With the October 16, 2018 response, the Access to Information and Privacy [ATIP] office of the Respondent released three additional pages to the Applicant, noting that some of it was still exempt from release pursuant to section 19(1) of the *ATIA* as it was personal information.

[12] The Applicant received approximately 452 – 454 pages of the approximately 1600 pages that had been generated in response to his Access Request. His current request is to receive the other approximately 1050 pages so that he might understand the reasons for the exclusion of those materials and the rationale for exempting the records.

[13] The stated reason of the Respondent for not delivering all the materials generated was "because of duplication and irrelevance".

[14] The OIC issued an investigation report on November 9, 2018 addressing the Applicant's November 10, 2010 complaint. That report was not before the Court on this motion nor was the complaint.

IV. **The Judicial Review Application and the Rule 317 Request**

[15] On December 21, 2018 the Applicant filed a Notice of Application for judicial review under section 41 of the *ATIA* seeking review of "the decision of the Minister of Justice and Attorney General of Canada in respect of a refusal to give access to a record or part thereof duly requested by the Applicant in accordance with provisions of the Act".

[16] Review of all four responses is being sought although a complaint was made only against the first response which was made on November 1, 2010.

[17] The Notice of Application included a request under Rule 317 of the *Rules* that the Minister of Justice and the Attorney General of Canada send a certified copy to the Applicant and to the Registry of "all records generated by the material gathering process that were not part of the records produced in response to the request regardless if they were deemed irrelevant."

[18] The Respondent, by letter dated January 8, 2019 addressed to the Federal Court Registrar, objected to the production of the certified tribunal record (CTR) as requested in the Notice of Application on the following grounds:

1. The Application was brought under section 41 of *the ATIA* and it is not a judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

2. The Applicant is seeking production of records related to the material gathering process that were not ultimately responsive to the access request and are outside the purview of the Court's review on a section 41 application.

3. The records being sought by way of the certified tribunal record request are the very same records that the Applicant seeks in his Notice of Application, that is, the production of records including those deemed irrelevant that are not privileged. To provide those records would duplicate the records sought in the end and render that portion of the substantive application moot.

[19] On January 11, 2019, the Applicant wrote to the Registrar of the Court challenging the statements made by the Respondent and providing reasons which will be discussed later.

V. **The Issues**

[20] In arguing that the Order of the Prothonotary should be overturned, the Applicant makes allegations of procedural unfairness and bias against the Prothonotary. In addition, he challenges various findings of fact made by the Prothonotary.

[21] The Respondent argues that a CTR is not appropriate because the application is brought under section 41 of the *ATIA* and not under section 18.1 of the *Federal Courts Act*.

[22] The Respondent also frames the issue as being whether there was a palpable and overriding error made by the Prothonotary such that the Order should be overturned.

[23] The Applicant argues the Prothonotary committed palpable and overriding errors as well as errors of law in arriving at the findings that he was attempting to circumvent the ATIP Framework and that production of the records he requested would make the application moot. He states these findings were also biased.

[24] In addition, the Applicant submits that the Prothonotary made a palpable and overriding error of fact and law when she mischaracterized his Access Request and she did not apply the legal principles developed in the jurisprudence regarding relevancy when she found that the records he requested were not relevant to his underlying application.

VI. **Standard of Review**

A. *The Standard of Review on Appeal from a Prothonotary*

[25] In *Hospira Healthcare Corp v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*] the Federal Court of Appeal established that when conducting an appeal from a discretionary decision of a Prothonotary the standard of intervention is that found in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*] which is that "discretionary orders of prothonotaries should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts": *Hospira* at paras. 64-65, 79.

[26] This standard applies to questions of fact or mixed fact and law and inferences of fact: *Maximova v Canada (Attorney General)*, 2017 FCA 230 [*Maximova*] at paragraph 4; *Housen* at paragraph 25.

[27] The Prothonotary's exercise of discretion involves applying legal standards to the facts as found. For the purposes of the *Housen* framework, exercises of discretion are questions of mixed fact and law: *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paragraph 72 [*Mahjoub*].

[28] In *Mahjoub*, Mr. Justice Stratas explained what constitutes a palpable and overriding error and how it is determined on appeal in detail at paragraphs 61-65 (citations omitted):

> Palpable and overriding error is a highly deferential standard of review. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

> "Palpable" means an error that is obvious. Many things can qualify as "palpable." Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.
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> But even if an error is palpable, the judgment below does not necessarily fall. The error must be overriding.
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> "Overriding" means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding." The judgment of the first-instance court remains in place.
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> There may also be situations where a palpable error by itself is not overriding but when seen together with other palpable errors, the outcome of the case can no longer be left to stand. So to speak, the tree is felled not by one decisive chop but by several telling ones.

B. *The Standard of Review for Allegations of Bias*

[29] An allegation of bias engages the very foundation of our judicial system. It calls into question not only the personal integrity of the Prothonotary in this instance but generally the integrity of the entire administration of justice (*Coombs v Canada (Attorney General),* 2014 FCA 222 at paragraph 14):

> Further, the appellants repeatedly attack the integrity of the Prothonotary, of the Judge and of the Federal Court (appellants' memorandum of fact and law in file A-148-14 at paragraphs 28, 34-46, 50, 54, 56, 60, 63-65, 69, and 72-79; appellants' memorandum of fact and law in file A-147-14 at paragraphs 48, 77 and 78). The appellant's allegations are most serious, and such a step should not be undertaken lightly. Indeed, an allegation of bias engages the very foundation of our judicial system. The appellants' allegations call into question not only the personal integrity of the Prothonotary and of the Judge, but the integrity of the entire administration of justice (*R. v. S. (R.D.*), *supra* at paragraph 113).

[30] The test for determining whether there is actual bias or a reasonable apprehension of bias by a decision-maker has been established by the Supreme Court of Canada in *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at pages 394 and 395:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude.
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> . . . The grounds for this apprehension must, however, be substantial . . . [and not] related to the "very sensitive or scrupulous conscience".

[31] When assessing allegations of actual or perceived bias made against a judicial officer, whether a prothonotary or a judge, there is a presumption of judicial impartiality and integrity which is strong and cannot be easily rebutted: *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at paragraph 16.

VII. **Did the Prothonotary Err in Finding Rules 317 and 318 do not assist the Applicant?**

[32] The Prothonotary characterized the issue to be determined as whether the records sought by the Applicant in his Application but not disclosed to him are producible. That characterization accords with the Applicant's statement that the issue before the Prothonotary was whether, under the circumstances of this case, the Respondent should comply with the Applicant's request to produce certain tribunal records.

[33] The Prothonotary noted that the material gathering process had generated approximately 1,600 pages of records, but that not all of the pages were included in the response on the basis of "duplication and irrelevance".

[34] The Prothonotary observed that the Applicant was seeking review under section 41 of the *ATIA* and that his request specifically included records that were not produced as part of the response.

[35] The Applicant has raised a number of criticisms of the Prothonotary's decision that he cannot avail himself of Rules 317 and 318 to obtain the relief he is seeking. The objections generally deal with issues of natural justice, predominantly perceived bias by the Prothonotary. Issues of bias will be discussed in the next section.

[36] The Prothonotary found herself in general agreement with the written representations of the Respondent. In particular, the Respondent noted that the *ATIA* establishes its own process for disclosure of documents as described in *Stubicar v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 725 at paragraph 12 [*Stubicar*] where Mr. Justice Harrington said:

> Rules 317 and 318 cannot be used to provide to the applicant the very documents withheld under the *Privacy Act*. Indeed, sections 46 and 47 of that Act provide that the Court may examine any record which was withheld from an applicant, but that it shall take every reasonable precaution to avoid disclosure to the applicant. At the hearing of the judicial review on the merits, the presiding judge will have to review the material withheld in order to determine whether or not the decision of the CBSA was justified. Although the case deals with the *Access to Information Act*, rather than the *Privacy Act*, the process is described in *the*, 2011 FC 233, [2011] FCJ No 283 (QL).

[37] The Respondent objected to the Applicant's Rule 317 request on the ground that the request for production of records is outside the purview of this Court's review in an application under section 41 of the *ATIA.*

[38] The Prothonotary noted that an application under section 41 is distinguished from the application for judicial review under section 18.1 of the *Federal Courts Act*. The Prothonotary observed that the ability to apply to this Court for review if access to a requested record is refused is found in section 41 of the *ATIA.* Relying on *Blank v Canada (Justice)*, 2016 FCA 189 [*Blank 2016*] the Prothonotary found that under section 41 the reviewing authority of this Court is limited to the power to order access to a specific record when access has been denied contrary to the legislation.

[39] In *Merck Frosst Canada Ltd. v Canada (Health*), [2012] 1 SCR 23 [*Merck Frosst*] the Supreme Court confirmed at paragraph 53 that an *ATIA* review is sometimes referred to as a *de novo* assessment of whether the record is exempt from disclosure and that while the term *de novo* may not, strictly speaking, be apt there is no disagreement that the role of the judge on review is to determine whether the exemptions have been applied correctly.

[40] The Applicant is aware that the proceedings under the *ATIA* are, in essence, conducted *de novo*. He is also aware that the recent amendments to the *ATIA* have clarified that. In *Lavigne v Canada Post Corporation*, 2009 FC 756 at paragraph 28 [*Lavigne*] Mr. Justice de Montigny, then of this Court, had the following to say about the impact of the *de novo* hearing on Rule 317:

> The three applications which form the basis of these proceedings do not attack the Commissioner's decisions but are rather *de novo*

> proceedings where the judge hears and weighs the evidence advanced by the parties to determine whether the OLA has been infringed. Therefore, the Commissioner does not have a duty under Rule 317 of the *Federal Courts Rules* to disclose information in the current proceedings. Such being the case, I can see no error in the decision of the Prothonotary.

[41] The Prothonotary's decision in *Lavigne* was rendered by Prothonotary Tabib. In another decision made on September 15, 2015 involving Rule 317 and section 41 of the *ATIA*, Prothonotary Tabib found that "recourse under section 41 of the Act is a *de novo* determination of the validity of the government department's denial of access and not a judicial review of that decision or of the decision of the Information Commissioner". Prothonotary Tabib then held that the record upon which a decision was made was not relevant to a proceeding under section 41 of the ATIA: *Nolin v Attorney General of Canada*, unreported, Docket T-1749-14.

[42] On appeal, Prothonotary Tabib was upheld by Madame Justice Roussel in a decision that is also unreported in the same docket. Justice Roussel added that the Federal Court of Appeal in *Mushkegowuk Council v Canada (Attorney General)*, 2011 FCA 133 at paragraph 5 held that this Court should be particularly reluctant to interfere with a discretionary decision made on non-vital issues by a Prothonotary in the course of case management proceedings. Justice Roussel noted that in *Stubicar* and in *Gaudes v Canada (Attorney General)*, 2005 FC 351 at paragraphs 10 and 8 respectively, production orders under Rule 317 were found not to be matters vital to the disposition of an application for judicial review.

[43] Citing *3430901 Canada Inc v Canada (Minister of Industry)* 2001 FCA 254, the Applicant submits that given a conflict between the *Rules* and the *ATIA*, the latter takes

precedence. He points to the language in paragraph 36 for support of that proposition. I have underlined the specific words to which the Applicant referred at the hearing of this motion:

> However, this expertise must be balanced against the primary purpose of the Act, namely, the provision of a public right of access to government records, albeit one that is limited by other considerations, and the creation of mechanisms for independent review as the means by which the statutory purpose is pursued. The key to interpreting the scope of the right of access and of the exemptions is to be found in striking an appropriate balance between the competing legislative policies that underlie them, a function for which a body independent of the Executive is better suited than the institution resisting the request for access. As counsel for the Information Commissioner pithily put it in the course of argument, if the Court were to confine its duty under section 41 to review ministerial refusals of access requests by deferring to ministerial interpretations and applications of the Act, it would, in effect, be putting the fox in charge of guarding the henhouse.

[44] This reference does not assist the Applicant. There is no conflict between the *Rules* and the *ATIA*. Firstly, although the word "review" is found in the relevant sections of each, they address different matters. Secondly, the Federal Court of Appeal was discussing competing legislative policies within the *ATIA*, not competing legislation. Thirdly, the Federal Court of Appeal was considering the appropriate standard of review to be applied to the Minister's interpretation of the phrase "advice and recommendations" and at no point in paragraph 36 or elsewhere does the Federal Court of Appeal state (?) that the *ATIA* is to take precedence over other legislation. The *ATIA* also does not contain such a statement. There is jurisprudence though that given section 4 of the *ATIA*, it takes precedence over other statutory provisions restricting disclosure, except for those provisions included in Schedule II of the *ATIA*: *Canadian Imperial Bank of Commerce v Canada,* 2007 FCA 272, at paragraph 27. As Rule 317 does not restrict disclosure, it is not in conflict with the *ATIA*.

[45] Given all of the foregoing, I find that the Prothonotary did not err in fact or law in arriving at the conclusion that Rules 317 and 318 cannot provide the Applicant with the relief he seeks.

[46] The foregoing finding that production of a CTR under Rule 317 is not available in a section 41 review hearing resolves the balance of the issues. However I will briefly address some of the remaining issues raised by the Applicant. Most relate to procedural fairness/appearance of bias.

VIII. **Has the Applicant shown procedural unfairness or bias by the Prothonotary?**

[47] Set out below and numbered are the main allegations of procedural unfairness, including bias, that were levied against the Prothonotary by the Applicant. Each allegation is immediately followed by my analysis which is unnumbered.

[48] The Applicant alleges the Prothonotary displayed an appearance of bias by:

(i) Accepting the representations of the Respondent and rejecting all of the Applicant's representations including, his affirmed evidence.

Affirmed or sworn evidence upon which opposing counsel has not conducted cross-examination "is not an admission as to the truth of the contents of the affidavit"**:** *Exeter v Canada (Attorney General)* 2015 FCA 260 at paragraph 9 citing *Zheng v Canada (Minister of Citizenship and Immigration),* 2007 FC 1311 at paragraph 13.

(ii) Reversing the onus on the filing of the 317/318 Motion by, contrary to the usual procedure, directing the Applicant to bring a motion challenging the Respondent's objection, contrary to what is set out in *Bernard v Public Service Alliance of Canada*, 2017 FCA 35 at paragraph 16 as cited in the *Dr. Lisa S. Sterling et al v The Lower Nicola Indian Band*, 2018 CanLII 59735 (FC) at paragraph 42. The Applicant adds that the reversal of onus was also an error of law because there is a duty of procedural fairness on the decision-maker to make applicable disclosure once a Rule 317 request is made: *May v Ferndale Institution*, 2005 SCC 82.

Even if Rule 317 did apply, there has been no reversal of onus. The procedure under Rule 318 is set out in *Federal Courts Practice* (Toronto: Thomson Reuters, 2019) at page 766 "If the tribunal or another party to the application objects to the request, they must inform the other parties and the Court Administrator, in writing, of the reasons for their objection. The requesting party can then either accept the objection or bring a motion challenging it." (My emphasis.) *Merck Frosst* also sets out the customary procedure on judicial review at paragraph 250.

May is distinguishable on its facts. It involved a very different statutory scheme and a very different remedy was being sought. The personal liberty of the Applicant was at stake in *May* which is one of the factors outlined in *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 that affects the content of the duty of procedural fairness.

(iii) Making a finding that the Applicant was attempting to circumvent the Access to Information framework by requesting a Certified Tribunal Record thereby prejudicing the Applicant, demonstrating bias and thereby putting all the Prothonotary's other findings in question;

The Applicant has not been prejudiced by the finding and no bias arises from it. The 'circumventing' was the attempt to prematurely obtain records that are to be reviewed in the hearing of the underlying application. This issue was considered in *Coady v Canada (Royal Mounted Police)*, 2019 FCA 102 (*Coady*) at paragraph 11:

> [11] Third, the Federal Court held that the Prothonotary had not committed a palpable and overriding error in finding that the appellant's request for disclosure of the disputed records was premature as, in an application for review under section 41 of the *Access to Information Act*, the Court normally receives disputed records by way of an affidavit from the government institution that refused disclosure. As this stage in the application had not yet been reached, the Federal Court concluded that the Prothonotary did not err in finding the disclosure request to be premature.
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> (My emphasis)

(iv) Misapprehending the analysis made by the Federal Court of Appeal in the *Leahy* case (*Leahy v. Canada (Citizenship and Immigration*), 2012 FCA 227) and failing to recognize that the facts were different.

The Applicant discussed the *Leahy* case at length with the Prothonotary. In particular he relied on paragraph 137 in which the Court of Appeal said noted that the Crown "vigorously maintained that there was no reviewable error" but as the record before the Court was so thin and was coupled with little information in the reasons the Court was not able to accede to a submission that said, in effect, "trust us, we got it right."

While the Applicant takes that to mean all the information he seeks in his Rule 317/318 Motion should be before the Court, I cannot read *Leahy* that way or see how

it applies to the current facts. In *Leahy* the reviewing Court received a decision letter asserting that exemptions apply but providing no reasons in support and no indication of who made the relevant decisions or whether the decision-maker understood the legal concepts underlying the privilege claims.

Leahy states that if deficient information is received by the reviewing court it is impossible for a review to be conducted. The solution is also set out in *Leahy* and it is not to the effect that every record gathered, even if found to be irrelevant, is to be produced to the reviewing Court. Helpfully, Madam Justice Dawson set out in a Postscript at paragraph 141 what information the reviewing Court should have:

> 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.

The Prothonotary correctly noted that *Leahy* involved records for which exemptions were claimed while the records sought in the Applicant's motion have not been subject to any refusal of access or have they been exempted from disclosure.

(v) Being in general agreement with the written representations of the Respondent, including the applicability of *Yeager v Canada (Public Safety and Emergency Preparedness),* 2009 FC 813 [*Yeager*] and determining that to grant the Applicant's motion would effectively render the underlying application moot.

The Prothonotary did not err in finding that *Yeager* at paragraph 8 states that as the Rule 317 motion was attempting to obtain the same information as requested in the underlying application for judicial review, granting the motion would put an end to the principal application to the extent that it duplicated the requests in the application.

The Applicant distinguishes *Yeager* on the basis that there was overlap between what was sought in the underlying application and the Rule 317 motion but that is not what he is doing. The Applicant says that his Rule 317 request does not include any records at issue in the judicial review. This is because the 454 pages already produced in response to his Access Requests are already part of the Court record.

The underlying Notice of Application on the other hand seeks an order requiring the Respondent to provide the Court and the Applicant with records generated by the material gathering process that were not part of the records produced in response to his Access Request.

> There are two problems with this argument. One is that the Applicant knows it is not the role of this Court to review the manner in which government institutions respond to access requests: *Blank 2016* at paragraph 36. The other problem, also set out in *Blank 2016* at paragraphs 30 – 31, is that until a complaint has been made to and a report received from the Information Commissioner this Court, as required by section 41 of the *ATIA*, this Court has no jurisdiction to rule on any exemption or exclusion claimed by the Respondent.
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> As the Applicant now seeks records not produced in the response he received, he is asking for records that post-date his complaint and the Commissioner's report. There is no jurisdiction to make any determination in relation to the unproduced records absent compliance with section 41. This also applies to the productions made after November 10, 2018 when the complaint was filed.

[49] As a general comment, I observe that in *Apotex Inc v Canada (Health),* 2016 FC 776 Madam Justice Kane held that "prothonotaries are not required to provide reasons for the many decisions and orders they make, given the high volume of motions they consider and the need to advance the underlying litigation, so long as it is apparent that the submissions have been considered."

[50] Justice Kane's finding was subsequently referred to with approval by the Federal Court of Appeal in *Maximova.* The Court of Appeal also noted that when a prothonotary states that they have read the motion record, the Respondent's written representations and the Applicant's reply there is no error if the Court sitting in appeal is satisfied on that basis that the prothonotary directed their mind to the issues and law: *Maximova* at paragraph 12.

[51] Having reviewed the transcript of the hearing before the Prothonotary as well as considering the allegations set out above, the Order made by the Prothonotary including her reasons, I find that a reasonable person, fully informed and understanding the issues before the

Court, would not conclude that bias was shown by the Prothonotary in relation to any of the matters raised by the Applicant.

IX. **Summary and Conclusion**

[52] For the reasons already given and considering the deference owed to prothonotaries, particularly when sitting as Case Management Judges, I find that the Prothonotary made no error of law in her analysis nor did she commit any palpable and overriding error in regard to the facts that affect the outcome of this motion.

[53] The legislation and the jurisprudence are firmly against the outcome the Applicant seeks. To disclose to the Applicant, as part of the CTR, the impugned materials before the judicial review application is heard would negate the provisions of section 47.1 of the *ATIA*. It would also make the hearing of the Application under section 41 largely irrelevant since the genie, once released, could not be put back in the bottle.

[54] The appropriate avenue of redress for the Applicant is the judicial review hearing, where the disputed records will be placed before the Court through an affidavit from the Department of Justice. The presiding judge will then determine the process to be followed under section 47.1 including whether or not the Applicant is a participant.

[55] The Applicant put forward an alternate approach to the Prothonotary which was to have the records filed by way of a confidential affidavit. That is the usual process followed at the judicial review hearing of the underlying application.

[56] That the Prothonotary did not take the Applicant up on his alternate approach is not an indication of bias or procedural unfairness. The transcript of the hearing before the Prothonotary shows the Respondent confirmed that a particulars chart has been provided to the Applicant as well as the public affidavit. The confidential affidavit is said to be ready to go. It appears therefore that when the section 41 application is scheduled to be heard the usual process will be followed, just as it has previously between these parties.

[57] The underlying authority for this process is found in subsection 47(1) of the *ATIA* which provides that in any proceeding arising from an application under section 41 the Court shall take every reasonable precaution to avoid disclosure of any information or other material that the head of a government institution would be authorized to refuse to disclose under the *ATIA*. Specifically, two such reasonable precautions, stated in subsection 47(1), are that, when appropriate, the Court receive representations *ex parte* and conduct the hearing *in camera*.

[58] As the information would be confidential and not available to the Applicant until the judge hearing the application ruled on the exemptions, it does not benefit the Applicant to have the procedure done before the judicial review is even set down for hearing.

[59] The motion is dismissed with costs to the Respondent.

ORDER in T-2181-18

THIS COURT ORDERS that:

1. The Attorney General of Canada is removed as a Respondent, effective immediately.
2. The Motion is dismissed.
3. Costs to the Respondent

"E. Susan Elliott"
Judge

APPENDIX

Access to Information Act (R.S.C., 1985, c. A-1)

Review by Federal Court — complainant

41 (1) A person who makes a complaint described in any of paragraphs 30(1)(a) to (e) and who receives a report under subsection 37(2) in respect of the complaint may, within 30 business days after the day on which the head of the government institution receives the report, apply to the Court for a review of the matter that is the subject of the complaint.

Review by Federal Court — government institution

(2) The head of a government institution who receives a report under subsection 37(2) may, within 30 business days after the day on which they receive it, apply to the Court for a review of any matter that is the subject of an order set out in the report.

Review by Federal Court — third parties

(3) If neither the person who made the complaint nor the head of the government institution makes an application under this section within the period for doing so, a third party who receives a report under subsection 37(2) may, within 10 business days after the expiry of the period referred to in subsection (1), apply to the Court for a review of the application of any exemption provided for under this Part that may apply to a record that might contain information described in subsection 20(1) and that is the subject of the complaint in respect of which the report is made.

Review by Federal Court — Privacy Commissioner

(4) If neither the person who made the complaint nor the head of the institution makes an application under this section within the period for doing so, the Privacy

Révision par la Cour fédérale : plaignant

41 (1) Le plaignant dont la plainte est visée à l'un des alinéas 30(1)a) à e) et qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les trente jours ouvrables suivant la réception par le responsable de l'institution fédérale du compte rendu, exercer devant la Cour un recours en révision des questions qui font l'objet de sa plainte.

Révision par la Cour fédérale : institution fédérale

(2) Le responsable d'une institution fédérale qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les trente jours ouvrables suivant la réception du compte rendu, exercer devant la Cour un recours en révision de toute question dont traite l'ordonnance contenue dans le compte rendu.

Révision par la Cour fédérale : tiers

(3) Si aucun recours n'est exercé en vertu des paragraphes (1) ou (2) dans le délai prévu à ces paragraphes, le tiers qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les dix jours ouvrables suivant l'expiration du délai prévu au paragraphe (1), exercer devant la Cour un recours en révision de l'application des exceptions prévues par la présente partie pouvant s'appliquer aux documents susceptibles de contenir les renseignements visés au paragraphe 20(1) et faisant l'objet de la plainte sur laquelle porte le compte rendu.

Révision par la Cour fédérale : Commissaire à la protection de la vie privée

(4) Si aucun recours n'est exercé en vertu des paragraphes (1) ou (2) dans le délai prévu à ces paragraphes, le Commissaire à la protection de la vie privée qui reçoit le compte rendu en application du paragraphe

Commissioner, if he or she receives a report under subsection 37(2), may, within 10 business days after the expiry of the period referred to in subsection (1), apply to the Court for a review of any matter in relation to the disclosure of a record that might contain personal information and that is the subject of the complaint in respect of which the report is made.

Respondents

(5) The person who applies for a review under subsection (1), (3) or (4) may name only the head of the government institution concerned as the respondent to the proceedings. The head of the government institution who applies for a review under subsection (2) may name only the Information Commissioner as the respondent to the proceedings.

Deemed date of receipt

(6) For the purposes of this section, the head of the government institution is deemed to have received the report on the fifth business day after the date of the report.

…

Court to take precautions against disclosing

47 (1) In any proceedings before the Court arising from an application under section 41 or 44, the Court shall take every reasonable precaution, including, when appropriate, receiving representations ex parte and conducting hearings in camera, to avoid the disclosure by the Court or any person of

(a) any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Part; or

(b) any information as to whether a record exists where the head of a government institution, in refusing to disclose the record

37(2) peut, dans les dix jours ouvrables suivant l'expiration du délai prévu au paragraphe (1), exercer devant la Cour un recours en révision de toute question relative à la communication d'un document susceptible de contenir des renseignements personnels et faisant l'objet de la plainte sur laquelle porte le compte rendu.

Défendeur

(5) La personne qui exerce un recours au titre des paragraphes (1), (3) ou (4) ne peut désigner, à titre de défendeur, que le responsable de l'institution fédérale concernée; le responsable d'une institution fédérale qui exerce un recours au titre du paragraphe (2) ne peut désigner, à titre de défendeur, que le Commissaire à l'information.

Date réputée de réception

(6) Pour l'application du présent article, le responsable de l'institution fédérale est réputé avoir reçu le compte rendu le cinquième jour ouvrable suivant la date que porte le compte rendu.

…

Précautions à prendre contre la divulgation

47 (1) Dans les procédures découlant des recours prévus aux articles 41 et 44, la Cour prend toutes les précautions possibles, notamment, si c'est indiqué, par la tenue d'audiences à huis clos et l'audition d'arguments en l'absence d'une partie, pour éviter que ne soient divulgués de par son propre fait ou celui de quiconque :

a) des renseignements qui, par leur nature, justifient, en vertu de la présente partie, un refus de communication totale ou partielle d'un document;

b) des renseignements faisant état de l'existence d'un document que le responsable d'une institution fédérale a refusé de

under this Part, does not indicate whether it exists.

…

Burden of proof — subsection 41(1) or (2)

48 (1) In any proceedings before the Court arising from an application under subsection 41(1) or (2), the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Part or a part of such a record or to make the decision or take the action that is the subject of the proceedings is on the government institution concerned.

Burden of proof — subsection 41(3) or (4)

(2) In any proceedings before the Court arising from an application under subsection 41(3) or (4), the burden of establishing that the head of a government institution is not authorized to disclose a record that is described in that subsection and requested under this Part or a part of such a record is on the person who made that application.

Order of Court where no authorization to refuse disclosure found

49 Where the head of a government institution refuses to disclose a record requested under this Part or a part thereof on the basis of a provision of this Part not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

communiquer sans indiquer s'il existait ou non.

…

Charge de la preuve : paragraphes 41(1) et (2)

48 (1) Dans les procédures découlant des recours prévus aux paragraphes 41(1) et (2), la charge d'établir le bien-fondé du refus de communication totale ou partielle d'un document ou des actions posées ou des décisions prises qui font l'objet du recours incombe à l'institution fédérale concernée.

Charge de la preuve : paragraphes 41(3) et (4)

(2) Dans les procédures découlant des recours prévus aux paragraphes 41(3) et (4), la charge d'établir que la communication totale ou partielle d'un document visé à ces paragraphes n'est pas autorisée incombe à la personne qui exerce le recours.

Ordonnance de la Cour dans les cas où le refus n'est pas autorisé

49 La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou partielle d'un document fondée sur des dispositions de la présente partie autres que celles mentionnées à l'article 50, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; la Cour rend une autre ordonnance si elle l'estime indiqué

Federal Courts Act **(R.S.C., 1985, c. F-7)**

Extraordinary remedies, federal tribunals

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Recours extraordinaires : offices fédéraux

18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de certiorari, de mandamus, de prohibition ou de quo warranto, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

***Federal Courts Rules* (SOR/98-106**

Appeal

51 (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.

Service of appeal

(2) Notice of the motion shall be served and filed within 10 days after the day on which the order under appeal was made and at least four days before the day fixed for the hearing of the motion.

…

Material from tribunal

317 (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

Request in notice of application

Appel

51 (1) L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.

Signification de l'appel

(2) L'avis de la requête est signifié et déposé dans les 10 jours suivant la date de l'ordonnance frappée d'appel et au moins quatre jours avant la date prévue pour l'audition de la requête.

…

Matériel en la possession de l'office fédéral

317 (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

Demande inclue dans l'avis de demande

(2) An applicant may include a request under subsection (1) in its notice of application.

Service of request

(3) If an applicant does not include a request under subsection (1) in its notice of application, the applicant shall serve the request on the other parties.

Material to be transmitted

318 (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

(a) a certified copy of the requested material to the Registry and to the party making the request; or

(b) where the material cannot be reproduced, the original material to the Registry.

Objection by tribunal

(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

Directions as to procedure

(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).

Order

(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.

(2) Un demandeur peut inclure sa demande de transmission de documents dans son avis de demande.

Signification de la demande de transmission

(3) Si le demandeur n’inclut pas sa demande de transmission de documents dans son avis de demande, il est tenu de signifier cette demande aux autres parties.

Documents à transmettre

318 (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l’office fédéral transmet :

a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;

b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

Opposition de l’office fédéral

(2) Si l’office fédéral ou une partie s’opposent à la demande de transmission, ils informent par écrit toutes les parties et l’administrateur des motifs de leur opposition.

Directives de la Cour

(3) La Cour peut donner aux parties et à l’office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d’une opposition à la demande de transmission.

Ordonnance

(4) La Cour peut, après avoir entendu les observations sur l’opposition, ordonner qu’une copie certifiée conforme ou l’original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2181-18
STYLE OF CAUSE:	SHELDON BLANK v THE MINISTER OF JUSTICE
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND WINNIPEG, MANITOBA
DATE OF HEARING:	JULY 13, 2020
REASONS FOR ORDER AND ORDER:	ELLIOTT J.
DATED:	JANUARY 13, 2021

APPEARANCES:

Sheldon Blank	FOR THE APPLICANT (ON HIS OWN BEHALF)
Erica Haughey	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT