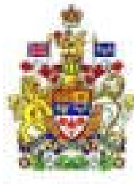
Federal Court of Appeal  Cour d'appel fédérale

Date: 20100708

Docket: A-519-09

Citation: 2010 FCA 183

CORAM: **BLAIS C.J.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

SHELDON BLANK

Appellant

and

THE MINISTER OF JUSTICE

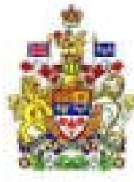
Respondent

Heard at Winnipeg, Manitoba, on June 23, 2010.

Judgment delivered at Ottawa, Ontario, on July 8, 2010.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: BLAIS C.J.
DAWSON J.A.

Federal Court of Appeal  Cour d'appel fédérale

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal from the judgment of Justice de Montigny of the Federal Court: 2009 FC 1221. The Federal Court dismissed the appellant's application for judicial review.

[2] In his application for judicial review and in this appeal, the appellant seeks access to records under the *Access to Information Act*, R.S. 1985, c. A-1 (the "Act"). He raises several grounds of review. For the reasons set out below, I would dismiss the appeal, with costs.

A. The facts

[3] On January 21, 2002, the appellant first sought records from the respondent. The records concerned the respondent's conduct of a prosecution, later dropped, against the appellant and Gateway Industries Ltd. under the *Fisheries Act*, R.S. 1985, c. F-14.

[4] The Federal Court has set out, in great detail (at paragraphs 4-21), the complicated history of the dealings among the appellant, the respondent and the Office of the Information Commissioner of Canada stretching all the way back to 2002. This history shows some of the factors that made this matter complicated and lengthy.

[5] Although the first request was in January 21, 2002, by January 30, 2003 the appellant had made a total of 67 requests under the Act, and also the *Privacy Act*, R.S. 1985, c. P-21. The Department of Justice says that it has reviewed 60,000 pages of material in response; the appellant says less was reviewed, but he still estimates it at over 25,000 pages. Since many pages were concerned with or were related to the conduct of the prosecution, issues of solicitor-client privilege frequently arose. The resulting page-by-page review took much time.

[6] The appellant involved the Office of the Information Commissioner of Canada by way of two complaints. The first was on October 2, 2002 and concerned alleged delay by the respondent. The second, on November 7, 2002, was broader and concerned the respondent's failure to identify

all of the documents responsive to his request and its improper application of exemptions under the Act.

[7] The Office of the Information Commissioner is an independent and impartial agency charged with the responsibility of investigating complaints under the Act. In this case, it has been investigating issues such as whether the respondent has been acting in bad faith, the timeliness of the respondent's response, the discrepancy between the numbers of documents originally identified as responsive and the number of documents released, missing documents, the respondent's identification of the documents, and the respondent's assertions of exemptions, in particular solicitor-client privilege. The scope and application of that privilege was taken to the Supreme Court of Canada: *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39.

[8] The Office's investigation stretched over five years. Of note is that in his oral and written submissions in this Court, the appellant did not complain about the conduct of the Office in its lengthy investigation.

[9] On September 5, 2008, the Office released an investigation report. Two of the issues considered in the report were highly relevant to the appellant's application for judicial review in the Federal Court: the application of the solicitor-client privilege exemption in section 23 of the Act, and missing records.

[10] On the solicitor-client privilege issue, the Office concluded that "[w]e are satisfied that the records which remained exempted qualify as solicitor-client privilege for the purposes of section 23." It added that "proper discretion was exercised" and "the privilege was not waived."

[11] On the missing documents issue, the Office observed that it sent one of its investigators to Winnipeg "to search through some 40 boxes of records to locate additional records" and that it found and released some records to the appellant. Later, after receiving a final release of documents, the appellant provided additional evidence to the Office suggesting that documents were missing. The Office made a second trip to Winnipeg for a follow-up search. In the end, on the missing documents issue, the Office wrote the following in its investigation report:

> Our investigation has revealed that, by their own admission, Justice officials cannot guarantee that all the records created were retained. Nor were we able to determine with certainty which records were, or could, be responsive to your request.
>
> Based on the above, we are unable to definitively report to you that you have received all of the records to which you are entitled under the Act. We assure you that we have done everything possible to find relevant records and review them for possible release to you.

[12] Soon after receiving this report, the appellant commenced an application for judicial review in the Federal Court. As mentioned above, the Federal Court dismissed the appellant's application for judicial review. Its reasons for doing so will be set out below, as I consider each of the grounds for appeal raised by the appellant in this Court.

B. The appellant's grounds for appeal

[13] In his notice of appeal to this Court, the appellant has raised many overlapping grounds of appeal. He asks this Court to reverse a number of the Federal Court's rulings and correct its reasons.

[14] A consideration of the appellant's written and oral submissions has served to clarify the issues. Further, at the hearing of this appeal, the Court permitted the appellant to file seven compendia of documents from the appeal record, each of which was devoted to a particular issue in the notice of appeal. These materials have given the Court an even clearer picture of the precise issues being raised on appeal by the appellant and his submissions on each. The Court is grateful to the appellant for providing these compendia to us.

[15] The grounds of appeal and submissions made by the appellant can be grouped into four categories:

(1) The interpretation and application of the exemption for solicitor-client privilege under section 23 of the Act and whether the privilege was waived (paragraphs 1, 5, 6, 7 and 8 of the relief sought in the notice of appeal).

(2) Whether the Department engaged in bad faith or otherwise misconducted itself in carrying out its responsibilities under the Act (paragraphs 3 and 6 of the relief sought in the notice of appeal).

(3) The issue of missing and unprocessed documents and whether the appellant has received everything to which he is entitled under the Act (paragraphs 2 and 4 of the relief sought in the notice of appeal).

(4) Issues relating to costs (paragraph 9 of the relief sought in the notice of appeal).

C. Analysis

(1) The interpretation and application of the exemption for solicitor-client privilege under section 23 of the Act and whether the privilege was waived

[16] In this case, the respondent invoked the solicitor-client privilege exemption under section 23. Following an analysis of the relevant case law (especially this Court's decision in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 F.C. 421 and *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9), the Federal Court set out the standard of review of the respondent's decision as follows (at paragraph 31):

> …two different standards of review [are to be followed] with regard to the respondent's decision to refuse to release information pursuant to the solicitor-client privilege exemption in s. 23 of the Act. It must apply the correctness standard to review the decision that the withheld information falls within the s. 23 statutory exemption, and the standard of reasonableness to the discretionary decision to refuse to release exempted information. Of course, the Court must also consider whether the discretion was exercised in good faith and for a reason rationally connected to the purpose for which it was granted.

[17] For the purposes of this appeal, we accept this as the standard of review.

[18] The Federal Court (at paragraphs 34-44) concluded that the respondent was justified in claiming solicitor-client privilege over many documents. It added that the respondent appropriately severed privileged material from the documents, allowing portions of the documents to be revealed to the appellant. I agree with the Federal Court's conclusion and I see no reviewable error in its reasons on this point.

[19] On the solicitor-client privilege issue, the appellant alleged that three particular pages withheld from him were not privileged because they "demonstrate misconduct." At a general level, the misconduct alleged by the appellant concerns certain matters in the earlier criminal prosecution: the improper swearing of an affidavit, the failure of the Crown to give him disclosure, limitations issues, and other irregularities in the prosecution. Having not seen these documents, the appellant's assertion that the documents "demonstrate misconduct" is purely speculative. I would add that the appellant raised much of this alleged misconduct before Manitoba Court of Queen's Bench in his prosecution. That court's reasons for judgment show no findings that can be said to constitute misconduct.

[20] Further, "misconduct" by itself is not a recognized exception to the privilege that the respondent asserts over the three pages. There is an exception for "communication[s] in furtherance of a criminal purpose" or to perpetuate a tort: *Solosky v. Canada*, [1980] 1 S.C.R. 821 at pages 755-757 and Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis Canada, 2009) at pages 937-939. Where clients seek out a

lawyer "for the purpose of assisting [them] to perpetuate a crime or fraud, there [is] no privilege": Bryant et al., *supra* at page 937.

[21] This exception does not apply to the three pages that the appellant seeks. During the course of the hearing, the appellant invited the Court to examine these three pages, which were appended to a confidential affidavit before this Court. The respondent did not object to this Court reviewing these pages. Having reviewed these pages, I conclude that there is no basis for this Court overturning the Federal Court's conclusion that these pages are privileged. Further, these pages are not "communication[s] in furtherance of a criminal purpose" or to perpetuate a tort and so the documents remain privileged.

[22] On the issue of waiver of privilege, the appellant submitted that the respondent lost its right to claim solicitor-client privilege over the entire prosecution file because the Crown made submissions on the issues in open court in the prosecution. The Federal Court concluded (at paragraph 46) that it was "unable to find any evidence that would support a claim for waiver" that would result in the whole file being released. This is a factual finding and can be set aside only on the basis of palpable and overriding error, which the appellant has not demonstrated. In addition, as a matter of law, submissions in open court that reveal advice otherwise covered by solicitor-client privilege could waive any privilege attached to that advice, absent any possible defence such as inadvertence; but the waiver would extend only to that specific advice, and certainly not to the entire prosecution file: Bryant et al., *supra* at pages 957 to 959.

[23] Before the Federal Court, the appellant suggested that the respondent's inconsistent approach to solicitor-client privilege gave rise to waiver: the respondent claimed that some documents responsive to access requests were covered by solicitor-client privilege, but it released these same documents in response to other access requests without asserting privilege. The Federal Court concluded (in paragraph 47) that, as a matter of law, waiver would not apply. It added that, in any event, a number of documents affected by this issue were released during the hearing.

[24] The issue is now moot. The appellant already has these documents under other access requests and perhaps also at the hearing in the Federal Court. Nothing in the record or submissions suggests that there is still a live controversy with practical import for the parties concerning these documents. I would add that the material before the Court is insufficient to determine these issues. The appellant has raised this issue in general terms, but in his notice of appeal and his submissions has failed to particularize what documents, if any, are still in issue. He has also failed to identify the factual circumstances relevant to waiver pertaining to each document or category of documents. The transcript of the proceedings, the appellant's compendia and the memorandum of the respondent shed no further light on the matter. As it is unnecessary to do so, I refrain from comment on the Federal Court's legal conclusion that, as a matter of law, waiver would not apply in these circumstances.

(2) Whether the Department engaged in bad faith or otherwise misconducted itself in carrying out its responsibilities under the Act

[25] The appellant submitted, both in the Federal Court and in this Court that the respondent's decision was made in bad faith by Crown officials who have the most to lose in the appellant's ongoing civil action for damages against the Crown for fraud, conspiracy, perjury and abuse of powers. Related to this, the appellant submitted that under the Act the respondent should have disclosed to him material that was improperly withheld from him in the criminal prosecution, contrary to *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, [1992] 1 W.W.R. 97.

[26] The Federal Court rejected these submissions. It began by acknowledging that it was bound to consider whether the respondent exercised its discretion concerning the appellants' access requests in good faith and for rational reasons (at paragraph 52). The Federal Court noted that the appellant had previously made these submissions to some extent, unsuccessfully: *Blank v. Canada (Minister of the Environment)*, 2006 FC 1253, 300 F.T.R. 273; *R. v. Gateway Industries Ltd.*, 2002 MBQB 285, [2003] 2 W.W.R. 671 (one of the rulings in the appellant's prosecution). The Federal Court added that the appellant adduced no concrete evidence to support his allegations of bad faith and that it was not the role of the Federal Court to decide whether the Crown had fulfilled its disclosure obligations in the criminal prosecution.

[27] I substantially agree with the reasons of the Federal Court on this point. On the issue of whether there was bad faith in the respondent's processing of the access requests, the Federal Court had evidence capable of supporting the conclusion it made. I would add that if the respondent were

acting in bad faith concerning the appellants' access requests, the Office likely would have detected it in its five-year investigation and would have condemned it in its investigation report. It did not.

(3) The issue of missing and unprocessed documents and whether the appellant has received everything to which he is entitled under the Act

[28] Both in the Federal Court and in this Court, the appellant submitted that the respondent deliberately failed to locate and process all of the records that were responsive to his request.

[29] Although there is no evidence whatsoever to support deliberate misconduct by the respondent, the appellant's submission gains some force from the findings in the Office's investigation report. As noted above, the Office reported that "by their own admission, Justice officials cannot guarantee that all the records created were retained" and that the Office could not "determine with certainty which records were, or could be responsive…". It added that it was "unable to definitively report to you that you have received all of the records to which you are entitled under the Act." It concluded that it had "done everything possible to find relevant records and review them for possible release…".

[30] The Federal Court rejected the appellant's submission, finding that the efforts of the respondent and the Office were significant and that they did everything they could to locate and produce documents to the appellant (at paragraph 50):

> Despite the applicant's assertions, the facts prove otherwise. The respondent, in fact, went to great lengths to locate and process all of the documents relevant to the request, albeit not

> as expeditiously as it should have done. Several consultations with the Winnipeg Regional Office and other departments were held to determine what could be released. The DOJ ATIP Office also cross-referenced numerous pages released in other requests or as the result of other court proceedings, and cooperated with the Information Commissioner investigators. As a result, three further releases of documents were made to the applicant between 2002 and 2008, thereby providing him with another 800 pages or so. While not all documents were collected and released at first, subsequent searches and releases ensured that the applicant was provided with most of the information to which he is entitled. It may well be that some documents created by the respondent were not retained or located, as admitted by the respondent itself. But I am satisfied that everything that could realistically be done to comply with the applicant's Access request has been done. Indeed, the [Office of the Information Commissioner] itself reported that they have done "everything possible to find relevant records and review them for possible release" to the applicant, therefore recording his complaint as resolved. Once again, the considered opinion of the Commissioner is a factor to be considered on judicial review.

[31] The Affidavit of Francine Farley is the primary basis for the Federal Court's factual findings in this passage. Many of the statements in the affidavit, particularly the important statements that appear in paragraph 25 of the affidavit, are based not on personal knowledge or actual experience, but only on a "review of the file." As for the Federal Court's conclusion that "everything that could realistically be done to comply with the [appellant's] access request has been done," another judge of that Court looking at the somewhat brief and unparticularized evidence in the affidavit might not have reached that conclusion with the same level of certainty, or might have reached a different conclusion.

[32] However, this is an appeal from a judgment on an application for judicial review. In such a matter, this Court is not allowed to reweigh the evidence or retry the facts. This Court cannot interfere just because another judge might have made different findings of fact on this evidentiary record. The threshold for interference by this Court is much higher than that: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33.

[33] The facts as found by the Federal Court must be accepted by this Court, unless the appellant demonstrates palpable and overriding error: *Housen*, *supra*. Examples of palpable and overriding error include a total absence of evidence in support of a factual finding, or a factual finding that cannot be made rationally or as a matter of logic on the basis of the evidence in the record: *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25.

[34] The appellant has failed to demonstrate palpable and overriding error. There was evidence upon which the Federal Court could find that the respondent was compliant with its obligations to search, review, evaluate and produce available and releasable documents.

[35] It is true that in its investigation report the Office found that documents were missing and that it had difficulty in determining with certainty which records were or could be responsive. This is not necessarily evidence that shows that the respondent is breaching its obligations under the Act. It must be remembered that, as mentioned in paragraphs 4 and 5, above, this was a most complex and challenging matter, with 67 access to information requests triggering a review of tens of thousands of pages of documents located at multiple locations, including sealed court files. In addition, as the Federal Court noted, an important piece of evidence before it was the investigation report of the independent and impartial Office, which had been investigating this matter for approximately five years. That report deserves significant weight: *Blank v. Canada (Minister of Justice)*, 2005 FCA 405, 344 N.R. 184 at paragraph 12. As mentioned above, the Office reported that "everything possible to find relevant records and review them for possible release" to the

appellant had been done. Finally, the appellant cross-examined Ms. Farley on her affidavit and a transcript of that cross-examination was before the Federal Court and this Court. That cross-examination did not reveal instances of non-compliance that the Federal Court needed to address.

[36] I would add that, in making its factual findings based on the evidence, the Federal Court was mindful of the importance of the appellant's rights under the Act. At the outset of its reasons (at paragraphs 23-25), it correctly stated that one of the purposes of the Act, as expressed in subsection 2(1), "is to provide the public with a right of access to information contained in records held by the government" and that this right should be facilitated, not frustrated, within the limits of the law: see *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, 148 D.L.R. (4th) 385 at paragraphs 59-63. The Federal Court evaluated the appellant's submissions with those purposes very much front of mind, but rejected the appellant's submissions, based on a rational review of the evidence in the record, without any legal error.

(4) Issues relating to costs

[37] In the Federal Court, the appellant submitted that a significant penalty should be imposed upon the respondent because of its heinous conduct. The Federal Court rejected the appellant's submission and, instead, ordered costs against the appellant, consistent with the result on the application and the factual findings it made. The appellant appeals this costs award.

[38] There are no grounds to interfere with the Federal Court's discretionary, fact-based costs decision. Like the Federal Court, I would also order that costs follow the result of this appeal.

D. Proposed disposition

[39] Therefore, for the above reasons, I would dismiss the appeal, with costs.

"David Stratas"
J.A.

"I agree
Pierre Blais C.J."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-519-09
STYLE OF CAUSE:	Sheldon Blank v. The Minister of Justice
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	June 23, 2010
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Blais C.J. Dawson J.A. `
DATED:	July 8, 2010

APPEARANCES:

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