

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140203

Docket: A-229-13

Citation: 2014 FCA 30

**CORAM: DAWSON J.A.
STRATAS J.A.
NEAR J.A.**

BETWEEN:

PATRICK WHITTY

Appellant

and

**THE ATTORNEY GENERAL OF CANADA
AS REPRESENTED BY THE MINISTER OF THE
ENVIRONMENT**

Respondent

Heard at Toronto, Ontario, on February 3, 2014.

Judgment delivered from the Bench at Toronto, Ontario, on February 3, 2014.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on February 3, 2014)

STRATAS J.A.

[1] Mr. Whitty appeals from the judgment of the Federal Court (*per* Justice Snider): 2013 FC 595. The Federal Court dismissed his application for judicial review.

[2] This matter concerns Mr. Whitty's access requests to Environment Canada under the *Access to Information Act*, R.S.C. 1985, c. A-1.

[3] The Federal Court found that Mr. Whitty made three complaints to the Office of the Information Commissioner:

- (1) Mr. Whitty's first complaint concerned Environment Canada's assertion of a two hundred day extension of time to respond to his access request. In response to Mr. Whitty's complaint, the Office found the extension to be valid and reasonable. Mr. Whitty did not seek judicial review of the Office's finding.
- (2) Mr. Whitty's second complaint was made after Environment Canada had failed to respond to his access request within the two hundred day extension of time. Before the Office could issue its report concerning the complaint, Environment Canada responded to Mr. Whitty's request, redacting many portions of many documents based on exemptions to disclosure under the Act. The Office, viewing this complaint as being one about the failure to produce documents within the two hundred day extension of time, recorded the complaint as "resolved."
- (3) Mr. Whitty's third complaint concerned the redactions made by Environment Canada, purportedly based on exemptions to disclosure under the Act. Mr. Whitty made this complaint in June 2012.

[4] On July 23, 2012, just one month after making his third complaint to the Office, Mr. Whitty applied for judicial review in the Federal Court.

[5] The Federal Court characterized the application for judicial review as a challenge to Environment Canada's assertion of exemptions and the making of redactions – in other words, a judicial review concerning Mr. Whitty's third complaint. Mr. Whitty disagrees and submits that the judicial review in fact concerned the second complaint.

[6] The Federal Court's characterization of the application for judicial review is largely a factual matter. Accordingly, on appeal, Mr. Whitty must convince us that the Federal Court's characterization is vitiated by palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. He has not done so. The application asks for "complete" and "unredacted" copies of documents, matters that fell within the ambit of the third complaint. This is evidence upon which the Federal Court could rely in characterizing the application before it.

[7] We note that even if the application for judicial review concerned the second complaint, that complaint was resolved. An application for judicial review from it is moot and the Federal Court would have properly dismissed it on that ground.

[8] Having characterized the judicial review as being concerned with Mr. Whitty's third complaint, the Federal Court relied on section 41 of the Act and concluded that the application for judicial review was premature. Section 41 of the Act provides that a judicial review can be brought only after the Office has investigated and reported on the relevant complaint: see, e.g., *Statham v.*

Canadian Broadcasting Corporation, 2009 FC 1028 at paragraph 18, aff'd 2012 FCA 315. At the time the application for judicial review was brought, the Office had not even appointed an investigator to examine Environment Canada's assertion of exemptions and redactions to the documents. Section 41 of the Act is a statutory expression of the common law doctrine that, absent exceptional circumstances, all adequate and alternative remedies must be pursued before resorting to an application for judicial review. Since the Office had not completed its investigation and had not issued its report, in the Federal Court's view an application for judicial review did not lie.

[9] We see no grounds to interfere with the Federal Court's interpretation and application of section 41 to the facts of this case.

[10] Therefore, for the foregoing reasons, we will dismiss the appeal with costs. We note that after the Office investigates and reports on Mr. Whitty's third complaint, this decision is not a bar to a new application for judicial review from the Office's report.

“David Stratas”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-229-13

**APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE SNIDER OF THE
FEDERAL COURT, DATED JUNE 4, 2013, DOCKET NO. T-1423-12.**

STYLE OF CAUSE: PATRICK WHITTY v. THE
ATTORNEY GENERAL OF
CANADA AS REPRESENTED BY
THE MINISTER OF THE
ENVIRONMENT

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 3, 2014

REASONS FOR JUDGMENT OF THE COURT BY: DAWSON J.A.
STRATAS J.A.
NEAR J.A.

DELIVERED FROM THE BENCH BY:
STRATAS J.A.

APPEARANCES:

Patrick Whitty FOR THE APPELLANT
(ON HIS OWN BEHALF)

Jacqueline Dais-Visca FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada