Federal Court  Cour fédérale

**Date : 20110714**

**Docket: DES-7-08**

**Citation: 2011 FC 887**

**Ottawa, Ontario, July 14, 2011**

**PRESENT: The Honourable Mr. Justice Blanchard**

**BETWEEN:**

**IN THE MATTER OF a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act* (IRPA);**

**AND IN THE MATTER of the referral of a certificate to the Federal Court pursuant to section 77(1) of the IRPA;**

**AND IN THE MATTER of Mohamed Zeki MAHJOUB**

## REASONS FOR ORDER AND ORDER

[1] By oral motion made on June 9, 2011, Public Counsel on behalf of Mr. Mahjoub, seek an order that solicitor client privilege has been waived and that disclosure should be made of all communications in relation to legal advice to:

(a) Canadian Security Intelligence Service (CSIS):
   i. In relation to section 21 of the *Canadian Security Intelligence Service Act*, RSC, 1985, c C-23, (the CSIS Act) warrants in relation to CSIS counsel and the independent Department of Justice **(**DOJ) counsel;
   ii. In relation to CSIS interceptions of solicitor-client communications on behalf of Canadian Border Services Agency (CBSA); and/or

iii. In relation to how CSIS should respond or react to the December 2008 Order of the Court; and/or

(b) CBSA in relation to CSIS interceptions of communications on behalf of CBSA.

*Introduction*

[2] Counsel for Mr. Mahjoub contend that, as a result of evidence elicited by the Ministers in direct examination of certain witnesses, namely Mr. Vrbanac and Mr. Flanigan (both from CSIS), and Ms. Deschenes (from CBSA), the Ministers have implicitly waived solicitor-client privilege in respect to legal advice provided to CSIS and the CBSA.

*Facts giving rise to the issue*

[3] The issue was first raised during the cross-examination of Mr. Vrbanac when the Ministers, on an objection, disavowed any reliance on legal advice to advance good faith.

[4] During his examination-in-chief, Mr. Vrbanac was asked questions relating to the section 21 warrant application process followed by CSIS in order to obtain a warrant. The questions related to: the preparation of the case brief in collaboration with CSIS legal services; the reason CSIS legal services was involved in the process; the draft affidavit reviewed by the independent DOJ counsel, the independent DOJ counsel's certificate; and the different roles of the independent DOJ counsel and CSIS legal services unit. In explaining the process and its various checks and balances, the witness stated that the process included a review of the warrant affidavit by CSIS legal unit for the purpose of ensuring the legal threshold was met to obtain the warrant powers sought and satisfy the Court. The witness also testified that the process provided for a review of the draft affidavit prepared in support of the warrant by an independent DOJ counsel for the purpose of challenging

the information. Following the review the independent DOJ counsel would issue a certificate if satisfied the facts and the operational information was justified.

[5] The examination-in-chief of Mr. Flanigan, for the most part, related to the CSIS intercepts of solicitor-client communications on behalf of CBSA by CSIS. Mr. Flanigan was asked about his understanding of the arrangement at the time it was being negotiated. In response to questions from Ministers' Counsel, he stated that CSIS received legal advice relating to its role as agent for CBSA. The witness also testified having received legal advice in response to the December 2008 Court Order.

[6] During her examination-in-chief Ms. Deschenes was asked about CBSA's logistics relating to the monitoring of Mr. Mahjoub's communications. Her responses included that the CBSA was working with DOJ lawyers and other supervisors to ensure CBSA's compliance with the Court Order, the *Privacy Act* and government rules.

[7] The issues relating to legal advice relied upon raised during examination-in-chief were pursued on cross-examination by Public Counsel with each of the three witnesses.

[8] Transcripts of the pertinent evidence adduced on examination-in-chief of each of the three above-named witnesses relating to issues raised on this motion are reproduced in the Annex to the within Reasons for Order and Order.

*The Law*

[9] Waiver of solicitor-client privilege is established when the possessor of the privilege knows of the existence of the privilege and voluntarily indicates an intention to waive it: *K.F. Evans Ltd v Canada (Minister of Foreign Affairs)*, [1996] FCJ No 30 (Lexis), (1996), 106 FTR 210 (T.D.) There may also be waiver by implication. The concept of implied waiver is addressed in Sopinka, Lederman and Bryant, *The law of Evidence in Canada* 3d ed. (Toronto: LexisNexis Canada Inc. 2009) at 959:

> As to what constitutes waiver by implication, Wigmore said:
>
> > Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e. not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.

[10] The jurisprudence supports the following propositions relating to implied waiver of the privilege:

(a) waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. *S. & K. Processors Ltd. v Campbell Ave. Herring Producers Ltd* (1983), 35 CPC 146, 45 BCLR 218 (SC) (S & K);

(b) where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost. (S & K);

(c) in cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived. (S & K);

(d) the privilege will deemed to have been waived where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action. *Bank Leu Ag v Gaming Lottery Corp.*, [1999] OJ No 3949 (Lexis); (1999), 43 C.P.C. (4th) 73 (Ont. S.C.) at paragraph 5;

(e) the onus of establishing the waiver rests on the party asserting waiver of the privilege. (S & K at paragraph 10).

*Mr. Mahjoub's position*

[11] Mr. Mahjoub argues that by eliciting the evidence of the three witnesses summarized above, the Ministers have waived solicitor-client privilege in relation to the legal advice described. He contends that there was no reason for the Ministers to elicit the evidence except to indicate that they relied upon legal advice as a justification for a position or approach they took on an issue, when that position or approach is alleged to be an abuse of process. It is argued that by necessary implication the witnesses were saying that they sought, obtained and relied upon legal advice to ensure that they were acting properly and lawfully, in other words, with due diligence and in good faith.

[12] In response to the contention that the Ministers made no express waiver of the privilege and that Ministers' Counsel expressly stated that the Ministers had no intention of waiving the privilege,

Mr. Mahjoub asserts that it is not the position of the Ministers' counsel, but rather the facts and the evidence of the witness on behalf of the client that mattered in deciding whether privilege is waived.

[13] Mr. Mahjoub also asserts a fairness argument by arguing that the Ministers cannot voluntarily present evidence that clearly implies due diligence or good faith by reliance on advice of counsel and then rely on privilege to prevent challenge to that implication. Mr. Mahjoub relies on *R. v Campbell,* [1999] 1 SCR 565, for this proposition.

[14] Finally, Mr. Mahjoub points to certain excerpts of the evidence of Mr. Flanigan in support of his contention that the Ministers have waived privilege by testifying about the nature of the legal advice. Upon review of the evidence in respect to this assertion by Mr. Mahjoub, I am satisfied that the allegation has no merit. Considering the line of questions put to the witness in context, I am satisfied that neither the nature of the legal advice nor any part thereof was disclosed by this evidence. I reproduce the relevant passage of the transcripts below:

> Q. We'll get to that. At the time when the arrangement was being negotiated what was your understanding about dealing with solicitor/client calls?
> A. At the time the arrangement was being put in place, the terms and conditions of the court order specified all communications were to be monitored, this was a consensual arrangement. We had legal advice on our role as an agent for CBSA and because it wasn't something that was falling under our normal warranted intercept programs under section 21, we put in place methodology that was consistent with the directions contained in the Court order.
> Q. What was that?
> A. All communications were monitored and reported to CBSA.

[15] In my view the witness' answer, "All communications were monitored and reported to the CBSA" was responsive to the methodology referred to in the prior answer given and not the legal advice obtained on CBSA's role.

*The Ministers position*

[16] The Ministers, in response, argue that, in all the circumstances, there has been no implied waiver, nor any partial disclosure of privileged information which would support a finding of waiver. The Ministers' submit the jurisprudence is clear that waiver implies an element of intention to waive on the part of the client, and there is nothing on the record to indicate any manifestation of the Ministers' voluntary intention to waive solicitor-client privilege, explicitly or implicitly. The Ministers' argue the *R. v Campbell* decision relied on by Mr. Mahjoub can be distinguished on the facts. The Ministers argue that the critical point in *R. v Campbell* was that the Crown, after being cautioned by the Court, expressly relied on the legal advice as evidence of good faith. The Ministers' submit they took a different approach in the present case by stating their clear position of disavowing on any reliance on legal advice to advance good faith. The Ministers are of the view the Court must take into consideration this explicit statement of the Ministers and that a decision to go behind solicitor-client privilege cannot be based simply on Mr. Mahjoub's inference of what the purpose of the evidence is.

*Analysis*

[17] On the evidence, I find no manifestation of a voluntary intention to waive the privilege by the Ministers. In his examination-in-chief Mr. Vrbanac was questioned in relation to certain process engaged in by CSIS to obtain a warrant under section 21 of the CSIS Act. In my view, his testimony

is about describing the applicable process and not about injecting in the process the legal advice as an element of the Ministers' claim of defence. There is a difference between adducing evidence to describe a particular process which involves legal advice relating to the application of facts to certain legal thresholds and relying on legal advice to justify an illegal activity. This is particularly so when the process is described without reference or disclosure of any of the legal advice. In the instant case, the Ministers took care in assuring the content of the legal advice was not elicited in its examination-in-chief and advised the Court the legal advice would not be relied upon to advance their argument that they were acting properly and lawfully. The same reasoning is applicable to the evidence of Mr. Flanigan and Ms. Deschenes.

[18] The Supreme Court decision of *R v Campbell* relied upon by Mr. Mahjoub can be distinguished on the facts. The critical point in that case is that the Crown relied on the legal advice as evidence of good faith. Further, in *Campbell* at paragraph 70, "the existence or non-existence of the asserted good faith depended on the content of that legal advice". As stated above, the circumstances here are far different.

[19] The circumstances that would lead a Court to find an implied waiver based on the principles articulated at paragraphs 9 and 10 above simply do not arise on the evidence before me. In the result, I do not find an implied waiver of the privilege as alleged by Mr. Mahjoub.

*Conclusion*

[20] For the above reasons, the motion will be dismissed.

## ORDER

**THIS COURT ORDERS that** the motion is dismissed

"Edmond P. Blanchard"
Judge

ANNEX

**Excerpts of transcript of evidence of Mr. Vrbanac**
**June 3, 2011**

Page 9 to 14

Q. Can you describe to the court the internal process for the Service to initiate a section 21 warrant?

A. Certainly, before the headquarters branch prepares the case brief, the regional office responsible for the investigation determines that the investigation reached a point where more intrusive techniques are required; consequently, the application or the request to obtain technical and warranted powers under section 21 of the CSIS Act, a request is submitted to the responsible headquarters branch. Before it progresses from the branch to legal services, there is a determination made within The Service that these powers are needed, and the threat has reached the point of being reasonable, there's a reasonable grounds to believe the activities represent a threat to the security of Canada.

When that threshold is met the case is presented to CSIS legal services who also review the facts presented before them to ensure that that threshold has been met. In preparing the case brief the headquarters branch uses information in The Service's operational data bases to justify the activities that represent a threat and to demonstrate the need to seek intrusive powers. That case brief is prepared for the legal services to begin the process.

Q. Without telling the Court what advice is provided by legal services, can you tell us why CSIS legal services is involved in this process?

A. Certainly. The determination of whether or not the test has been set is made or is proposed by both the headquarters and the regional branch and it's put before legal counsel to ensure that the threshold is consistent with the legal requirements to satisfy the Court that the powers are required as stated under the warrant, under the CSIS Act.

So it's the legal advice that challenges the facts presented by the officers to ensure that we have that substantive case to present to the court.

Q. Thank you. The next place I would like to take you to is marked as letter H on page 2. It's speaking about, "The draft affidavit along with the schedule of facts are reviewed by independent counsel, another Department of Justice lawyer who does not work in CSIS legal services." Can you describe what information is provided to independent counsel for their review?

A. Certainly, the independent counsel is provided with all of the operational reporting used to justify the affidavit. For almost every sentence in the affidavit that provides a statement of fact there's an operational report to coincide with that statement and it's the job of the independent counsel to challenge both The Service and CSIS legal to explain how the statement in the

affidavit is consistent with the operational report and where the facts coincide to make those statements in the affidavit.

Because the process is done ex parte, the introduction of the independent counsel provides an unbiased, I guess outside The Service review, review of the affidavit to ensure there is substantial justification for the information in the affidavit.

Q. Continuing on in that paragraph, I want to draw your attention to the second last, sorry, the last sentence, where it speaks to the independent counsel's certificate. Can you describe to the Court what an independent counsel certificate is?

A. It's my understanding after the process of facting and a review of the affidavit and the facts are completed, the independent counsel signs a certificate explaining that they have gone through this process, they have reviewed the facts and are satisfied that the operational information is justified by the operational information. So that is their final certification that this process has been completed.

Q. Continuing on with that sentence, it states that the IC certificate – the independent counsel certificate – changed from, "I have challenged the operational information" to, "I have challenged some of the operational information." Can you describe why that changed?

A. In this particular case I wouldn't know specifically why that statement would have changed. I could assume that either the independent counsel didn't review every piece of information in the affidavit, if there is some obvious information, for example, the address or the location of a building, that may not have been part of the operational information that was specifically reviewed. So that could be the reason why the sentence was changed. But in this case I don't have any information as to why it would have changed from one to the other.

Pages 16-17

Q. Now, the next point is L on page 2 and this speaks to how an affidavit and the warrants are reviewed and approved by CSIS legal services. It certifies that the material complies to section 21 of the CSIS Act. You've spoken about independent counsel.

I just want you to explain what is the difference between an independent counsel and the CSIS Department of Legal Service Unit lawyer?

A. The legal services lawyer represents The Service. It's a solicitor for CSIS in these matters. In the final review of the material and the warrant application, it is on CSIS legal services to ensure that the powers being asked for are consistent with the threat and the information provided in the affidavit suitably justifies the request for those powers.

If we don't have enough information in the affidavit I would suspect that the advice from counsel would be you can't ask for five or ten different types of powers. So it's my belief that

the information in the affidavit is, or legal services ensures, there's sufficient information to justify the powers being asked.

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**Excerpts from transcript of examination of evidence of Mr. Flanigan**
**June 21, 2011**

Page 43

Q. We'll get to that. At the time when the arrangement was being negotiated what was your understanding about dealing with solicitor/client calls?

A. At that time the arrangement was being put in place, the terms and conditions of the court order specified all communications were to be monitored, this was a consensual arrangement. We had legal advice on our role as an agent for CBSA and because it wasn't something that was falling under our normal warranted intercept programs under section 21, we put in place methodology that was consistent with the directions contained in the Court order.

Q. What was that?

A. All communications were monitored and reported to CBSA.

Page 50-51

Q. Before appearing in court, did you give any direction or what was your response to it?

A. In response to the Court proceedings and legal advice we received we issued a direction to the regions that they were to cease monitoring any solicitor/client communications and to ensure that any copies of any material that may have been held relative to CBSA monitoring was deleted.

Q. That would have been in response to Justice Layden-Stevenson's order?

A. That's correct.

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**Excerpts of the transcript of the examination of evidence of Ms. Deschenes**
**June 27, 2011**

Page 25

Q. Now, we talked about arranging for CSIS to act on CBSA's behalf. I'd like to ask you about the logistics of how the monitoring was going to take place. Were you involved in discussions in July of 2006 with respect to how that was going to happen?

A. I was involved at a high level. Certainly I was involved with Ted Flanigan and CSIS brought sort of a general framework of how they intercepted communications. We took that and then my Director General of Intelligence, Caroline Melis, and Louis Dumont, the Director of Security Review would have been working with our DOJ lawyers and other supervisors to make sure what we were doing was meeting the requirements of the Court, and we weren't doing anything that was not appropriate under the privacy act or the government rules.

**FEDERAL COURT**
**SOLICITORS OF RECORD**

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| **DOCKET:** | DES-7-08 |
| **STYLE OF CAUSE:** | The Minister of Citizenship and Immigration and The Minister of Public Safety v. Mohamed Zeki Mahjoub |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | July 6, 2011 |
| **REASONS FOR ORDER:** | BLANCHARD J. |
| **DATED:** | July 14, 2011 |

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