Cour d'appel fédérale

Date: 20201026

Docket: A-92-20

Citation: 2020 FCA 179

CORAM: **PELLETIER J.A.**
NEAR J.A.
BOIVIN J.A.

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Appellant

and

CHIEF SHANE GOTTFRIEDSON, on his own behalf and on behalf of all the members of the TK'EMLÚPS TE SECWÉPEMC INDIAN BAND and the TK'EMLÚPS TE SECWÉPEMC INDIAN BAND, CHIEF GARRY FESCHUK, on his own behalf and on behalf of all the members of the SECHELT INDIAN BAND and the SECHELT INDIAN BAND, VIOLET CATHERINE GOTTFRIEDSON, CHARLOTTE ANNE VICTORINE GILBERT, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, DAPHNE PAUL, and RITA POULSEN

Respondents

Online videoconference hosted by the Registry on September 1, 2020.

Judgment delivered at Ottawa, Ontario, on October 26, 2020.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

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

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. Introduction

[1] This is an appeal from the decision of the Federal Court made in the course of case management of a complex class action involving individuals who attended Indian residential schools as day students. The Federal Court's decision is reported as *Chief Shane Gottfriedson et al. v. Her Majesty the Queen*, 2020 FC 399 (the Decision).

[2] The case management judge framed the issue before him as "a dispute about the extent to which a document producing party may be compelled to assist the receiving party to more efficiently search a voluminous and optically unreadable record with due regard to protecting solicitor-client and litigation privilege": Decision at para. 7. This appeal comes to this Court because Her Majesty the Queen (the Crown) says that the assistance which the Federal Court ordered infringes its litigation privilege.

[3] The claim arises from the operation of some 140 residential schools located across Canada between 1920 and 1997. As can be imagined, discovery of documents in an action of this scope is not a trivial undertaking. To date, the Crown has disclosed approximately 50,000 documents in electronic form and is currently reviewing a further 82,000 for relevance and privilege.

[4] Both parties are using digital tools to assist them in dealing with this mass of paper. The difficulty is that the plaintiffs (respondents in this Court) cannot search many of the documents disclosed to date using optical character recognition (OCR) software because the electronic

copies of those documents are of poor quality, presumably because the original documents are also of poor quality.

[5] The Crown, for its part, has reviewed the documents at various times and for various purposes, as this is not the first time the question of residential schools has come up. It has entered them into document management software which is essentially a database in which documents are given a unique identifier and then described in various ways so as to permit searches of the database and, by extension, the documents. Such a database normally contains fields such as document type, author, recipient, and date. This enables counsel to search the entire database for all documents which, for example, a particular author sent to a particular recipient during a given date range. The unique identifier then allows the original documents to be reviewed. Other fields may contain other information of use to counsel such as short descriptions of the contents of documents, or keywords which identify other characteristics of the documents. All of this must be entered into the database in some way so that it can then be searched.

[6] Given the volume of documents disclosed, the plaintiffs have an interest in being able to search them digitally and, presumably, to establish their own database to manage this mass of documents. But since many of the documents do not lend themselves to OCR, the plaintiffs will have to read the documents themselves and to enter the relevant information in their database, an expensive and time-consuming process. As a result, the plaintiffs have been in touch with the Crown asking for disclosure of its database so as to allow them to zero in on those documents in

this mass of documents which would assist them in making their case. These discussions were largely unfruitful so the plaintiffs approached the Federal Court for assistance.

[7] The Federal Court made the following orders:

> THIS COURT ORDERS that Canada shall forthwith disclose to the Plaintiffs all of the field names it has used in the organization and management of its documents in this case and, to the extent that they are known or knowable, the rules that Canada utilized to populate those fields with content.
>
> THIS COURT FURTHER ORDERS Canada to disclose any content in its confidential affidavits that pertains to the creation, organization, collection and management of its evidence database but excluding privileged content in the form of legal advice or the opinions, observations or strategy of its counsel.

[8] The Crown appeals from the Federal Court's order on the ground that it infringes its litigation privilege in that the orders compel it to disclose matters which came into existence for the purpose of defending this claim and others flowing from the operation of residential schools. The plaintiffs rely on the standard of review and argue that the Federal Court's order is a "real world solution to a real world problem".

[9] For the reasons which follow, I would allow the appeal.

II. <u>The decision under appeal</u>

[10] The Federal Court began its reasons by noting that the plaintiffs initially sought "an Order compelling Canada to produce, as a supplement to its documentary productions, its associated database fields and field content" on the basis that they needed this information to effectively and efficiently search and organize the documents in this case: Decision at para. 2.

However, at the case management conference, the plaintiffs limited their demand to the names of the fields in the Crown's database.

[11] The Court disagreed with the plaintiffs' contention that their motion was to be decided under Rules 222 and 223 of the *Federal Courts Rules* SOR/98-106 (the Rules) dealing with discovery of documents. As noted earlier, the Court found that the dispute was not about which documents had to be disclosed or the form of that disclosure but rather the extent to which a disclosing party was required to assist a receiving party to deal with documents which cannot be read electronically.

[12] The Court noted that the Crown had, over the course of many years, reviewed the documents which are now subject to disclosure to the plaintiffs for litigation and document management purposes. As documents were reviewed, they were "coded" under various fields so as to enable subsequent searches. In this context, I take "coded" to mean that information which was responsive to the field name was entered in that field for that document.

[13] The Court observed that documents were not coded for solicitor-client or litigation privilege which, I assume, means that there was no field in which the reviewers could or should indicate that all or part of a document was subject to either solicitor-client (i.e. legal advice) privilege or litigation privilege. As a result, allowing the plaintiffs unrestricted access to all of the fields or their content in the Crown's database creates a risk of disclosure of privileged information. This could occur if the field contains privileged information without disclosing its status, or if the document referred to in that field is itself privileged.

[14] The Court commented that the plaintiffs' scaled down request (field names and rules used to populate those fields) would, by their reckoning, allow them to better understand the Crown's document management system so as to be more selective about the documents that are likely to be the most important to the prosecution of their claims. The Court reasoned that if there were a few fields that would be expected to identify highly relevant documents, "Canada may be able to identify for the Plaintiffs those original documents without ever disclosing the related field content": Decision at para. 10.

[15] The Court went on to say that there were no rules that applied to the relief the plaintiffs were seeking, the need for which arises from voluminous document production that is mainly unreadable by OCR. The Court referred to the Canadian Judicial Council's *National Model Practice Direction for the Use of Technology in Civil Litigation* as well as some jurisprudence from the courts of Ontario and British Columbia. The Court cited *Bronson v. Hewitt*, 2007 BCSC 1705, 1705 B.C.L.R. (4th) 124 [*Bronson*], a case dealing with a large disorganized documentary production in which the Court granted an order requiring the disclosing party to organize the documents chronologically and to distinguish between originals and copies.

[16] The Court also cited and quoted from *Wilson v. Servier Canada Inc.,* [2002] O.J. No. 3723, 116 A.C.W.S. (3d) 837 (ONSC) [*Wilson*] in which the Ontario Superior Court noted an earlier order it made requiring the disclosing party to share the objective fields of its electronic database relating to its production. It went on to say that it was implicit to an affidavit as to documents that a defendant gives meaningful access to its documents through its electronic database when it has been prepared by that defendant. The Ontario Superior Court further stated

that the production of documents implies meaningful access to those documents through an electronic database at least when the database has already been prepared by the defendant for its own purposes.

[17] The Federal Court observed that there was no evidence that the disclosure of field names or the rules Canada used to populate those fields with searchable content will create a risk that solicitor-client communications will be disclosed. The Court noted the Crown's objection that the disclosure being sought would compromise its litigation privilege and that the choice of field names reflects its litigation strategy.

[18] The Court accepted that some field content could fall within the Crown's litigation privilege or contain solicitor-client privilege but did not accept that the mere disclosure of field names or the rules applied to populate those fields fell within Canada's claim to litigation privilege. It reasoned that this was purely factual information that could assist the plaintiffs to better understand how Canada's documents have been organized and categorized. Such disclosure would not impose any undue burden on the Crown or compromise its litigation interests: Decision at para. 17.

[19] The Court acknowledged that the information which the Crown sought to protect could be, in whole or in part, the work product of counsel and created in anticipation of litigation but observed that it was not in the nature of "strategy, advice, observations or opinions": Decision at para. 19. According to the Court, the purpose of the database was to facilitate counsel's efficient management and retrieval of documents.

[20] The Court then turned to the basis upon which it might order this kind of production in the absence of express authority in the Rules. It found that considerations of economy, fairness and proportionality had to be kept in mind. The Court referred to Rule 3 which directs that the Rules be applied to achieve the least expensive determination of litigation and to the Court's Notice to the Profession on proportionality which requires litigants in case-managed proceedings to act cooperatively at all stages of an action and particularly, where discovery is concerned.

[21] With these factors in mind, the Court made the order quoted above. The second paragraph of that order, dealing with the creation, organization, collection and management of its database, was made as a result of the Court's determination that disclosure of this type of information would not be a breach of litigation or solicitor-client privilege. This issue had not previously been raised in the plaintiffs' written pleadings.

III. Statement of Issues

[22] In its memorandum of fact and law, the Crown identifies five issues arising from the Federal Court's decision, four of which turn on or around the question of litigation privilege. The fifth issue turns on the procedural fairness of the Court's inclusion of the rules used to populate the various fields in the Crown's database in the information to be supplied to the plaintiffs. Given my conclusions on the issue of litigation privilege, it will not be necessary to address this issue.

[23] The plaintiffs argue that the issue is the standard of review which, considering the wide berth given to case management judges, militates in favour of dismissing the appeal.

[24] In my view, the issues in this appeal are the application of the law as to litigation privilege to the facts of this case. This can be broken down into two questions:

A. Is the Crown's document management database protected by litigation privilege?

B. If privileged, can the Court nonetheless sever portions of the documents after engaging in a balancing exercise so as to order its partial disclosure notwithstanding the Crown's litigation privilege?

IV. Analysis

[25] The order under appeal was made by a Federal Court sitting in case management. Like most such orders, it embodies a discretionary decision. A five judge panel of this Court dealt with the standard of review of such decisions in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 in which it was held at paragraph 72 that the standard of review articulated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 should be applied in appeals from discretionary decisions of motions judges: correctness for error of law and palpable and overriding error for errors of fact or mixed fact and law (except for extricable errors of law).

[26] While the question of whether a given document is privileged would normally be a question of mixed fact and law and therefore entitled to deference, the question of the legal consequences of such a finding is an extricable question of law, which is reviewed on the standard of correctness.

A. *Is the Crown's document management database protected by litigation privilege?*

[27] The Federal Court considered that the problem before it was not what had to be produced but rather how it had to be produced: Decision at para. 7. The obligation to disclose relevant documents in Rule 223 is the foundation for the obligation to produce those documents for inspection and for the obligation to provide copies found in Rule 228. There is an expanded definition of "document" in Rule 222(1) which provides as follows:

> document includes an audio recording, a video recording, a film, a photograph, a chart, a graph, a map, a plan, a survey and a book of account, as well as data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device.

> document s'entend notamment d'un enregistrement sonore, d'un enregistrement vidéo, d'un film, d'une photographie, d'un diagramme, d'un graphique, d'une carte, d'un plan, d'un relevé, d'un registre comptable et de données enregistrées ou mises en mémoire sur quelque support que ce soit par un système informatique ou un dispositif semblable et qui peuvent être lues ou perçues par une personne ou par un tel système ou dispositif.

[28] As a result, a database assembled and stored on a computer is a document within the meaning of the Rule and, unless otherwise excluded, must be disclosed and produced.

[29] Rule 228 specifically excludes privileged documents from its scope. That said, the non-compellability of privileged documents is not a consequence of Rule 228 but of the law as to solicitor-client/litigation privilege. Since the plaintiffs were asking for a document (or portions of a document) in the Crown's hands for which privilege was claimed, there was, with respect, a question of what had to be produced.

[30] Given the Crown's claim of privilege, the Federal Court addressed the status of the database. It appeared to distinguish between the structure of the database (the field names) and the "rules" for populating those fields, on one hand, and the entries made in those fields, on the other. At paragraph 16 of its reasons, the Court noted that there was no risk that "the disclosure of field names or the rules Canada used to populate those fields with readable content will create a risk that solicitor-client communications will be disclosed". Later, at paragraph 17, the Court accepted that "some field content may fall within Canada's litigation privilege or contain solicitor-client communications" while restating its conclusion that the disclosure of purely factual information such as field names and the "rules" for populating those fields would not compromise the Crown's litigation privilege.

[31] The Court concluded this part of its analysis at paragraph 19 by noting that:

> The information Canada seeks to protect may be, in whole or in part, the work product of counsel and created in anticipation of litigation. Nevertheless, it is not obviously in the nature of strategy, advice, observations or opinions. Rather, its purpose was to facilitate the efficient management and retrieval of documents by Canada and its counsel.

[32] This reasoning draws a distinction, within a document for which litigation privilege is claimed, between strategy, advice, observations or opinions on one hand, and steps taken to assist in the management of documents in the course of the litigation on the other. In effect, the order made by the Federal Court implicitly held that the latter could be severed from the former and disclosed, notwithstanding the existence of litigation privilege.

[33] In the end, it appears that the issue was not whether the Crown had a legitimate claim of litigation privilege but whether that privilege sheltered the information which the plaintiffs were seeking and which the Judge ordered the Crown to disclose.

[34] The Federal Court referred to jurisprudence which discussed the assistance to be provided by the producing party in cases in which document production is voluminous. In *Bronson,* cited above, the producing party, which had simply dumped a mass of disorganized documents on the other party, was ordered to provide basic information which typically would be required in an affidavit as to documents. That is not the case here.

[35] *Wilson*, cited above, involved a database prepared by the defendants for use with the Summation legal data processing system. While the defendant objected to producing the database, it did not invoke litigation privilege even though counsel had prepared the database at significant expense to themselves (and their clients) in respect of their own documents presumably for the purposes of the litigation. The Court in *Wilson* treated the database as an index to the documents which goes beyond the scope of an affidavit as to documents required by the Rules.

[36] Neither of these cases is particularly helpful in a case involving litigation privilege.

[37] The Supreme Court of Canada recently revisited the subject of litigation privilege in *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521 [*Lizotte*]. At paragraph 19 of its reasons, the Supreme Court said that litigation privilege “gives rise to an

immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation". Further, at paragraph 32, the Supreme Court went on to find that litigation privilege was a class privilege, which "entails a presumption of non-disclosure once the conditions for its application are met". The conditions for its application are that the document is created for the dominant purpose of litigation and that the litigation is pending or reasonably apprehended: *Lizotte* at para. 33.

[38] On the question of the disclosure of documents covered by litigation privilege, the Court cited with approval the decision of the majority in the Ontario Court of Appeal in *General Accident Assurance Co. v. Chrusz*, 45 O.R. (3d) 321, [1999] O.J. No 3291 (CA) [*Chrusz*]. In doing so, the Supreme Court disagreed with the proposition, set out in the reasons of the dissenting judge, that litigation privilege claims should be determined after considering "whether in the circumstances the harm flowing from non-disclosure clearly outweighs the benefit accruing" from protecting privacy interests: *Chrusz* at p. 365, cited in *Lizotte* at para. 38. The Supreme Court adopted the position of the majority and declined to adopt a case-by-case approach to litigation privilege because of the uncertainty and the proliferation of pre-trial motions which a case-by-case weighing would entail: *Lizotte* at para. 39. The privilege applies unless the document in question comes within an exception which means that "the onus is not on a party asserting litigation privilege to prove on a case-by-case basis that the privilege should apply in light of the facts of the case and the 'public interests' that are at issue" (citations omitted): *Lizotte* at para. 37.

[39] As a result, a party attempting to defeat litigation privilege must identify an exception to litigation privilege and not simply urge the Court to engage in a balancing exercise on a case-by-case basis. The exceptions to solicitor-client i.e. legal advice privilege also apply to litigation privilege: *Lizotte,* at para. 41. Those exceptions include public safety, innocence of the accused and criminal communications. In addition, litigation privilege does not apply to "evidence of the claimant party's abuse of process or similar blameworthy conduct": *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319 at para. 44 [*Blank*]. Finally, litigation privilege, unlike legal advice privilege, is limited in time. It no longer applies once the litigation which gave rise to it, or closely related litigation, is at an end: *Blank* at paras. 37-38.

[40] Once it was found that the Crown's document management database is protected by litigation privilege, the onus was on the plaintiffs to establish the existence of an exception to the privilege as applied to the whole of the document database. This was not done nor could it have been since, on the facts of this case, none of the exceptions to litigation privilege arise. There is no suggestion of public safety, innocence at stake or criminal communications in this litigation. And the litigation over the plaintiffs' claims is ongoing.

[41] As a result, the Crown's document management database is a privileged document whose disclosure cannot be compelled since it does not come within one of the exceptions. Thus, the Federal Court could not have ordered its disclosure and production in its entirety. The question which arises though is whether the Federal Court could order its disclosure in part, either because those parts of the document were never privileged or because their disclosure is innocuous and

assists in "the just, most expeditious and least expensive determination" of the issues between the parties. That is the question to which I now turn.

B. *If privileged, can the Court nonetheless sever portions of the documents after engaging in a balancing exercise so as to order its partial disclosure notwithstanding the Crown's litigation privilege?*

[42] While the Supreme Court has consistently held that solicitor-client privilege, including litigation privilege, must be as close to absolute as possible, it has repeatedly held that the privilege can be abrogated by legislation, though any legislation purporting to do so must be interpreted restrictively: *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, 2002 SCC 61, [2002] 3 S.C.R. 209 at para. 36; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193 at para. 16; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809 at para. 33; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555 at para. 71.

[43] These cases deal with the abrogation of solicitor-client privilege of an entire document. Thus, solicitor-client privilege, while as close to absolute as possible, is not absolute and can be abrogated by appropriate statutory language, subject to constitutional constraints such as in the case of search and seizure: *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336 at para. 71.

[44] The Federal Court did not abrogate the Crown's claim of litigation privilege. To the contrary, the Court was intent on preserving the Crown's privilege but it did reason that it had

the right to reach into a privileged document and to order disclosure of those parts of it which it considered were either not privileged or privileged, but whose disclosure was innocuous (or not privileged precisely because their disclosure was innocuous).

[45] The notion of severing or redacting certain portions of privileged documents arises in the *Access to Information Act*, R.S.C. 1985, c. A-1, and in equivalent provincial legislation: see for example, *Access to Information Act*, sections 23, 25; *Freedom of Information and Privacy Act*, R.S.O. 1990, c. F.31, sections 10(2), 19; *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, sections 8, 22. These provisions would allow the Federal Court to do what it did in this case, if the proceedings had been brought under that legislation. However, they were not. I have not been able to find any other legislation that would apply in the circumstances of this case.

[46] The Supreme Court has recognized that legal privilege (legal advice privilege or litigation privilege) has gone from being 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 at p. 875-876. This means that the Crown has a substantive right to assert its litigation privilege and to have it respected.

[47] The Federal Court relied on principles of economy, fairness and proportionality as well as Rule 3 to justify its decision. Substantive law cannot be modified by rules of procedure: see *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666 at paras. 17-18. In this case, the Federal Court's order has subordinated the Crown's substantive right to litigation privilege to procedural rules and practice principles. This is an error. Rule 3, to which the

Federal Court made reference, applies to the interpretation of the Rules. It does not modify legal principles which arise independently of the Rules.

[48] Rule 4, upon which the Federal Court relied in making the order it did, provides:

On motion, the Court may provide for any procedural matter not provided for in these Rules or in an Act of Parliament by analogy to these Rules or by reference to the practice of the superior court of the province to which the subject-matter of the proceeding most closely relates.	En cas de silence des présentes règles ou des lois fédérales, la Cour peut, sur requête, déterminer la procédure applicable par analogie avec les présentes règles ou par renvoi à la pratique de la cour supérieure de la province qui est la plus pertinente en l'espèce.

[49] Rule 4 allows the Federal Courts to deal with a gap in the Rules by analogy from the rules of procedure or practice in the province with the closest connection with the action. Given that litigation privilege is a question of substantive law, Rule 4 is of no assistance in this case since questions of litigation privilege are not procedural matters. The Federal Court erred in proceeding as it did.

[50] The difficulty in this case is a practical one, that is, the cost and delay which the plaintiffs will incur in reviewing the documents which have been disclosed and produced to them to date. This is a real problem though its source is not necessarily the limitations of OCR technology. By casting a wide net in terms of the scope of their action, the plaintiffs have given themselves the ability to compel disclosure of documents created over a lengthy period of time from a large number of establishments. This is their right. The predictable consequence of the exercise of that right is that the number of relevant and potentially relevant documents is very large.

[51] It was also predictable that, in litigation spanning 100 years, a portion of the relevant documents would be in poor condition and not readily readable by OCR software.

[52] To the extent that technology can be used to make litigation more manageable and less expensive, it should be used. Nevertheless, there is no rule that technological limits alter the obligations of the parties, one to the other. Each party is entitled to a useful affidavit as to documents and to the production of copies that are as usable as the condition of the original documents permits. Once those obligations have been satisfied by the producing party, the state of the relevant technology is irrelevant. The current status of OCR technology does not justify departures from established principles governing litigation privilege.

[53] It is important to distinguish between using the Rules to obstruct and delay another party and the inconvenient invocation of legal rights. Both the Rules and the Practice Directives issued by the Federal Court proscribe procedural obstructionism and give case management judges the ability to intervene to correct any abuses. A party's invocation of its legal rights cannot be side-stepped using tools designed to address abusive use of the Rules. The tone of the plaintiffs' argument suggests that they may believe that the Crown's position in this litigation is an abuse of process. If that is the plaintiffs' real objection to the position taken by the Crown in the litigation, then they should plead abuse of process and muster the evidence in support of that position if they can. Nibbling around the edges by invoking Rules 3 and 4 will not do.

[54] As a result, I find that the Federal Court erred in law in ordering the production of portions of a document which is covered by litigation privilege in the absence of a legal justification for doing so. This is an error that justifies this Court's intervention.

V. Conclusion

[55] For these reasons, I would allow the appeal with costs, set aside the Federal Court's order and making the order which the Federal Court should have made, I would dismiss the plaintiffs' notice of motion.

"J.D. Denis Pelletier"
J.A.

"I agree
D. G. Near J.A."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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