

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230621

Docket: A-99-22

Citation: 2023 FCA 144

**CORAM: STRATAS J.A.
LASKIN J.A.
MONAGHAN J.A.**

BETWEEN:

KATHRYN CHIN

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Calgary, Alberta, on June 21, 2023.
Judgment delivered from the Bench at Calgary, Alberta, on June 21, 2023.

REASONS FOR JUDGMENT OF THE COURT BY:

MONAGHAN J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Calgary, Alberta, on June 21, 2023).

MONAGHAN J.A.

[1] In March 2021, the appellant, Kathryn Chin, submitted a request for personal information to the Canadian Security Intelligence Service (CSIS). In its response, CSIS advised Ms. Chin that it would neither confirm nor deny the existence of any personal information in the CSIS information bank designated PPU 045 (CSIS Investigational Records) and that, if information

did exist, it would be exempt from disclosure pursuant to sections 21 and/or 22(1)(a) or (b) of the *Privacy Act*, R.S.C. 1985, c. P-21.

[2] After the Office of the Privacy Commissioner determined that Ms. Chin's complaint about this CSIS decision was not well-founded, Ms. Chin sought judicial review in the Federal Court.

[3] The Federal Court concluded that CSIS reasonably determined that any actual or hypothetical records in PPU 045 were exempt from disclosure and dismissed her application for judicial review (2022 FC 464 *per* Justice Fothergill). Ms. Chin appeals that decision to this Court.

[4] Before giving our decision on the appeal, we must address one preliminary matter. Ms. Chin brought a motion to adduce new evidence that she submits demonstrates that the CSIS search that led to the decision under review was neither complete nor timely and so unreasonable.

[5] Ms. Chin has not satisfied the test for the admission of new evidence: *Palmer v. R.*, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212 at 775 S.C.R. Importantly, the new evidence does not bear on a decisive or potentially decisive issue and, even if admitted, would have no effect on the outcome of this appeal. This is so because the only decision under review is the CSIS decision relating to personal information, if any, in PPU 045. The new evidence concerns the CSIS response to Ms. Chin's request for personal information as might exist in a different information

bank—PPU 035 (Complaints Against CSIS or its Employees). That response was not the subject of the judicial review application before the Federal Court and is not the subject of this appeal.

As a result, the motion to admit new evidence will be dismissed.

[6] We turn now to the appeal. On an appeal from a judicial review by the Federal Court, we must decide whether the Federal Court identified and then properly applied the correct standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 45.

[7] In our view, it did. Put another way, we agree with the Federal Court that the CSIS decision regarding PPU 045 is to be reviewed on a standard of reasonableness. We also agree, substantially for the reasons given by the Federal Court, that CSIS reasonably concluded that any records that did exist were exempt from disclosure and CSIS was not required to state whether PPU 045 contained any records relating to Ms. Chin.

[8] On appeal, Ms. Chin also submits her procedural fairness rights were violated because the hearing was not held *in camera*. Court proceedings are presumptively open to the public: *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361. The Supreme Court of Canada has consistently said the power to impose limits on open and accessible court proceedings must be exercised with care and restraint: *Rémillard v. Canada (National Revenue)*, 2022 FCA 63 at para. 49, and cases there cited. An *in camera* hearing is exceptional.

[9] We agree with Ms. Chin that the *Privacy Act* requires the Federal Court to take reasonable precautions to avoid disclosure of certain information. However, to do so, the *Privacy Act* permits, rather than mandates, an *in camera* hearing in appropriate circumstances. It does not limit the means by which a reviewing court fulfils its duty to take the precautions not to disclose the relevant information. In this circumstance, the Federal Court exercised its duty by accepting the secret CSIS evidence on an *ex parte* basis. Section 51 of the *Privacy Act* mandates an *in camera* hearing in very limited circumstances. The judicial review here is not one of those. We see no error or breach of procedural fairness.

[10] Finally, as she did before the Federal Court, Ms. Chin submits to us that CSIS violated her rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c. 11 [Charter]*.

[11] The Federal Court noted that a *Charter* challenge to government acts or omissions must be supported by evidence that those acts or omissions may have caused the harm (reasons at para. 28). While the Federal Court expressly stated it was neither confirming nor denying the existence of relevant records in PPU 045, it also said it saw no evidence suggesting any involvement or acquiescence by CSIS in attempts to harm Ms. Chin (reasons at para. 26). For purposes of making this finding, the Federal Court had available the secret evidence filed by CSIS concerning the PPU 045 search results. We agree with the Federal Court's reasons for dismissing Ms. Chin's *Charter* challenge.

[12] In conclusion, sympathetic as we are to Ms. Chin's challenges, we will dismiss the motion to submit new evidence and the appeal. In these circumstances we will not award costs.

"K.A. Siobhan Monaghan"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE FOTHERGILL
DATED APRIL 5, 2022, DOCKET NO. T-1219-21**

DOCKET: A-99-22

STYLE OF CAUSE: KATHRYN CHIN v. ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: JUNE 21, 2023

**REASONS FOR JUDGMENT OF THE COURT
BY:** STRATAS J.A.
LASKIN J.A.
MONAGHAN J.A.

DELIVERED FROM THE BENCH BY: MONAGHAN J.A.

APPEARANCES:

Kathryn Chin FOR THE APPELLANT
ON HER OWN BEHALF

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