Date: 20091002

Docket: T-680-08

Citation: 2009 FC 1000

Ottawa, Ontario, October 2, 2009

PRESENT: THE CHIEF JUSTICE

BETWEEN:

NEIL KITSON

Applicant

and

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AS REPRESENTED BY: THE MINISTER OF NATIONAL DEFENCE
and THE MINISTER OF JUSTICE
AND ATTORNEY GENERAL OF CANADA**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant's access to information request was reasonably denied. These reasons also explain why certain procedures mandated in the access legislation unjustifiably offend the open court principle.

Background

[2] In December 2006, the applicant made a request to the Department of National Defence (National Defence) under the *Access to Information Act* (the Act), 1985 R.S.C., c. A-1, for information relating to the number of prisoners taken by Canadian troops in Afghanistan, the prisoners' physical location after capture and their current location. It is acknowledged that the information sought relates to the period of September 2006 during Operation Medusa.

[3] In September 2007, the applicant received seventy-three expurgated sheets in response to his request. The redactions were made under s. 15 of the Act. Other redactions concerning personal information are not of concern to the applicant.

[4] In March 2008, in response to a complaint made by the applicant concerning the redactions, the Office of the Information Commissioner concluded that "… the information, which continues to be withheld under s. 15(1), if disclosed, could reasonably be expected to be injurious to the defence of Canada or its allies." Accordingly, the Office of the Information Commissioner determined that the exemption provision was properly invoked.

[5] The applicant then launched this application for judicial review of the discretion exercised by National Defence concerning the redactions it made under s. 15 of the Act (the information in issue).

The Open Court Principle: "Reading Down" s. 52(2)

[6] Court proceedings are presumptively to be heard in public. This open court principle also applies to judicial reviews in the Federal Court concerning refusals to disclose information sought under the Act. See, for example, *Hunter v. Canada (Consumer and Corporate Affairs)*, [1991] F.C.J. No. 245 (C.A.) at paragraphs 24-26 and 43-46.

[7] Where the s. 15 exemption is in play, as in this proceeding, s. 52(2) envisages that the hearing shall be in private and, at the request of the government institution, shall be heard and determined in the National Capital Region.

[8] Section 52(3) affords the right to the government institution to make representations in the absence of the private sector party.

[9] Sections 52(2) and (3) read as follows:

(2) An application referred to in subsection (1) or an appeal brought in respect of such application shall (a) be heard *in camera*; and (b) on the request of the head of the government institution concerned, be heard and determined in the National Capital Region described in the schedule to the *National Capital Act*.	(2) Les recours visés au paragraphe (1) font, en premier ressort ou en appel, l'objet d'une audition à huis clos; celle-ci a lieu dans la région de la capitale nationale définie à l'annexe de la *Loi sur la capitale nationale* si le responsable de l'institution fédérale concernée le demande.
(3) During the hearing of an application referred to in subsection (1) or an	(3) Le responsable de l'institution fédérale concernée a, au cours des

appeal brought in respect of such application, the head of the government institution concerned shall, on the request of the head of the institution, be given the opportunity to make representations ex parte.	auditions, en première instance ou en appel et sur demande, le droit de présenter des arguments en l'absence d'une autre partie.

[10] On March 5, 2008, pursuant to s. 52(2) and (3), a hearing took place in private and in the absence of the applicant to review the respondents' confidential affidavits that had been filed to support the non-disclosure of the redacted information. This closed hearing took place in the National Capital Region on the request of counsel for National Defence.

[11] During the private hearing, the Court examined the respondents' affiants to determine which portions of the respondents' materials could be delivered to the applicant and to test the merits of the respondents' non-disclosure of the information in issue.

[12] As a result of the private hearing, the respondents agreed to serve on the applicant substantial portions of their affidavits and memorandum of law originally filed confidentially. These documents had not previously been delivered to the applicant.

[13] One of the respondents' two affiants was a deputy director in National Defence responsible for responding to access to information requests. All of her affidavit was delivered to the applicant with the exception of the single paragraph which made the redacted information part of the court record: "13. Attached as Exhibit "A" to this Affidavit is a copy of the records at

issue in this Application filed confidentially, pursuant to the November 12, 2008 Order of Prothonotary Roger R. Lafrenière."

[14] Similarly, eight of the thirteen paragraphs filed by the affiant on behalf of the Information Support Team in the Strategic Joint Staff at National Defence Headquarters (the second affidavit) were served on the applicant after the private hearing. The Court is satisfied that the remaining five paragraphs were appropriately filed without disclosure to the applicant.

[15] Also, the respondents agreed to serve on the applicant their memorandum of fact and law, save for the five paragraphs which correspond to the confidential portions of the second affidavit.

[16] In short, prior to the hearing of April 20, 2009, the applicant had received much of the material originally filed in private, with the exception of the redacted information in issue and the few paragraphs noted above. The information disclosed to the applicant was placed on the court file.

[17] The purpose of the hearing of April 20, 2009 was to receive the oral submissions of both parties. It took place in Vancouver, B.C. where the applicant resides. No request was made that the hearing be conducted in private. Nor did the Court direct that the hearing take place in private. No specific mention was made of the information in issue during this public hearing.

[18] Section 52(2) of the access legislation is identical in its wording, except for its numeration, to s. 51(2) of the *Privacy Act*, R.S.C. 1985, c. P. 21.

[19] Section 51(2) of the *Privacy Act* was considered in *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, where the Supreme Court of Canada made it clear, at paragraph 58, that it is not "… open to a judge to conduct a hearing in open court in direct contradiction to the requirements of the statute, … . Unless the mandatory requirement is found to be unconstitutional and the section is "read down" as a constitutional remedy, it cannot otherwise be interpreted to bypass its mandatory nature."

[20] It was only after the hearing of April 20, 2009, when the matter was under reserve, that it became apparent to this judge that the Court's encouragement of the openness principle was inconsistent with the mandatory provisions of s. 52(2)(a), as interpreted in *Ruby*. According to *Ruby*, the hearing of April 20, 2009 should have been in private, even though the applicant was present and the information in issue was not mentioned.

[21] The Court then communicated with the parties to determine how best to resolve this procedural oversight. The respondents' concern, as I understood their initial reaction, was that an attempt to correct the situation retroactively would be an *obiter* exercise. It was better, in my view, to consider the legality of s. 52 of the access legislation now, in the exceptional circumstances of *Ruby* having resolved other identical provisions.

[22] The applicant agreed to serve and file a notice of constitutional question pursuant to s. 57 of the *Federal Courts Act* that he intended to question the constitutional validity of ss. 52(2)(a) and 52(2)(b) of the *Access to Information Act*. This was done. Subsequently, the parties filed their memoranda of law addressing the constitutional issue. The Court waived the necessity to file a notice of motion under Rule 359.

[23] In *Ruby*, the Supreme Court of Canada read down s. 51(2)(a) of the *Privacy Act* to make the provision consistent with the open court principle (at paragraphs 59-60):

> … the requirement that the entire hearing of a s. 41 application or appeal therefrom be heard *in camera*, as is required by s. 51(2)(*a*), is too stringent. … [t]he section is overbroad in closing the court to the public even where no concern exists to justify such a departure from the general principle of open courts.
> …
>
> … The appropriate remedy is therefore to read down s. 51(2)(*a*) so that it applies only to the *ex parte* submissions mandated by s. 51(3). A reviewing court retains the discretion, pursuant to s. 46, to conduct the remainder of the hearing or any portion thereof, either in public, or *in camera*, or *in camera* and *ex parte*.

[24] The parties acknowledge that the language of s. 51(2)(a) of the *Privacy Act* is identical to that of s. 52(2)(a) of the *Access to Information Act*. No other provision of the access legislation distinguishes the legal situation addressed in *Ruby*.

[25] Accordingly, the appropriate remedy here is to read down s. 52(2)(a) of the *Access to information Act* so that it applies only to the *ex parte* submissions mandated by s. 52(3).

[26] Similarly, although the issue was not addressed in *Ruby*, I am satisfied that s. 52(2)(b) of the access legislation should also be read down to apply only to the *ex parte* submissions mandated by s. 52(3). This reading down is not intended to affect in any manner the right of the head of the government institution to request that the *ex parte* hearings shall be heard and determined in the National Capital Region.

Analysis

[27] According to s. 15(1) of the Act, National Defence had the discretion to refuse the applicant's request for "… information the disclosure of which could reasonably be expected to be injurious to … the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive of hostile activities, … ."

[28] In this case, the information in issue is contained in Canadian Forces (CF) Significant Incident Reports (SIR) generated by deployed Canadian force units and elements in Afghanistan during the period July 4 to November 17, 2006.

[29] The purpose of the SIR reports is to communicate information regarding significant incidents through the CF chain of command to the Chief of the Defence Staff and Deputy Minister of National Defence.

[30] Concerning information relating to the detention of Afghan nationals, the issue of interest to the applicant, the respondents assert that the SIR's include the following tactical information:

- the name of the detainee and temporary identification number;
- the name and decryption of the operation;
- the location, date, and time of capture;
- the description of the circumstances surrounding the capture;
- the physical state of the detainee;
- the location of the detainee at the time of reporting;
- the preliminary intent concerning the detainee; and
- the status of detainees every 24 hours or upon their release or transfer.

[31] In this proceeding, one commenced under s. 41 of the Act, the respondents have the burden of establishing that National Defence was authorized to refuse to disclose the information in issue: s. 48.

[32] Sections 49 and 50 are the two provisions in the access legislation concerning the standard of review to be applied by the Federal Court in proceedings challenging the refusal by government institutions to disclose the requested information.

[33] The standard of review for most of the access to information litigation has been governed by s. 49:

49. Where the head of a government institution refuses to disclose a record	49. La Cour, dans les cas où elle conclut au bon droit de la personne qui

requested under this Act or a part thereof on the basis of a provision of this Act 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.	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 loi 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.

[34] One of the leading decisions interpreting s. 49 is *Canada (Information Commissioner) v. Canada (Minister of Industry)*, 2001 FCA 254, where Justice Evans of the Federal Court of Appeal set out a two-fold standard of review at paragraph 47:

> In reviewing the refusal of a head of a government institution to disclose a record, the Court must determine on a standard of correctness whether the record requested falls within an exemption. However, when the Act confers on the head of a government institution the discretion to refuse to disclose an exempted record, the lawfulness of its exercise is reviewed on the grounds normally available in administrative law for the review of administrative discretion, including unreasonableness.

[35] Section 50 sets out a specific standard of review for four injury-based exemptions concerning federal provincial affairs (s. 14), international affairs and the defense of Canada (s. 15), the conduct of lawful investigations (ss. 16(1)(c) and (d)) and the financial interests of a government institution or Canada's ability to manage its economy (s. 18(d)). To repeat, s. 15 is the exemption in play in this proceeding.

[36] According to s. 50, the Federal Court shall "… if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the record" order the disclosure of the information in issue where the s. 15 exemption is the one being asserted by the government institution. The provision reads as follows:

> 50. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which 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.
> (Emphasis added)
>
> 50. Dans les cas où le refus de communication totale ou partielle du document s'appuyait sur les articles 14 ou 15 ou sur les alinéas 16(1)c) ou d) ou 18d), la Cour, si elle conclut que le refus n'était pas fondé sur des motifs raisonnables, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner communication totale ou partielle à la personne qui avait fait la demande; la Cour rend une autre ordonnance si elle l'estime indiqué.

[37] The statutory language of this provision dictates a reasonableness standard of review. The outcome would be the same even if one thought further contextual analysis was necessary to support further what is mandated by s. 50: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paragraphs 18-19.

[38] On the basis of my review of the information in issue and the *ex parte* hearing of March 5, 2009, there is no doubt in my mind that the documents identified by National Defence come within the s. 15 exemption.

[39] Similarly, I find that the information in issue is of the kind referred to in paragraph 30 of these reasons, including the nature of the operations and the location, date, time and other circumstances surrounding the capture of the detainees. On the record before me, I am satisfied that the disclosure of this information in 2007 could have been of assistance to the enemy of the CF in Afghanistan, could have caused harm to members of the CF and others in that country and could reasonably have been expected to be injurious to the defence of Canada or its allies within the meaning of s. 15 of the Act. The determination made in 2007 by National Defence not to disclose this information was made on reasonable grounds. Finally, there is no further information in issue which could reasonably have been severed within the meaning of section 25 of the Act.

[40] It may be that the outcome would be different if the request were made some time after the CF are no longer engaged in Afghanistan. However, this decision is not one to be made today.

[41] This application for judicial review will be dismissed. The respondents are to be commended for not having sought costs in the circumstances of this proceeding. The co-operation of both parties has been appreciated.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. Do ss. 52(2)(a), 52(2)(b) and 52(3) of the *Access to Information Act*, R.S.C. 1985, c. A-1, infringe or deny the applicant's rights or freedoms guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

   Answer: Yes.

2. If the answer to Question 1 is in the affirmative, are ss. 52(2)(a), 52(2)(b) and 52(3) of the *Access to Information Act* reasonable limits, prescribed by law, democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

   Answer: No. Sections 52(2)(a) and 52(2)(b) are read down to apply to subsection (3) only.

3. The application for judicial review is dismissed without costs.

"Allan Lutfy"

Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

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DATED:	October 2, 2009

APPEARANCES:

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Ms. Erin M. Tully	FOR THE RESPONDENTS

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