

**Date: 20070917**

**Docket: A-515-06**

**Citation: 2007 FCA 289**

**CORAM: NOËL J.A.  
NADON J.A.  
PELLETIER J.A.**

**BETWEEN:**

**SHELDON BLANK**

**Appellant**

**and**

**THE MINISTER OF THE ENVIRONMENT**

**Respondent**

Heard at Winnipeg, Manitoba, on September 12, 2007.

Judgment delivered at Ottawa, Ontario, on September 17, 2007.

**REASONS FOR JUDGMENT BY:**

**PELLETIER J.A.**

**CONCURRED IN BY:**

**NOËL J.A.  
NADON J.A.**

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**REASONS FOR JUDGMENT**

**PELLETIER J.A.**

[1] Following the collapse of the Crown's prosecution of Mr. Blank and his company Gateway Industries Ltd., Mr. Blank commenced an action for malicious prosecution. In support of that action, Mr. Blank filed various requests for disclosure under the *Access to Information Act*, R.S.C. 1985, c. A-1 (the Act). The last of those requests was disposed of by Russell J. of the Federal Court in a decision reported at 2006 FC 1253, [2006] F.C.J. No. 1635 (*Blank v. Canada (Minister of the Environment)*). Mr. Blank now appeals from that decision on grounds which have become familiar to this Court, namely the adequacy of the severance ordered by the Court, the allegation that the

Crown is using solicitor-client privilege to conceal evidence of its own wrong-doing, and the public interest in disclosure notwithstanding the existence of a claim of privilege.

[2] Mr. Blank complains as well that documents which were ordered disclosed, and which were disclosed in other proceedings, have been declared exempt in these proceedings when they have lost their exempt status. This matter was argued before Russell J. on June 1, 2006, and his decision rendered on October 19, 2006. The Supreme Court heard argument on Mr. Blank's appeal with respect to litigation privilege on December 13, 2005, and rendered its decision on September 8, 2006. Thus, at the time the matter was argued before Russell J., the status of documents subject to a claim of litigation privilege had not been decided, as a result of which the Crown maintained its position with respect to those documents. Mr. Blank's complaint relates to a list of documents which the Minister of the Environment forwarded to the Minister of Justice in respect of which a claim of privilege had been made. Some of those documents were released to Mr. Blank following the decision of the Supreme Court. Mr. Blank believes that some of the documents appearing on the list in question, which appears at pages 55 to 59 of Volume II of the Appeal Book, were released to him following the decision of the Supreme Court but were nonetheless declared to be exempt from disclosure by Russell J.

[3] One answer to Mr. Blank's complaint is that if the documents were disclosed to him in another file, then he has the documents and the purposes of the legislation have been met. Mr. Blank has a different concern. He is unable to cross-reference the documents which were released to him following the Supreme Court's decision with those which Russell J. declared to be exempt. As a

result, he is unable to satisfy himself that he has all the documents to which he is entitled in the present file.

[4] As a result, Mr. Blank says that Russell J. was bound to review the list of documents which were forwarded to the Department of Justice and to satisfy himself that the documents which he declared exempt were not on that list. I disagree. Russell J. was required to rule on the disclosure of the documents which were before him. He carefully catalogued them and identified those which were in issue. He distinguished between documents where litigation privilege was claimed and those where legal advice privilege was claimed, as well as those where the claim of privilege did not distinguish between the two types of privilege. He then reviewed the contentious documents and ruled on their disclosure on the strength of the information which the parties provided him. He ordered disclosure of all documents where the claim of exemption was based on litigation privilege. Where the exemption claimed did not distinguish between the two branches of privilege, he reviewed the documents to satisfy himself that a valid exemption existed. All of this is carefully recorded in Schedules A and B to his decision. In light of those circumstances, the fact that further documents were exchanged between the parties after they appeared before him was, for his purposes, immaterial.

[5] Mr. Blank has a deeply flawed view of the effect of section 25 of the Act which deals with severance. Invoking notions of statutory interpretation and parliamentary supremacy, he argues that the obligation to sever protected information set out in section 25 can be used to limit the exemption in favour of solicitor client privilege. Section 25 is a straight-forward disposition:

25. Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.

25. Le responsable d'une institution fédérale, dans les cas où il pourrait, vu la nature des renseignements contenus dans le document demandé, s'autoriser de la présente loi pour refuser la communication du document, est cependant tenu, nonobstant les autres dispositions de la présente loi, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.

[6] Section 25 is designed to avoid the possible non-disclosure of an entire record on the ground that a part of the record contains exempt information. All that section 25 requires is that the exempt information be severed from the record and that the balance of the record be disclosed. This Court has specified that where the exemption is challenged, the requester must be given sufficient identifying information with respect to the document to be able to identify it and to challenge the claimed exemption: see *Blank v. Canada (Minister of the Environment)*, 2001 FCA 374, [2001] F.C.J. No. 1844. This does not include information which would disclose the subject matter of the privileged communication: see *Blank v. Canada (Minister of Justice)*, 2007 FCA 147, [2007] F.C.J. No. 523, at para. 7.

[7] None of this supports the view that section 25 somehow reduces the scope to be given to the exemptions provided for in the Act. Once the reviewing authority concludes that a record contains exempt information, it must then address its mind to the possibility of excising the exempt information from the record and disclosing the balance of the document, subject to the requirement that the remaining parts retain some coherence: see *Blank v. Canada (Minister of Justice)*, 2005 FC

1551, [2005] F.C.J. No. 1927, at para. 36. There is no possible conflict between section 25 and the provisions of the Act which provide exemptions to disclosure. Section 25 simply provides that those parts which are not exempt continue to be subject to disclosure if disclosure is meaningful. The fact that exemption in favour of solicitor-client privilege has its origins in the common law is irrelevant to the operation of section 25. It is the fact of exemption which is material not the source of the exemption.

[8] Russell J. reviewed each of the documents listed in Schedule B and determined that the claim of litigation privilege was to be set aside and ordered disclosure of portions of records for which a claim of legal advice privilege was made. Given that Russell J. properly stated the test for severance and applied it to each of the documents in issue, it is not necessary for us to review his work on the basis of Mr. Blank's mistaken views as to the effect of section 25.

[9] Mr. Blank argues in this case, as he has in each of the other cases he has pursued to this Court, that the Crown is using solicitor-client privilege to conceal evidence of its wrongdoing. In a related argument, he complains that Russell J. erred in imposing on him the burden of proving that disclosure was required rather than giving effect to the Act's premise that disclosure rather than non-disclosure was the norm. In effect, Mr. Blank complains that the Court is not sufficiently attuned to the problem which confronts him, namely that the evidence of the Crown's wrongdoing is in files which the Crown, the alleged wrong-doer, refuses to disclose on grounds of solicitor-client privilege.

[10] On at least two occasions, this Court has reviewed documents which were the subject of the same argument and in both cases found that there were no grounds for breaching solicitor-client privilege: see *Blank*, 2007 FCA 147, [2007] F.C.J. No. 523, at para. 19 and *Blank v. Canada (Minister of Justice)* 2004 FCA 287, [2004] F.C.J. No. 1455, at para. 64. It is not sufficient to allege wrongdoing and to insist upon a review of the documents for which the Crown claims an exemption. The onus is upon Mr. Blank to demonstrate a basis for his allegation of wrongdoing. To date, he has failed to do so.

[11] Mr. Blank's argument as to the public interest in disclosure is essentially the same argument. It assumes that where there is a challenge to the Crown's claim of privilege, the privilege must yield because of the public interest in disclosure. The premise which underlies this reasoning is that there is no principled reason which would justify the Crown standing on its privilege. We have not been given any reason to believe that the claim of privilege has not been exercised appropriately in this case.

[12] For these reasons, we are of the view that this appeal should be dismissed with costs.

"J.D. Denis Pelletier"

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J.A.

"I agree  
Marc Noël J.A."

"I agree  
M. Nadon J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-515-06

**(APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED OCTOBER 16, 2006, NO. T-567-05)**

**STYLE OF CAUSE:** *SHELDON BLANK v. THE MINISTER OF THE ENVIRONMENT*

**PLACE OF HEARING:** Winnipeg, Manitoba

**DATE OF HEARING:** September 12, 2007

**REASONS FOR JUDGMENT BY:** PELLETIER J.A.

**CONCURRED IN BY:** NOËL J.A.  
NADON J.A.

**DATED:** September 17, 2007

**APPEARANCES:**

Sheldon Blank ON HIS OWN BEHALF

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