Federal Court of Appeal | Cour d'appel fédérale

Date: 20160623

Docket: A-378-15

Citation: 2016 FCA 189

CORAM: **DAWSON J.A.**
RYER J.A.
DE MONTIGNY J.A.

BETWEEN:

SHELDON BLANK

Appellant

and

THE MINISTER OF JUSTICE

Respondent

Heard at Winnipeg, Manitoba, on February 29, 2016.

Judgment delivered at Ottawa, Ontario, on June 23, 2016.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: DAWSON J.A.
RYER J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal from a decision of Justice Brown (the Judge) of the Federal Court dated June 16, 2015 (2015 FC 753), wherein he dismissed the appellant's application under section 41 of the *Access to Information Act*, R.S.C. 1985, c. A-1 (the Act) for judicial review of the Department of Justice's (DOJ) decision to deny him access to portions of the requested records dealing with ongoing civil litigation between the parties.

[2] For the reasons that follow, I have come to the conclusion that the appeal should be dismissed for the following reasons.

I. Facts

[3] The relevant facts were set out quite thoroughly by the Judge in his reasons. I shall therefore only refer to the facts that are pertinent for the purpose of this appeal.

[4] The appellant was the owner of a paper mill that was operated by his company, Gateway Industries Ltd., in the City of Winnipeg. In 1995, the appellant and his company were charged with 13 violations under the *Fisheries Act*, R.S.C. 1985, c. F-14 by way of summary conviction proceedings. Eight of those charges were quashed on April 4, 1997, as they failed to identify the place at which the offences allegedly occurred: see *R. v. Gateway Industries Ltd.*, [1997] M.J. No. 185, [1997] 7 W.W.R. 120.

[5] On April 10, 2001, the remaining five charges were held to be nullities because of the absence of a certificate establishing when the Minister of Fisheries became aware of the alleged violations: *R. v. Gateway Industries Ltd.*, 2001 MBQB 106, [2001] M.J. No. 172. The Crown then chose to continue with those five charges by way of indictment and accordingly laid new charges in July of 2002. On February 4, 2004, the Crown decided to stay the prosecution. By that time, the mill was no longer in operation.

[6] In May of 2002, the appellant and his company commenced a civil action against the respondent and certain of her employees and agents alleging abuse of process in respect of the

13 aforementioned criminal charges. This lawsuit is still ongoing and is defended by the DOJ and its outside counsel.

[7] On November 30, 2006, the appellant made a request under the Act for:

> All records and communications dealing with or referring to the civil litigation involving Sheldon Blank and Gateway Industries Ltd. (Manitoba Court of Queen's Bench File CI 02-01-28295) from Rod Garson to anyone, or from anyone to Rod Garson. This request includes Rod Garson's notes made on this subject.

[8] Mr. Garson was the Crown counsel with the Federal Prosecution Service (FPS) who, at least for some period of time, was responsible for carriage of the prosecution.

[9] On March 14, 2007, the DOJ first sent 194 redacted pages that formed, in its view, the releasable documents relevant to the appellant's access request, claiming the personal information (section 19), advice or recommendations (section 21(1)(a)), consultations or deliberations (section 21(1)(b)) and solicitor-client privilege (section 23) exemptions of the Act. The appellant complained to the Office of the Information Commissioner (the Commissioner) on the grounds that the DOJ improperly severed the records and wrongfully applied the exemptions. In response to the appellant's complaint to the Commissioner, the DOJ subsequently agreed to release two other sets of documents. On November 10, 2009, the Commissioner reported the result of its investigation to the appellant and declared itself satisfied that the DOJ had properly applied the exemptions.

[10] On December 9, 2009, the appellant applied to the Federal Court for judicial review of the DOJ's decision to deny him access to portions of the requested records. On August 30, 2010,

the DOJ disclosed 111 pages of documents that were attachments to previously released documents. These documents were said to have been inadvertently omitted (the attachments). All but 27 of the 111 pages were redacted as the DOJ continued to claim the same exemptions under the Act as claimed in its 2007 release of documents. The appellant has not made a complaint to the Commissioner in respect of the redacted attachments.

[11] The issue of the Federal Court's jurisdiction to review the disclosure of those attachments was raised before the case management judge who deferred it to the application judge.

II. Decision of the Federal Court

[12] Referring to an earlier decision of the Federal Court involving the same parties (*Blank v. Canada (Minister of Justice)*, 2009 FC 1221, 373 F.T.R. 1, at para. 31 (*Blank 2009*)), the Judge found that the jurisprudence had already determined in a satisfactory manner the applicable standard of review with regard to the respondent's decision to refuse to release information pursuant to the application of a discretionary exemption under the Act: correctness for the decision that the withheld information falls within the statutory exemptions and reasonableness for the discretionary decision to refuse to release exempted information.

[13] On the application for judicial review the Judge did not consider two affidavits dated July 11, 2013 and February 28, 2013 which had been filed by the appellant in support of prior interlocutory motions; those affidavits had become spent when the motions were decided and no proper request to introduce them in the record of the current application had been made. In the

Judge's view the respondent was entitled to know the case it had to respond to. In addition, the appellant waited until the end of the hearing before requesting leave to file the affidavits, which, in the Judge's opinion, was far too late.

[14] Turning to the question of the Federal Court's jurisdiction to review the attachments, the Judge stressed that the appellant had not asked the Commissioner to review or report on the redaction of those documents. The Judge held that the failure to do so had the effect of barring the appellant from seeking the Federal Court's review because, according to section 41 of the Act, a complaint to the Commissioner is a condition precedent to the Court's jurisdiction.

[15] As for the question of the application of the exemptions pursuant to the Act, the Judge specified that, although the decision under review was the DOJ's, the Commissioner's findings were owed considerable deference given his expertise with respect to access to information. The Commissioner found that the information withheld under subsection 19(1) met the definition of "personal information" and that none of the conditions allowing for the disclosure of personal information contained in subsection 19(2) applied. Having reviewed the redacted documents, the Judge came to the same conclusion.

[16] The Judge also decided, as had the Commissioner, that solicitor-client privilege was correctly claimed and that the DOJ had properly exercised its discretion not to waive the exemption. The Judge highlighted that litigation privilege was still alive in respect of the ongoing civil litigation, as opposed to litigation privilege attached to the criminal proceedings that terminated with the stay of the remaining charges in 2004.

[17] Addressing the appellant's complaint that documents may be missing, the Judge stated that the Federal Court has no jurisdiction to order a more thorough search and disclosure and that he had no reason to believe the integrity of the record had been tampered with.

[18] The Judge then reviewed the exceptions to solicitor-client privilege as stated by the Supreme Court in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319 (*Blank SCC*) and *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574 (*Blood Tribe*). After reviewing the documents in question the Judge concluded there was no evidence of abuse of process or similar blameworthy conduct which would vitiate solicitor-client privilege.

[19] Since the Judge found that the non-disclosure was justified by solicitor-client privilege, it was not necessary to deal with the advice, recommendation and consultation exemptions of the Act. In any event, the Judge was satisfied that the records fell within the exemptions claimed and that exempted portions of the record had been severed in a proper manner.

[20] Finally, the Judge fixed and awarded costs payable by the appellant to the respondent in the amount of $7,000 all inclusive.

III. Issues

[21] I agree with the respondent that this appeal raises the five following questions:

A. Did the Judge err by refusing to consider the appellant's two affidavits?

B. Did the Judge err by concluding that the Federal Court lacked jurisdiction to review the redaction of the attachments released by the respondent on August 30, 2010, because there was neither a complaint to, nor a review by, the Commissioner in respect of these redactions?

C. Did the Judge err by concluding that the Federal Court lacked jurisdiction to order a further search?

D. Did the Judge err by deciding that the redacted portions of the record were protected by solicitor-client privilege?

E. Did the Judge err in his award of costs?

IV. Standard of review

[22] In an appeal from an application for judicial review, the task of this Court is to assess whether the Federal Court correctly selected the standard of review and then properly applied it: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 47; *Erasmo v. Canada (Attorney General)*, 2015 FCA 129, [2015] F.C.J. No. 638, at para. 25.

[23] Contrary to the respondent's submission, this Court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard: *Telfer v. Canada Revenue Agency*, 2009 FCA 23, [2009] F.C.J. No. 71, at para. 18 (*Telfer*). On the contrary, the Supreme Court has held that a court sitting in appeal of a lower court's judgment on an application for judicial review of an administrative decision should "step […] into the shoes" of the lower court and review for itself the administrative decision on the

correct standard of review: *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610, at para. 14, cited in *Merck Frosst Canada Ltd v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247; see also *Telfer*, at para. 18.

[24] When reviewing a decision to withhold information pursuant to section 23 of the Act, it is well established that two standards of review must be applied as two separate determinations must be made: correctness for the decision that the withheld information falls within the statutory exemption, and reasonableness for the discretionary decision to refuse to release exempted information: see *Blank 2009*, at paras. 27-31; *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 F.C.R. 421, at para. 47. The Judge correctly identified those standards of review at paragraph 27 of his reasons, and the appellant has not challenged that portion of his decision.

[25] As for the other issues raised in this appeal, they pertain to decisions made by the Judge himself and not to his review of decisions made by the respondent. Accordingly, the applicable standard of review for those issues is the appellate standard of review stated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Therefore, to succeed on this appeal the appellant must persuade us that the Federal Court erred on a pure question of law or on a question of law that can be extracted from a question of mixed fact and law. In the absence of this sort of legal error the appellant can succeed only if he demonstrates palpable and overriding error.

V. Analysis

A. *Did the Judge err by refusing to consider the appellant's two affidavits?*

[26] The appellant stresses that he is a lay person, and that many of the documents that would have been introduced in the record as attachments to his affidavits of July 11, 2011, and February 28, 2013, were documents received from the respondent. As a result, they would not have prejudiced the respondent and would have been useful to the Court, as they would have shown that the respondent knowingly withheld relevant records and thus acted in bad faith.

[27] In my view, the appellant has failed to establish an error in the Judge's exercise of discretion. As noted by the Judge, the appellant must be presumed to have some knowledge of the process to be followed as he has filed many applications for judicial review and appeals before the Federal Court and this Court. More importantly, those affidavits had been previously filed by the appellant in support of interlocutory motions before a prothonotary, and these motions had been disposed of at the time of the hearing of the application for judicial review. To that extent, they were spent and did not form part of the appellant's record on the current judicial review application.

[28] Rule 306 of the *Federal Courts Rules*, S.O.R./98-106 makes it clear that affidavits in support of an application for judicial review must be filed within 30 days of the date the notice of application was filed. It is true that with leave of the Court, a party may file additional affidavits. In the case at bar, the Judge refused to grant leave because the request was not timely (it was made on the last day of a two and a half day hearing) and because it would have been

procedurally unfair to the respondent who was entitled to know the case he had to respond to. Despite the appellant's assertions to the contrary, I see no reviewable error in the Judge's ruling.

B. *Did the Judge err by concluding that the Federal Court lacked jurisdiction to review the redaction of the attachments released by the respondent on August 30, 2010, because there was neither a complaint to, nor a review by, the Commissioner of these redactions?*

[29] The Federal Court lacked jurisdiction to conduct a review of the 2010 release because the appellant had not previously made a complaint to the Commissioner about the release as referenced by section 41 of the Act:

Review by Federal Court	**Révision par la Cour fédérale**
41 Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.	41 La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.
(emphasis added)	(soulignement ajouté)

[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] In the case at bar, not only has the appellant not filed a complaint with the Commissioner with respect to the additional 111 pages disclosed to him on August 30, 2010, but he took this course of action with his eyes wide open. As mentioned by the Judge, the appellant was advised by the respondent that this was contrary to section 41 of the Act, but he nevertheless chose not to avail himself of his right to file a complaint. He must now bear the consequences. 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. There is, indeed, some evidence that the respondent knew about the missing attachments as early as February 22, 2007 and acknowledged that they were relevant to the request (Appeal Book, p. 2135). Whatever the reason for not disclosing them before the filing of the application for judicial review, the fact remains that the records involved (111 pages minus 27 pages that were

released in their entirety) were not reviewed by the Commissioner and no determination was made as to whether they were properly redacted. 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.

C. *Did the Judge err by concluding that the Federal Court lacked jurisdiction to order a further search?*

[33] The appellant made allegations before both the Commissioner and the Federal Court that documents may be missing or could have been tampered with. He made this bold statement on the basis that the attachments were originally withheld from him, and that some documents were "sanitized" when originally disclosed to him so as to hide the icons on the originals that indicated some documents contained attachments. As a result, he asked both the Federal Court and this Court to order "a new and proper search for the records relevant to the request".

[34] Relying on the authorities of *Blank v. Canada (Minister of the Environment)*, [2000] F.C.J. No. 1620, 2000 CanLII 16437 (F.C.T.D.) (*Blank 2000*) and *Blank v. Canada (Minister of Justice)*, 2004 FCA 287, [2005] 1 F.C.R. 403 (*Blank 2004*), the Judge found that the Court had no jurisdiction to make such an order in the absence of any grounds to believe that the integrity of the records had been tampered with. Having carefully read the unredacted version of the documents relied upon by the appellant in support of his allegation that the respondent did not act in good faith, I am unable to find in his favour. While the decision to remove (instead of blacking out) the icons that demonstrated the existence of attachments on some documents may have been ill advised, the record shows that this course of conduct was initially followed on the

belief that these attachments were privileged and some icons disclosed privileged information. This record does not establish that the respondent tampered with the documents or tried to evade its obligations under the Act.

[35] As noted by the Court below, the appellant has filed 96 access requests and the DOJ had reviewed 61,312 pages as of January 2010. In that context, it is not surprising that some documents may have been missed in the early stages of the gathering process or been discovered on an ongoing basis. I also note that the appellant has repeatedly asked for a more thorough search and disclosure over the last 15 years on the basis that documents were missing, and that such allegations and requests have been dismissed on every occasion by this Court and the Federal Court: see e.g. *Blank 2000*, at paras. 9, 15 and 19; *Blank 2004*, at paras. 76-77; *Blank v. Canada (Minister of Environment)*, 2006 FC 1253, [2006] F.C.J. No. 1635, at para. 33(g), aff'd 2007 FCA 289, [2007] F.C.J. No. 1218; *Blank v. Canada (Minister of Justice)*, 2015 FC 956, [2015] F.C.J. No. 949, at para. 56 (*Blank 2015*).

[36] Once again, the primary oversight role under the Act remains with the Commissioner. The Federal Court's role is narrowly circumscribed; section 41, when read in conjunction with sections 48 to 49, confines its reviewing authority to the power to order access to a specific record when access has been denied contrary to the Act. Unless Parliament changes the law, it is not for the Court to order and supervise the gathering of the records in the possession of the head of a government institution or to review the manner in which government institutions respond to access requests, except perhaps in the most egregious circumstances of bad faith. On the basis of the confidential record that is before me, I have been unable to find evidence that would lead me

to believe, on reasonable grounds, that there has been any attempt to tamper with the integrity of the records. Accordingly, the Judge did not err in concluding that he lacked jurisdiction to order a further search of the records.

D. *Did the Judge err by deciding that the redacted portions of the record were protected by solicitor-client privilege?*

[37] The appellant argues that the Judge erred in finding that the exempted or redacted portions of the record fell within the solicitor-client exemption set out in section 23 of the Act for two reasons. First, the privilege was spent since these documents were created for the dominant purpose of the criminal proceedings and these proceedings have been stayed. Second, the appellant contends that the privilege has been vitiated by an abuse of process to the extent that the Crown agent made an inappropriate offer to withdraw the charges in the criminal proceedings in exchange for a withdrawal of the civil liability claims.

[38] Solicitor-client privilege has evolved over time from a rule of evidence to a rule of substantive law: *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860, 141 D.L.R. (3d) 590 (*Descôteaux*). The rule has even been held to be "a fundamental civil and legal right" (*Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 839, 105 D.L.R. (3d) 745 (*Solosky*)), and Chief Justice Lamer went as far as saying that "the relationship and the communications between solicitor and client are essential to the effective operation of the legal system" (*R. v. Gruenke*, [1991] 3 S.C.R. 263 at p. 289, [1991] 6 W.W.R. 673).

[39] Solicitor-client privilege breaks down into two different privileges each with a distinct rationale, scope and duration. Professor Sharpe (as he then was) has captured the differences between litigation privilege and solicitor-client privilege:

> It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
>
> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).
>
> [R.J. Sharpe, "Claiming Privilege in the Discovery Process", in *Law in Transition: Evidence – Special Lectures of the Law Society of Upper Canada* (Don Mills, Ont.: Richard De Boo, 1984) at pp. 164-165, quoted in *Blank SCC*, at para. 28.]

[40] Even though litigation privilege is not explicitly included in section 23 of the Act, the Supreme Court has confirmed in *Blank SCC* that the phrase "solicitor-client privilege" in that section must be taken as a reference to both legal advice privilege and litigation privilege (*Blank SCC*, at paras. 3-4). That being said, the Supreme Court also made it clear that litigation

privilege attaches to documents created for the dominant purpose of litigation and expires when the litigation ends (see *Blank SCC*, at paras. 35-37, 58-60). In this regard, the Supreme Court has cautioned that litigation should be defined broadly to include "separate proceedings that involve the same or related parties and arise from the same or a related cause of action" (*Blank SCC*, at paras. 38-39). Nonetheless, criminal prosecutions and civil lawsuits spring from two different juridical sources and are, to this end, unrelated (*Blank SCC*, at para. 43).

[41] In the case at bar, exemptions are claimed on the basis of both legal advice and litigation privilege. The majority of the withheld records (or portions thereof) are communications either to or from counsel with the DOJ or the law firm defending the appellant's civil claim which discuss the civil litigation. This should come as no surprise, considering the wording of the appellant's access request. Since that civil lawsuit is currently before the Manitoba Court of Queen's Bench against the respondent, her employees and agents, the litigation is still alive and litigation privilege still exists and applies.

[42] Some of the records were created in the course of the prosecution but they are intertwined with discussions of the civil claim. Again, this is to be expected since the civil claim was commenced two years before the prosecution was stayed. It follows that these records are also protected from disclosure by litigation privilege. Only a few of the documents relate exclusively to the criminal prosecution and deal with the decision to stay the charges. These documents are discussed below.

[43] Accordingly, I agree with the Judge that the exemptions claimed under section 23 were correctly invoked and that the DOJ reasonably exercised its discretion not to disclose the withheld portions of the record. Contrary to the situation considered by the Supreme Court in *Blank SCC*, the litigation at issue here is not the criminal prosecution, but the civil claim before the Manitoba courts. Since that litigation is still outstanding, litigation privilege still applies.

[44] As for the few documents pertaining exclusively to the criminal prosecution, notwithstanding the expiry of litigation privilege, these documents are nevertheless protected from disclosure by legal advice privilege. Four conditions must be met for a document (or a portion thereof) to be considered as legal advice giving rise to the privilege: 1) there must be a communication; 2) made in confidence; 3) with a professional legal advisor; 4) for the purpose of giving and receiving legal advice: see *Descôteaux*, at pp. 873-874; *Solosky*, at p. 837; *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 49, 171 D.L.R. (4th) 193 (*R. v. Campbell*).

[45] My careful review of the unredacted material has convinced me that all of the impugned records that relate exclusively to the criminal prosecution meet these four conditions. All of these records are letters, memoranda and e-mail communications that contain or refer to legal advice between government lawyers, Crown agents and departmental officials. As such, they fall within the ambit of legal advice privilege, which is permanent in duration.

[46] It is also necessary to consider the extent to which legal advice privilege attaches to the advice provided by government lawyers.

[47] In the seminal case of *R. v. Campbell*, the Supreme Court held that the privilege will arise when in-house government lawyers provide legal advice to their client, in that case the Royal Canadian Mounted Police. The Court went on to add, however, that the privilege will not protect policy advice given outside the realm of their legal responsibilities. As the Court stated, "[w]hether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered": *R. v. Campbell*, at para. 50; see also *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809.

[48] At the core of the impugned records is a memorandum written by a counsel from the FPS which dealt with the issue of whether to stay the criminal charges against Mr. Blank and his corporation. That memorandum was distributed among senior officials of the FPS and underwent a series of iterations. Then counsel within the Legal Services Unit (LSU) of Environment Canada were provided a version of that memorandum for comment. Since the appellant was charged with offences under the *Fisheries Act*, it would be reasonable for the FPS to seek input from and dialogue with that department before coming to any final decision. In response, the LSU prepared a memorandum for the FPS, notifying them of the department's views with respect to the proposed course of action. These two memoranda contain, at least in part, legal rationales outlining why a stay of proceedings was or was not warranted in the circumstances. Eventually, a revised finalized memorandum was forwarded to the Acting Senior General Counsel, Director, Criminal Law Section.

[49] In my view, these communications are protected by legal advice privilege. This is particularly the case in respect of the communications between Crown counsel from the FPS and the LSU at the Department of Environment. These communications clearly meet all the criteria developed in *Descôteaux*. They offered a confidential legal opinion regarding the ongoing prosecution, as evidenced by the fact that the opinion cited case law and legislation and outlined whether a stay was warranted. Indeed, the response from the LSU includes a statement that the e-mail is "PROTECTED BY SOLICITOR-CLIENT PRIVILEGE" and is "LIMITED TO THE DEPARTMENT OF JUSTICE ONLY". Moreover, the relationship between the FPS and Environment Canada is akin to a solicitor-client relationship. These communications related to legal advice provided by lawyers in one government department to lawyers working in another as part of the ongoing dialogue relating to the existing criminal charges. As such, they are cloaked by solicitor-client privilege and were appropriately withheld from the appellant.

[50] I believe the final version of the memorandum from Crown counsel to the Acting Senior General Counsel, Director, Criminal Law Section with respect to the issue of staying the charges is also covered by legal advice privilege. As previously mentioned, whether or not legal advice privilege attaches in the context of government lawyers giving advice as part of their responsibilities depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

[51] Pursuant to section 579 of the *Criminal Code*, R.S.C. 1985, c. C-46, "[t]he Attorney General or counsel instructed by him for that purpose" may direct a stay of proceeding at any time before a judgment is rendered. It is not entirely clear from the record who had the delegated

authority to make that decision on behalf of the Attorney General at the relevant period of time. Whether it was the Acting Senior General Counsel, Director, Criminal Law Section, the Assistant Deputy Attorney General or another senior official, a decision to stay a proceeding, just as a decision to prefer an indictment or to appeal, involves numerous considerations that are often of a different magnitude than the decision to lay charges.

[52] When legal advice is sought and obtained in this context a solicitor-client relationship between a Crown prosecutor and the Attorney General or his delegate exists. Before exercising his statutory duty, the Attorney General or his delegate is entitled to receive legal advice; indeed, a minister of the Crown is no less entitled to legal advice when performing his functions than any private litigant. As Justice Brennan of the Australian High Court wrote in *Waterford v. Australia* (1987), 163 C.L.R. 54 (H.C.A.), at pages 74 to 75, as cited in *R. v. Ahmad* (2008), 77 W.C.B. (2d) 804, 59 C.R. (6th) 308 (Ont. S.C.) (*R. v. Ahmad*):

> ... I should think that the public interest is truly served by according legal professional privilege to communications brought into existence by a government department for the purpose of seeking or giving legal advice as to the nature, extent and the manner in which the powers, functions and duties of government officers are required to be exercised or performed. If the repository of the power does not know the nature or extent of the power or if he does not appreciate the legal restraints on the manner in which he is required to exercise it, there is a significant risk that a purported exercise of the power will miscarry. The same may be said of the performance of functions and duties. The public interest in minimizing the risk by encouraging resort to legal advice is greater, perhaps, than the public interest in minimizing the risk that individuals may act without proper appreciation of their legal rights and obligations. In the case of governments no less than in the case of individuals, legal professional privilege tends to enhance the application of the law, and the public has a substantial interest in the maintenance of the rule of law over public administration. Provided the sole purpose for which the document is brought into existence is the seeking or giving of legal advice as to the performance of a statutory power or the performance of a statutory function or duty, there is no reason why it should not be the subject of legal professional privilege. (emphasis added)

[53] Having reviewed the context of the memorandum, I am satisfied that it meets all of the factors required for solicitor-client privilege to apply. It is a communication made in confidence by counsel with the purpose of providing legal advice to the respondent. It is not a communication meant to secure the consent for a particular course of action, but a genuine recommendation of a legal nature. In that respect, it is of the same nature as a memorandum from a Crown counsel to the Attorney General or his delegate advising as to whether an indictment should be preferred (*R. v. Ahmad* and *R. v. Chan*, 2003 ABQB 169, 172 C.C.C. (3d) 349) or as to the merit of an appeal (*Samaroo v. Canada Revenue Agency*, 2014 BCSC 1349, [2014] B.C.J. No. 1879). The fact that the memorandum was drafted by the Crown counsel in charge of the file, in consultation with other prosecutors, does not disqualify it from being in the nature of legal advice. As the High Court of Ontario found in *R. v. Ahmad*, Crown counsel can wear two hats: while intimately connected with the prosecution, they are also the lawyers best situated to provide legal advice on the file.

[54] The content of the memorandum, particularly when seen in the context of the circumstances in which it was created, demonstrates that the memorandum was a confidential communication. The surrounding circumstances that, together with the content of the memorandum, support an inference of confidentiality include the complex nature of the prosecution with its attendant unique procedural history, the publicity surrounding the case and the pending civil action proceeding against the respondent and certain of her employees and agents.

[55] I am mindful of the decision rendered by the British Columbia Court of Appeal in *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337, [2009] B.C.J. No. 1469, where it was decided that communications between Crown counsel about charging decisions were not protected by legal advice privilege because they are not made within any solicitor-client relationship. That situation, however, can be distinguished from the case at bar. When exercising his or her discretion to lay charges, Crown counsel may consult with colleagues but ultimately makes his or her own independent decision. The advice that may be sought from other prosecutors or counsel is not that of a client *vis-à-vis* another lawyer. As noted by the British Columbia Court of Appeal, the mere fact that the Attorney General or his delegates can review a subordinate's decision and override it, is not sufficient to convert such a decision into legal advice. The Court was keen to acknowledge, however, that solicitor-client privilege may apply in other situations where Crown counsel genuinely give advice:

> [107] This conclusion should also not be taken as suggesting Crown counsel can never claim privilege. Outside of the charge approval process, Crown counsel may well take legal advice from other Crown counsel or from independent solicitors. Such communications will be subject to solicitor-client privilege. Even within the charge approval process, there may be unusual situations in which the Attorney General, Deputy Attorney General, Assistant Deputy Attorney General or an individual Crown counsel seeks legal advice on the limits of his or her jurisdiction under the *Crown Counsel Act*. In such instances, the advice would be taken within a solicitor-client relationship, and would be the subject of privilege.

[56] In my view, the decision to stay a prosecution of such a sensitive nature as the one considered here was not of the same nature as the run-of-the-mill charging decision made by Crown counsel in the exercise of his or her prosecutorial discretion, and was at the very least one of those unusual situations contemplated by the British Columbia Court of Appeal in the above quoted paragraph. The memorandum at issue here was clearly drafted as a recommendation and the Attorney General or his delegate was entitled to such recommendation before exercising his

statutory duty under section 579 of the *Criminal Code*. As a result, I find that it was cloaked in solicitor-client privilege.

[57] The only question left to be decided, therefore, is whether solicitor-client privilege that attaches to the impugned records has been vitiated by an abuse of process. In its earlier decision involving the appellant, the Supreme Court explicitly dealt with that possibility:

> The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.
>
> Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.
>
> [*Blank SCC*, at paras. 44-45.]

[58] In a subsequent decision, the Supreme Court appears to have somewhat narrowed the exceptions to solicitor-client privilege (at least in the context of the legal advice branch of that privilege) to those communications that are "criminal in themselves or intended to further criminal purposes". The Court went on to state that "[t]he extremely limited nature of the exception emphasizes, rather than dilutes, the paramountcy of the general rule whereby solicitor-client privilege is created and maintained 'as close to absolute as possible to ensure public confidence and retain relevance'" (*Blood Tribe*, at para. 10, citing *R. v. McClure*, 2001 SCC 14 [2001] 1 S.C.R. 445, at para. 35).

[59] The appellant argued before the Judge and before this Court that the privilege is being used to conceal the blameworthy conduct of the Crown and the inappropriateness of the Crown agent's offer to withdraw the charges in the criminal proceedings in exchange for a waiver of civil liability. The onus was obviously on the appellant to demonstrate a basis for this allegation: see *Blank v. Canada (Minister of the Environment)*, 2007 FCA 289, 368 N.R. 279, at para. 10. After reviewing the confidential record, the Judge was unable to find any evidence of abuse of process, improper conduct or of communications "criminal in themselves or intended to further criminal purposes".

[60] Following the decision of the Supreme Court in *Blood Tribe*, this Court and the Federal Court have repeatedly found that blameworthy conduct or abuse of process is not sufficient to lift solicitor-client privilege: see *Blank v. Canada (Minister of Justice)*, 2010 FCA 183, 409 N.R. 152, at para. 20; *Blank v. Canada (Minister of Justice)*, 2015 FC 460, [2015] F.C.J. No. 441, at para. 14; *Blank v. Canada (Minister of the Environment)*, 2015 FC 1251, [2015] F.C.J. No. 1299; *Blank 2015*, at paras. 52-53. After having carefully reviewed the impugned documents, I have been unable to find any communication that can properly be characterized as "criminal in themselves or intended to further criminal purposes". Further, the Judge did not err in finding that the evidence does not disclose any misconduct or attempted cover up of blameworthy conduct or abuse of process.

[61] For all of the foregoing reasons, I am therefore of the view that the redacted portions of the record were protected by solicitor-client privilege and that the Judge did not err in so finding.

E. *Did the Judge err in his award of costs?*

[62] The appellant submits that the Judge erred in law by not recognizing that an award of costs of $7,000 would act as a deterrent to citizens who desire to exercise their right for an independent review of a refusal by the Government to disclose records. He also suggests that an award of costs could have been made in his favour, pursuant to subsection 53(2) of the Act, in light of the fact that he raised an important new principle.

[63] It is well established that cost awards are quintessentially discretionary and should only be set aside on appeal if the court below has made an error in principle or if the costs award is plainly wrong: *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 247.

[64] Subsection 53(2) of the Act does contemplate an award of costs to an unsuccessful applicant where the Court is of the opinion that the application raises an important new principle in relation to the Act. The Judge noted, however, that the application concerned the same core argument that had been raised in numerous cases before this Court and the Federal Court, namely that solicitor-client privilege is being used to shield disclosure of evidence of misconduct. As for subsection 4(2.1) of the Act, which speaks to the increased responsibility of government institutions to assist the person making an access request and to respond accurately, completely and in a timely fashion, I agree with the respondent that it does not expand the scope of a section 41 application. As a result, the Judge could rely on subsection 53(1) of the Act to order that costs follow the event.

[65] Bearing in mind that the application of the default tariff would have entailed an award of costs to the respondent in the amount of $20,790 exclusive of disbursements, and considering the seriousness of the allegations made by the appellant and their rejection by the Court as well as the time and complexity involved, the Judge's exercise of discretion in awarding costs in the amount of $7,000 was neither plainly wrong nor an error in principle. There is therefore no justification to vary his order in that respect.

VI. Conclusion

[66] For these reasons, I am of the view that this appeal should be dismissed with costs in the amount of $2,000 (all inclusive) in favour of the respondent.

"Yves de Montigny"

J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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