Federal Court  Cour fédérale

Date: 20140819

Docket: T-463-13

Citation: 2014 FC 809

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, August 19, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

GUY VEILLETTE

Applicant

and

CANADA REVENUE AGENCY

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, relating to a staffing process conducted by the Canada Revenue Agency [CRA]. The applicant is challenging the decision dated February 18, 2013, by which an assistant commissioner of the CRA concluded that the applicant had not been treated arbitrarily, even though the applicant was not given access to relevant feedback information because, by his own

choice, he did not make use of the available mechanism for accessing that information, finding that mechanism too inconvenient.

I. Facts

[2] Guy Veillette applied for a Team Leader position classified at the MG-05 level. Mr. Veillette was an employee of the CRA at the time of the staffing process and was acting as an auditor in a position classified as AU-03.

[3] The applicant submitted his application on October 14, 2010. As part of the assessment process, he completed a "Supervisor Simulation 428" exercise, hereafter referred to as the "Simulation Test" in these reasons. This sort of test is also known as an "in-basket test".

[4] The Simulation Test is a standardized test developed by the Public Service Commission of Canada [PSC] and consists of a collection of memoranda, letters, reports and other documents that the candidate must process within a specified time. The CRA uses the Simulation Test with the permission of the PSC. Candidates must present, in writing, the decisions they made and the solutions they propose. This phase of the exam is followed by an oral presentation during which the candidate can further explain his or her decisions. If the jury—in this case, three CRA managers—concludes that the candidate does not meet the required level with regard to the qualifications assessed by the Simulation Test, the selection process ends there for that candidate. In the present case, Mr. Veillette was informed in a letter dated June 9, 2011, and signed by the selection board chairperson that he had not passed the Simulation Test.

[5] On June 16, 2011, Mr. Veillette asked for individual feedback on his performance in the staffing exercise he took part in. Such feedback is provided for under the CRA's staffing program. To this end, Mr. Veillette requested [TRANSLATION] "a copy of my exam, the notes that the assessors and markers took, the answer grid and any other relevant documents so that I can fully exercise my right to recourse". (The decision under review spoke in terms of [TRANSLATION] "access to my exam, my detailed results, the markers' notes, or the answer grid, either before or during the feedback". This difference is not significant for the purposes of this analysis.) This request was made in an email dated September 7. A meeting was then scheduled for September 12, 2011, so that Mr. Veillette could receive feedback.

[6] The answer that the applicant received was that he would not be provided with the information he sought. At the suggestion of a CRA representative, on September 27, 2011, he made a request to have these documents disclosed under the *Privacy Act*, RSC, 1985, c P-21.

[7] The feedback exercise took place as scheduled, on September 12, 2011, even though Mr. Veillette did not have in his possession the information that he claimed to need to further discuss his Simulation Test results. He filed a grievance regarding this feedback and requested a review of the decision, again under the CRA's staffing program. The grievance regarding the individual feedback is apparently still in progress, according the information given to the Court. At any rate, this is not the decision at issue in this application for judicial review.

[8] It is the feedback review decision, dated February 18, 2013, which is now before this Court. The request made under the *Privacy Act* did not yield any concrete results. Indeed, all that

was sent to the applicant was the first page of the integration booklet for the simulation and a statement that more than 60 pages had been redacted but could be made available for consultation under paragraph 17(1)(*a*) of the *Privacy Act*. Mr. Veillette did not avail himself of this option, as he considered the conditions imposed on such a consultation to be even more stringent than another offer that the CRA was to make.

[9] It was the Assistant Commissioner, CRA – Quebec Region, who acted as reviewer in this request. On February 8, 2012, Mr. Veillette notified the Assistant Commissioner of his frustration in not being able to gain access [TRANSLATION] "to my exam, my detailed results, the markers' notes, or the answer grid, either before or during the feedback" (email dated February 8, 2011). As a result, the CRA offered Mr. Veillette the opportunity to take part in what is called a selective disclosure process so that he could have access to some of the documents he said he needed.

[10] This process offered by the CRA entailed appointing a representative for the applicant. This representative would be the only person given privileged access to certain documents. This representative could thus be authorized to examine the assessor's guide for the exam and the notes prepared by the members of the selection board, which would refer to protected information. However, this representative had to consult these documents on the employer's premises and return all of them without making any copies. As for the notes that could be taken, it appears that they could be kept by the representative so long as they were not a transcript of the documents consulted, which are protected. In addition, these notes would be examined by the supervisor at the end of the meeting.

[11] It was made very clear that this information, and the notes taken, could be used only for the purpose of resolving the complaint. Furthermore, the representative had to agree to and sign a non-disclosure agreement providing that the information must be kept strictly confidential and cannot be disclosed except as required by law. Finally, that agreement contains the following clause:

> [TRANSLATION]
> In the event of a breach of the undertaking made in this agreement, I acknowledge and agree that the Crown may exercise its right to sue for damages.

[12] Selective disclosure, as summarized here, is the mechanism that the PSC uses in cases where standardized tools, such as the Simulation Test, have been used. It appears that the offer of selective disclosure made to the applicant in this case was the first of its kind ever made by the CRA.

[13] At any rate, what happened next indicates that Mr. Veillette tried to convince two people to agree to be his representative. These two people, his spouse and a union representative, declined, and after granting him extensions several times, the CRA concluded that the meeting with the Assistant Commissioner should go ahead. This meeting was held on January 17, 2013.

[14] On February 18, 2013, the Assistant Commissioner rendered his decision in a document over seven pages in length. In his decision, the Assistance Commissioner reviewed the applicant's various complaints and declared that he would have to determine whether the applicant had been treated arbitrarily. The Assistant Commissioner had to reject the various

arguments presented, and these aspects of the case are not included in the application for judicial review here.

[15] The Assistant Commissioner reviewed the applicant's complaint with respect to the lack of access to the documents related to his assessment for the staffing process. He noted that the applicant had not used the selective disclosure process, nor had he availed himself of the option of a consultation further to an access request under the *Privacy Act*.

II. Arguments

[16] Before this Court, the applicant raises three arguments against the Assistant Commissioner's decision. First, it is argued that the refusal to disclose documents relevant to a staffing recourse is a breach of procedural fairness. Similarly, it is submitted that the non-disclosure agreement requiring that the representative agree to a confidentiality clause stating that a breach of said clause could result in legal proceedings is also a breach of procedural fairness. Finally, should the Court not be satisfied that there was a breach of procedural fairness in this case, the applicant argues that the Assistant Commissioner's decision to reject his request for review is unreasonable and should therefore attract judicial review.

III. Standard of review

[17] The parties agree, as does the Court, that the allegations regarding breach of procedural fairness are subject to judicial review on the correctness standard. As for whether the decision to reject the request for review may be the subject of judicial review, it is the reasonableness

standard, within the meaning of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], that applies.

IV. Analysis

[18] To begin with, it is helpful to recall what is not being pleaded and debated in this case. The applicant did not bring a constitutional challenge, nor did he argue that the staffing program, including the recourses available under it, is *ultra vires* the CRA's authority.

[19] His main argument is more along the lines that the non-disclosure of documents relevant to his recourse in the staffing of a position he applied for is a breach of procedural fairness. However, the applicant also made a more refined argument to the effect that the breach of procedural fairness in this case could be limited to the fact that the CRA required that the disclosure take place through a representative named by the applicant. He argues that the conditions imposed are too onerous, particularly the clause recognizing that legal proceedings may be brought in case of a breach of confidentiality, which would deprive him of procedural fairness.

[20] The applicant sought to show that the CRA should have its own staffing rules since having changed its status. Sections 53 and 54 of the *Canada Revenue Agency Act*, SC 1999, c 17, give the CRA the exclusive right and authority to appoint its employees; to this end, it must develop (in French, "élabore") its own staffing program covering both appointments and recourses. These provisions read as follows:

Appointment of employees	**Pouvoir d'embauche de**

	l'Agence
53. (1) The Agency has the exclusive right and authority to appoint any employees that it considers necessary for the proper conduct of its business.	53. (1) L'Agence a compétence exclusive pour nommer le personnel qu'elle estime nécessaire à l'exercice de ses activités.
Commissioner's responsibility	**Nominations par le commissaire**
(2) The Commissioner must exercise the appointment authority under subsection (1) on behalf of the Agency.	(2) Les attributions prévues au paragraphe (1) sont exercées par le commissaire pour le compte de l'Agence.
Staffing program	**Programme de dotation**
54. (1) The Agency must develop a program governing staffing, including the appointment of, and recourse for, employees.	54. (1) L'Agence élabore un programme de dotation en personnel régissant notamment les nominations et les recours offerts aux employés.
Collective agreements	**Exclusion**
(2) No collective agreement may deal with matters governed by the staffing program.	(2) Sont exclues du champ des conventions collectives toutes les matières régies par le programme de dotation en personnel.

[21] According to the applicant, this means that the mechanisms in other acts or regulations for deciding staffing issues are not applicable. In staffing recourses, questions related to access to the necessary documentation for such recourses must therefore be handled exclusively in accordance the CRA's regime under sections 53 and 54 of its home legislation. The CRA cannot rely on acts and regulations affecting employees other than CRA employees. The applicant submits that the CRA's existing staffing regime does not allow access to be limited solely to the applicant's representatives. Based on case law considering a regime in place in the federal public service, it may be concluded [TRANSLATION] "that there is no reason to distinguish between disclosure that must be made to the applicant and disclosure that must be made to his representative".

[22] A helpful starting point could well be to consider what procedural fairness entails in such matters. It appears that procedural fairness does not require unlimited, unconditional access to the tools used to assess applicants for positions in the public service. The applicant does not deny this. In *Barton v Canada (Attorney General)*, [1993] FCJ 746, 66 FTR 54 [*Barton*], Justice Rothstein, then of this Court, recognized the inherent limits to the requested disclosure:

> [10] In the proceedings before me there was no dispute between counsel as to the importance of maintaining confidentiality of the information at issue. There could be serious prejudice to the employer if the information sought was publicly disclosed because of the expense involved in the preparation and use of standardized tests. Indeed, counsel for the applicants stated that it was important to the applicants and to the Public Service Alliance of Canada that public servants be selected on the basis of merit and the efficacy and therefore the confidentiality of such tests is an important aspect of this objective.

Moreover, the duty to disclose, in the absence of legislation or regulation, was of course supposed to be handled in such a way as to protect the legitimate interest in maintaining the effectiveness of selection tools, which is not possible if the tools are disseminated without adequately protecting their confidentiality. The Court proposed a sort of analytical framework, in the absence of legislative or regulatory rules:

> [16] A difficulty that arises in proceedings in which confidential information is to be disclosed on a limited basis, is the accountability of the recipients of the information to ensure adherence to the requirement that the information they receive remains confidential. For example, are there sanctions that can be imposed upon recipients of confidential information for unauthorized disclosure of the information? Does the tribunal conducting the proceedings have the power to cite for contempt? Are the persons to whom disclosure is made members of a professional society which may discipline members for breach of ethics?
>
> [17] These considerations are not, of course, exhaustive. However, they are some of the issues that a tribunal will consider

> when exercising its discretion as to who may receive disclosure of confidential information. Moreover, it must be remembered that in labour-management proceedings, representatives are not always lawyers. That fact alone cannot automatically disqualify them from receiving confidential information.
>
> [18] In my view, it would be an unusual case in which counsel or a representative would be denied disclosure of confidential information. Some special reason would have to be apparent that would lead to such an extraordinary result. In the ordinary case, unauthorized disclosure should be addressed by the conditions under which counsel or representative receives the confidential information, such as the duty not to copy it or perhaps the use of it only at specified locations.
>
> [19] The extent of the conditions will be dictated by the sensitivity of the information and the nature of the harm that could flow from unauthorized disclosure. Counsel should be asked for submissions on the conditions they think are appropriate and the tribunal should order such conditions as it, in the exercise of its discretion, considers reasonable in the circumstances of a particular case.

[23] In the case at bar, the subject of access to information in the case of a staffing recourse is addressed in the Directive on Recourse for Assessment and Staffing, which is Annex L to the Staffing Program ostensibly created pursuant to section 54 of the CRA's home legislation. The applicant did not challenge the validity of the creation of such a program. He argues, rather, that the Program did not provide that access to certain information can be given only through a designated representative.

[24] The Staffing Program and its annexes set out in precise detail the elements of a full staffing program for the CRA, including recourses for candidates eliminated at the various stages of the selection processes used by the Agency.

[25] Annex L to the Staffing Program, which is the Directive on Recourse for Assessment and Staffing, includes a provision regarding disclosure. Section 6.3 reads as follows:

> **6.3** It is mandatory that *Authorized Persons* disclose, upon request, prior to the Individual Feedback, all information relevant to the candidate/employee who is exercising recourse (including the employee's own results). The exception to this is any information that could compromise security or the integrity of any *standardized assessment tool* or any information that would contravene the *Privacy Act*. Further details on the responsibilities of *Authorized Persons* for provision of recourse is described in sections 8, 9 and 10 of this Directive.

Section 10.11.4 of the Directive on the Selection Process, which is Annex E to the Staffing Program, conveys the same message as section 6.3 of Annex L by stating that tests must be protected for future use and that, in any event, test material must be excluded from disclosure, even in the case of a recourse. Section 10.11.4 reads as follows:

> **10.11.4** The maintenance of the integrity and validity of the *standardized assessment tools* requires that *Authorized Persons*, *Competency Consultants* and other designated experts ensure that any disclosure does not jeopardize the ongoing use of the *standardized assessment tool* and/or *selection process*. **In particular, test material, including the scoring guide, cannot be disclosed for any reason, including recourse.**

As we can see, individuals who administer standardized assessment tools have a clear duty not to disclose any test materials, especially not the scoring guide.

[26] Nevertheless, section 6.3 of Annex L makes it possible to disclose to disappointed candidates "all information [that is] relevant . . . [except] any information that could compromise security or the integrity of any *standardized assessment tool* or any information that would contravene the *Privacy Act*".

[27] The respondent submits that this rules out the disclosure of anything that the CRA considers to be likely to compromise security or the integrity of the Simulation Test. Annex F to the Staffing Program, Guidelines on Assessment Methods, specifically provides that the CRA may use standardized assessment tools from the PSC's Personnel Psychology Centre, and section 6.3 of Annex L ensures that these tools are protected as required by the agreement between the CRA and the PSC.

[28] The applicant argues that section 6.3 does not allow the CRA to deny disclosure as it did because, he says, *Hasan v Canada (Attorney General)*, [1996] FCJ 491, 111 FTR 217 [*Hasan*], applies squarely to this case. *Hasan* was affirmed on appeal ([1996] FCJ 1588, 206 NR 175 and *Canada (Attorney General) v Kam*, [1996] FCJ 1589, 206 NR 173), which means that the outcome in this case has already been decided for this Court.

[29] To succeed, the applicant therefore had to establish the equivalency between the text in issue in *Hasan* and the wording of section 6.3 of Annex L (and of its companion, section 10.11.4 of Annex E). Unfortunately for the applicant, the texts are not even similar, let alone equivalent. The text in issue in *Hasan* is reproduced at paragraph 15 of that decision. It reads as follows:

> 24.(1) An appellant or the appellant's representative shall be provided access, on request, to any document that contains information that pertains to the appellant or to the successful candidate and that may be disclosed before the appeal board.
>
> (2) The appropriate deputy head may provide, on request, to the appellant or to the appellant's representative a copy of any document referred to in subsection (1).
>
> (3) Where the appropriate deputy head refuses to provide a copy of a document, the appellant or the appellant's representative may request that the appeal board order that a copy of the

> document be provided to the appellant or the appellant's representative.

[30] As can be seen, the language in itself does not in any way limit access to a representative. Contrary to section 6.3, it provides for broad disclosure. It therefore comes as no surprise that Justice Richard, then of this Court, refused to interpret the regulation's language as restricting access to information concerning the appellant. He nevertheless declared that there was an inherent limit in the language of the regulation because access is given only to documents containing information about the appellant and the successful candidate. This is why the "manual for assessors" was excluded. It should be noted that the Court specified that "[t]he Commission is entitled to control the circumstances under which the material is viewed, including an undertaking of non-disclosure and control over any notes taken".

[31] The Federal Court of Appeal rejected the Attorney General's argument that disclosure could be made either to the appellant or to his representative at the option of the employer, given that disclosure must be made "on request", which according to the Court Appeal indicated that that the option, assuming one to exist, belongs to the appellant or his representative.

[32] I do not think that these decisions go any further than that. They depend on the language of section 24 of what was then the *Public Service Employment Regulations*, SOR/2005-334. *Stare decisis* would apply only if the language of section 6.3 of Annex L were equivalent. The decisions are of no assistance to the applicant in his argument.

[33] The two texts are very different. Section 6.3 speaks of a disclosure to an employee, including the employee's results, but excludes among other things information that could compromise security or integrity. This was neither the purpose nor within the scope of section 24 at that time.

[34] Here, the applicant based his argument on *Hasan* to demand access to [TRANSLATION] "a copy of my exam, the notes that the assessors and markers took, the answer grid and any other relevant documents so that I can fully exercise my right to recourse". Clearly, the CRA concluded that some of these documents, presumably apart from the applicant's own results, fell under the provision in section 6.3 that allows the CRA to exclude information likely to compromise security or the integrity of a standardized assessment tool. Section 10.11.4 states that test material, including the scoring guide, shall not in any way be disclosed, so as to ensure continued use of the standardized tool. Unless sections 6.3 and 10.11.4 themselves are challenged, which is not the case here, they must be considered to be fully applicable.

[35] The applicant tried to find some relevance in case law from after *Hasan* (*Murphy v Canada (Attorney General)*, [1999] 2 FC 326; *Jain v Canada (Attorney General)*, 1999 CanLII 8510; *Canada (Attorney General) v Gill*, 2001 FCT 814). These cases pose the same problem as *Hasan*. They are based on a regulatory scheme that is different from the one that applies in this case.

[36] Similarly, the applicant did not dispute that the documents he wanted disclosed are covered by the exclusion clause in section 6.3. In fact, his argument seems to acknowledge that

he is seeking access [TRANSLATION] "to privileged materials". He argues, however, that he should be given access without having to go through a representative. The problem is that section 6.3 does not appear to give him access to these protected materials. Since he has not argued, let alone proved, that the desired information could not compromise security or the integrity of an assessment tool, and since he has not argued that section 6.3 is deficient in any way, it must be concluded that the applicant's argument can succeed only if he could show, first of all, that he himself was entitled to the protected information. He did not do so. The language of section 6.3 is definitely restrictive, but it is all we have to go on to evaluate the right to access. In my view, access to what the applicant himself called [TRANSLATION] "protected materials" is clearly excluded, and the applicant did not try to draw any distinctions with regard to the status of the documents.

[37] The applicant spent some time arguing that the disclosure regime under the *Public Service Staffing Tribunal Regulations*, SOR/2006-6, cannot apply in this case. He cites some case law on this point. However, the respondent never said that it does (*Johal v Canada (Revenue Agency)*, 2008 FC 1397). It is the language of section 6.3 of Annex L that is relied on, and if it is valid, it must be given full effect. The *Public Service Staffing Tribunal Regulations* are quite simply irrelevant for the purposes of this case. The respondent is not relying on them, as they apply in staffing processes other than the one in issue here.

[38] If it is true that the CRA offered the applicant selective disclosure through a representative of the applicant, it is because the CRA overstepped the disclosure ban found in section 6.3. The offer made to the applicant was obviously inspired by the conditional disclosure

permitted by the PSC when it administers its own tests. However, the respondent could not raise this process if the applicant was entitled to access because neither the *Public Service Staffing Tribunal Regulations* nor the agreement between the PSC and the CRA (with regard to the use and disclosure of the Simulation Test) could be enforced against applicant. They could only be used as inspiration in managing the disclosure that the CRA chose to offer. Indeed, the CRA's staffing process is independent of staffing processes in the rest of the public service, and a process stemming from other legislation cannot be binding on the CRA.

[39] As a result, the provisions enacted under the *Canada Revenue Agency Act* should fully apply. *Barton* certainly does favour disclosure, except with regard to so-called standardized tests, which have to remain protected. The effect of section 6.3 is to exclude "information that could compromise security or the integrity of any standardized assessment tool". The employer is not required to disclose. Whereas there is no obligation to in any way disclose documents that could compromise security and the integrity of a standardized tool, I do not see how the applicant could validly complain about more generous access and argue that the disclosure should be to him, not his representative. Yet this is what he is requesting. The applicant has not shown why the conditions should not be imposed, since the starting point is that no disclosure need be made. His argument must fail.

[40] In the alternative, in his second argument, the applicant submits that the conditions imposed are not needed to maintain security and the integrity of a standardized tool. He writes at paragraph 56 of his Memorandum of Fact and Law that

> [TRANSLATION]
> . . . it is precisely this that is recognized in the CRA's *Directive on Recourse for Assessment and Staffing*, which requires the disclosure of relevant documents unless disclosure "could compromise security or the integrity of any standardized assessment tool".

[41] With respect, this argument stems from a reading of section 6.3 that is, in my view, inappropriate. The language of the section does not speak of a disclosure that could compromise security or integrity, as the applicant says, but it does state that information that could compromise security or the integrity of any standardized assessment tool is excluded. There is no reference to conditions to be imposed where a disclosure of such information could be considered. As I explained above, section 6.3 excludes the disclosure of information that could compromise security or integrity. It does not give access to such information. As I read it, the language of section 6.3 is plain. It creates a duty to disclose information that is relevant to the employee who is seeking recourse but excludes information that could compromise security or the integrity of any standardized assessment tool. This means that the disclosure of such information is not contemplated by this section. If we assume that the information sought in this case could compromise security or the integrity of a tool, the analysis of section 6.3 could end here.

[42] The applicant relies on *D'Urzo v Canada (Revenue Agency)*, 2011 FC 951 [*D'Urzo*], a decision of Justice Near, then of this Court. Contrary to what the applicant argues, the Court in *D'Urzo* did not conclude that it was the policy itself that allowed access to the "Assessment Worksheets" in that case. Rather, the Court applied the administrative law doctrine of legitimate expectations to order access. Justice Near stated as follows at paragraph 39:

> [39] Although not argued by the Applicants, the doctrine of legitimate expectations essentially provides that if an administrative body makes promises regarding the procedure it follows, it will be unfair if the body does not follow that expected procedure in a given case (*Baker*, above, at para 26). In the present matter, the Applicants should have been able to review the Assessment Worksheets during Individual Feedback and prior to Decision Review. It would be important for the Applicants to access the information contained therein in order to establish arbitrary treatment. Justice O'Keefe stated in *Ng*, above, that the CRA's recourse program vests the decision-maker with "the discretion to ensure that disclosure is provided where necessary to ensure that procedural fairness is not violated," (at para 35).

No attempt was made to raise this doctrine in the case at bar.

[43] In fact, as the applicant himself noted, the situation in the case at hand was a first, and the employer could not have created a legitimate expectation. Rather, the applicant's argument, once refined, is that some of the disclosure conditions went too far. Objections were raised to the confidentiality clause, which states that an action in damages could be instituted if the clause is breached. As I have explained, section 6.3 does not permit, as of right, disclosure of information that could compromise security or the integrity of any standardized assessment tool. However, should access be granted, could there be a valid objection to a condition that provides a remedy where the duty of confidentiality is breached by the recipient of the information that could compromise security or integrity? The applicant specifically objected to the clause providing as follows:

> [TRANSLATION]
> In the event of a breach of the undertaking made in this agreement, I acknowledge and agree that the Crown may exercise its right to sue for damages.

[44] This clause is found in the agreement to which a representative of the applicant must agree to act on his behalf. It is just one clause among many others whose purpose is to ensure security and the integrity of an assessment tool should the employer give access to information of this sort despite section 6.3.

[45] The applicant claims that he asked two people, including his spouse, to represent him and that they refused because of this clause.

[46] In my opinion, the evidence in the record would not meet the burden of proving that the conditions imposed constitute a constructive refusal to provide the protected information that the applicant would have. Anyone who contracts an obligation may expect to be penalized for not honouring it. Mr. Veillette claims a "chilling effect". It also stands to reason that it is worth reminding someone who contracts an obligation of the importance of their undertaking and of the consequences that may flow from not honouring it. Such reminders are not unusual. Even if section 6.3 did not exist, I would not have concluded that the clause in question breaches procedural fairness because it has not been proven that, owing to its severity, it indirectly prevents the already limited access to confidential information. This clause is merely the natural consequence of the representative's undertaking to keep the information confidential.

[47] The applicant made no attempt to explain how someone who agrees to become his representative and to keep the information received confidential could object to such a clause, which is only of incidental significance. As noted at paragraph 30 of these reasons,

Justice Richard stated in *Hasan*, a case upon which the applicant relied heavily, that the non-disclosure undertaking is one possible means of controlling the circumstances of a disclosure.

[48] Needless to say, this was a key concern in *Barton*, above, where the Court appeared to recognize outright that the use of representatives could permit access to confidential information. The Court noted the need to avoid violations of confidentiality and to penalize them. The Court concluded that the condition of using a representative who would be compelled to uphold confidentiality is not a mechanism that would render procedural fairness illusory. The Court foresaw the difficulties that disclosure in common law could cause. In my view, the use of representatives is explicitly accepted in that case, but the Court is clearly troubled by the possibility that confidential information might be disclosed. The Court thus outright accepted the imposition of conditions and considered what penalties could be stipulated and, presumably, imposed. The Court went so far as to consider the power to cite for contempt of court or, if the individual is a member of a professional corporation, the ability to refer the case for disciplinary action.

[49] Finally, should the Court find that there was no breach of procedural fairness, it is submitted that it was unreasonable to reject the request for review.

[50] In my opinion, the decision of the Assistant Commissioner meets the reasonableness standard (*Dunsmuir*, para 47). It falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. He considered the applicant's arguments, apart from

the one concerning access to protected materials, and I do not see any grounds for criticizing him. Moreover, the applicant did not attack the decision in this regard.

[51] As for access to protected materials, to the extent that the applicant refuses to submit to the conditions for disclosure, it is hard to see how the decision maker can be criticized on the basis of the reasonableness of the decision, a much lower standard than correctness. Insofar as the guidelines provided that non-disclosure of protected information was the rule, a disclosure under conditions—reasonable ones, at that, if we refer to *Barton*, and even *Hasan*—does not sit well with an attack based on a lack of reasonableness. It is strictly speaking the applicant's choice not to accept the conditions, which are consistent with *Barton*.

V. Conclusion

[52] The applicant in this case went to great lengths in trying to evade section 6.3 of Annex L. He instead wanted to rely on case law relating to other regulatory texts. However, if section 6.3 was validly adopted, which is not in dispute, it must be taken into consideration, as the section constitutes the text defining the scope of the duty to disclose. This duty is limited to information that could not compromise security or the integrity of a standardized assessment tool, and there is no disputing that the information in issue here could compromise the integrity of the tool.

[53] The authorized persons are therefore not required to disclose. The disclosure proposed by the CRA, which in my view was desirable, was designed to offer more information than what the CRA was required to disclose. The CRA cannot be faulted for that. In the circumstances, the applicant cannot complain about the conditions imposed on him, especially since these

conditions are largely based on the conditions imposed elsewhere to protect the same type of standardized assessment tools.

[54] The application for judicial review must therefore be dismissed. The parties agreed that, in any event of the cause, costs in the amount of $3,000 could be awarded. The Court therefore awards costs in the amount of $3,000 in favour of the respondent, the Canada Revenue Agency.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review must be dismissed, and the Court awards costs in the amount of $3,000 to the respondent.

"Yvan Roy"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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