Federal Court of Appeal | Cour d'appel fédérale

Date: 20210223

Docket: A-163-20

Citation: 2021 FCA 33

CORAM: **GAUTHIER J.A.**
BOIVIN J.A.
LOCKE J.A.

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

JAMIE J. GREGORY

Respondent

Heard by online video conference hosted by the registry, on February 22, 2021.

Judgment delivered at Ottawa, Ontario, on February 23, 2021.

REASONS FOR JUDGMENT BY: LOCKE J.A.

CONCURRED IN BY: GAUTHIER J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

LOCKE J.A.

[1] This is an appeal by the Minister of Public Safety and Emergency Preparedness from a decision of Bell J. of the Federal Court (2020 FC 667). The Federal Court converted the respondent's application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, into an application for judicial review under section 41 of the *Privacy Act*, R.S.C. 1985, c. P-21,

and dismissed the appellant's motion to strike Jamie J. Gregory's (the respondent's) notice of application (the Application).

[2] The respondent's Application concerns the failure of the Royal Canadian Mounted Police (R.C.M.P.) to provide to the respondent a video that he requested. Following a complaint to the Privacy Commissioner about the lack of a timely response, the Privacy Commissioner commenced an investigation, which resulted in a report finding the complaint well-founded: the R.C.M.P. had failed to respond to the respondent's request within the 30-day period contemplated in section 14 of the *Privacy Act*, and had not extended the 30-day period as contemplated in section 15. The respondent commenced his Application after receiving this report. Among other things, the Application seeks disclosure of a 2006 video.

[3] Shortly after the commencement of the Application, the R.C.M.P. provided a response to the respondent's initial request for the video. The response refused disclosure stating, in part:

> […] Please be advised that a review of the records located reveals that all of the information you have requested qualifies for an exemption pursuant to subparagraph 22(1)(a)(i) of the [*Privacy*] *Act* […]

[4] Subparagraph 22(1)(*a*)(i) of the *Privacy Act* permits the R.C.M.P. to refuse to disclose information "that was obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to … the detection, prevention or suppression of crime." The appellant brought its motion to strike shortly after the R.C.M.P. provided its response.

[5] Before our Court, the appellant essentially argues that the request for disclosure of the video is premature because the Privacy Commissioner has not addressed, and has not been asked to address, the R.C.M.P.'s claim for an exemption under subparagraph 22(1)(*a*)(i) of the *Privacy Act*. The appellant argues that the Application is therefore bereft of any chance of success.

[6] The respondent did not participate in the present appeal, but indicated that he agrees with the Federal Court's decision.

[7] It is trite that a decision to grant or refusal a motion to strike is discretionary. Hence, the appropriate standards of review are those set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at para. 72. Accordingly, conclusions of law are reviewable on the standard of correctness, whereas findings of fact and findings of mixed fact and law are reviewable on the standard of palpable and overriding error.

[8] It is not in dispute that one of the preconditions for commencing an application before the Federal Court under section 41 of the *Privacy Act* is that the applicant (the respondent here) must have received a report from the Privacy Commissioner concerning his request. The dispute concerns whether the report from the Privacy Commissioner in this case is sufficient since it does not address the exemption claimed by the R.C.M.P.

[9] The Federal Court attempted to address a number of Federal Court of Appeal and Federal Court cases indicating that a report from the Privacy Commissioner addressing the specific

exemption claimed is required. The Federal Court distinguished the Federal Court of Appeal decisions it cited (e.g. *Statham v. Canadian Broadcasting Corporation*, 2010 FCA 315, [2012] 2 F.C.R. 421; *Whitty v. Canada (Attorney General)*, 2014 FCA 30, 460 N.R. 372), and disagreed with certain prior Federal Court decisions (*Sheldon v. Canada (Health)*, 2015 FC 1385; *Cumming v. Canada (Royal Mounted Police)*, 2020 FC 271).

[10] I disagree with the Federal Court, both on the distinctions it drew and its disagreement with the prior Federal Court decisions. However, given that the respondent has been waiting for some time for a conclusion, it is not appropriate to make a long dissertation as to how and why this is so, nor to recite factual errors in the decision of the Federal Court. It is also unnecessary to address these issues in detail given my conclusion with respect to prematurity.

[11] In my view, the Federal Court made a palpable and overriding error in determining that it had jurisdiction based on its conclusion that the Privacy Commissioner's report dealt with more than the deemed refusal due to the passage of time (Federal Court's decision at paras 17, 18 and 34). Nothing in the Privacy Commissioner's report or correspondence suggests this. This conclusion was simply not open to the Federal Court.

[12] It is recalled that this Court's decision in *Blank v. Canada (Justice)*, 2016 FCA 189, concerned the *Access to Information Act*, R.S.C. 1985, c. A-1, rather than the *Privacy Act*, but the principles discussed therein apply to both: *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227, 47 Admin. L.R. (5th) 1 at para. 68. The Court in *Blank* discussed the importance

of prior consideration by the Information Commissioner (or the Privacy Commissioner in this case) before the Federal Court can rule on any exemption claim:

> [30] The case law has made it abundantly clear that a complaint to and a report from the Commissioner is a prerequisite before the Federal Court can rule upon the application of any exemption or exclusion claimed under the Act: see *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [1999] F.C.J. No. 522, 240 N.R. 244, at para. 27; *Statham v. Canadian Broadcasting Corp.*, 2010 FCA 315, [2012] 2 F.C.R. 421, at para. 55. As stated by my colleague Justice Stratas in *Whitty v. Canada (Attorney General)*, 2014 FCA 30, 460 N.R. 372, at para. 8, this requirement is a statutory expression of the common law doctrine that all adequate and alternative remedies must be pursued before resorting to an application for judicial review, barring exceptional circumstances.
>
> [31] […] The independent review of complaints by the Commissioner is a cornerstone of the statutory scheme put in place by Parliament, and the Federal Court is entitled to the considerable expertise and knowledge of that officer of Parliament before reviewing the government's assertions of exemptions and redactions of documents. I agree with the Judge, therefore, that the appellant could not unilaterally ignore this requirement and come directly to the Court.
>
> [32] It is no excuse to assert that the respondent breached its duty to act in good faith by failing to make a complete and timely response to the appellant's access request, and that the attachments should have been caught by the initial access request made by the appellant. … Section 41 of the Act makes it clear that the Federal Court may only review a refusal to access personal information after the matter has been investigated by the Privacy Commissioner. Accordingly, the Judge correctly concluded he was without jurisdiction to review the documents disclosed after the Commissioner's report.

[13] Accordingly, there must be a report from the Privacy Commissioner on the validity of the R.C.M.P.'s exemption claim before the Federal Court may order the disclosure of the video in question. On the facts of this case, there is no report to ground the Federal Court's jurisdiction to examine the merits of the refusal. Therefore, I agree with the appellant that the Application is indeed premature, and the notice of application must be dismissed.

[14] I expect that the respondent will find this result extremely disappointing. The nominal period for disclosure under the *Privacy Act* is 30 days. In this case, the respondent has now been pursuing disclosure for over two years with nothing to show for it except an unexamined exemption claim by the R.C.M.P. Moreover, no reasons have been provided for the delay in this case. That said, there is no deadline in the *Privacy Act* for making a new complaint to the Privacy Commissioner about the R.C.M.P.'s exemption claim based on section 22 of the *Privacy Act*. That option remains open to the respondent. Once the Privacy Commissioner has issued a report on such a complaint, the respondent will be in a position to restart his efforts to obtain relief before the Federal Court, assuming he has not already obtained such relief from the Commissioner.

[15] For the reasons discussed above, I would allow the appeal, without costs. I would quash the judgment of the Federal Court, and grant the appellant's motion to strike the notice of application, again without costs.

"George R. Locke"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-163-20
STYLE OF CAUSE:	MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. JAMIE J. GREGORY
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	FEBRUARY 22, 2021
REASONS FOR JUDGMENT BY:	LOCKE J.A.
CONCURRED IN BY:	GAUTHIER J.A. BOIVIN J.A.
DATED:	FEBRUARY 23, 2021

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