Federal Court of Appeal | Cour d'appel fédérale

Date: 20120307

Docket: A-255-11

Citation: 2012 FCA 75

CORAM: **NOËL J.A.**
GAUTHIER J.A.
STRATAS J.A.

BETWEEN:

TOP ACES CONSULTING INC.

Appellant

and

THE MINISTER OF NATIONAL DEFENCE

Respondent

Heard at Ottawa, Ontario, on March 7, 2012.

Judgment delivered from the Bench at Ottawa, Ontario, on March 7, 2012.

REASONS FOR JUDGMENT OF THE COURT BY: NOËL J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench, at Ottawa, Ontario, on March 7, 2012.)

NOËL J.A.

[1] At issue in this appeal is whether a waiver allowing the Minister of National Defence (the Minister) to disclose specified information gathered pursuant to the *Defence Production Act*, R.S.C. 1985, c. D-1 (DPA), constitutes a consent under section 30 of the DPA, and if so, whether this consent relieves the Minister from its duty to refuse to disclose the subject information pursuant to subsection 24(1) of the *Access to Information Act*, R.S.C. 1985, c. A-1 (ATIA).

[2] Beaudry J. of the Federal Court (the Federal Court judge) answered both questions in the affirmative in refusing to grant the judicial review of a decision by the Department of National Defence to disclose unit prices contained in Standing Offers made by the appellant for Airborne Training Services. For the reasons which follow, the appeal cannot succeed.

[3] Section 30 of the DPA provides:

> **30.** No information with respect to an individual business that has been obtained under or by virtue of this Act shall be disclosed without the consent of the person carrying on that business, except
>
> (*a*) to a government department, or any person authorized by a government department, requiring the information for the purpose of the discharge of the functions of that department; or
>
> (*b*) for the purposes of any prosecution for an offence under this Act or, with the consent of the Minister, for the purposes of any civil suit or other proceeding at law.
>
> **30.** Les renseignements recueillis sur une entreprise dans le cadre de la présente loi ne peuvent être communiqués sans le consentement de l'exploitant de l'entreprise, sauf :
>
> *a*) à un ministère, ou à une personne autorisée par un ministère, qui en a besoin pour l'accomplissement de ses fonctions;
>
> *b*) aux fins de toute poursuite pour infraction à la présente loi ou, avec le consentement du ministre, de toute affaire civile ou autre procédure judiciaire.

[My emphasis]

Section 30 of the DPA is listed in the schedule referred to in subsection 24(1) of ATIA which provides:

24. (1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.	**24.** (1) Le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements dont la communication est restreinte en vertu d'une disposition figurant à l'annexe II.
…	[…]

[4] The waiver clause agreed to by the appellant reads :

> The Offeror agrees to the disclosure of its unit prices by Canada, and further agrees that it shall have no right of claim against Canada, the Minister, the Identified User, their employees, agents or servants, or any of them, in relation to such disclosure.

[5] The Federal Court judge held that by agreeing to this clause the appellant gave its "consent" to the release of the unit prices as this word is used in section 30 of the DPA. He further held that subsection 24(1) of the ATIA did not operate to prevent the release of this information.

[6] The appellant contends that the Federal Court judge erred in holding that it authorized the release of its unit prices and that even if it did, subsection 24(1) of the ATIA remains operative and prevents the Minister from releasing this information. According to the appellant, the Federal Court judge failed to follow the majority decision of this Court in *Canada (Information Commissioner) v. Canada (Minister of Industry)*, 2007 FCA 212, [2007] F.C.J. No. 780 [*Minister of Industry*] in construing subsection 24(1) as he did.

[7] The question whether the appellant consented to the release of its unit prices as contemplated by section 30 of the DPA arguably raises a mixed question of fact and law to be assessed on a standard of reasonableness, and the question whether subsection 24(1) of the ATIA operates as an absolute bar to the release of the requested information raises a question of law to be reviewed on a standard of correctness (*Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at paras. 53 and 54).

[8] Dealing with the first question, we are of the view that regardless of the standard of review to be applied, the Federal Court judge committed no error in holding that the appellant consented to the disclosure of its unit prices pursuant to section 30 of the DPA and that accordingly the Minister was not bound by the restriction set out in that provision. The appellant has failed to advance any tenable argument to counter the conclusion reached by the Federal Court judge on this point.

[9] The appellant's contention that subsection 24(1) of the ATIA operates to prevent the Minister from releasing its unit prices even though it authorized their disclosure requires more elaboration. In support of this contention, the appellant relies on the opinion of Evans J.A. in *Minister of Industry* who held in the context of that case that subsection 24(1) (*Minister of Industry* at para. 69):

> "imposes an unqualified duty on the head of a government institution to "refuse to disclose any record requested under this Act" which contains information, the disclosure of which is "restricted" by a provision listed in Schedule II."
>
> [Emphasis in the original]

[10] Relying on this reasoning, the appellant submits that the simple fact that its unit prices constitute information the disclosure of which is "restricted" by a provision listed in Schedule II of the ATIA (*i.e.* section 30 of the DPA) ought to have ended the matter.

[11] The Federal Court judge rejected this contention after pointing out that the above reasoning is contained in the dissenting reasons of Evans J.A. However, as the appellant correctly points out, although Décary J.A. ultimately adopted the solution proposed by Richard C.J., he expressly adopted the reasons of Evans J.A. on this point (*Minister of Industry* at para. 28). It therefore becomes necessary to determine precisely what was decided by Evans J.A. and agreed to by Décary J.A.

[12] The Court in that case was confronted with a request for the release of information which could potentially be accessed by two distinct statutory methods, the first being the one set out in the ATIA, and the other being subsection 17(2) of the *Statistics Act*, R.S.C. 1985, c. S-19 [*Statistics Act*], which authorizes the Chief Statistician to release specified information subject to specific terms and conditions. The Information Commissioner took the position that a refusal by the Chief Statistician to disclose information, which may be disclosed under subsection 17(2), could be reviewed within the framework of the ATIA despite the prohibition set out in subsection 24(1) (*Minister of Industry* at paras. 66 to 69).

[13] Evans J.A. rejected this contention. He referred to the statements made before the Parliamentary Committee responsible for the ATIA which suggested that provisions from other

statutes referred to in Schedule II of the ATIA, such as section 17 of the *Statistics Act*, were part of the scheme under which information could be accessed by different methods crafted to deal with the particularities of the information gathered under these particular statutes (*Minister of Industry* at paras. 72 to 74). According to Evans J.A., subsection 24(1) of the ATIA, by prohibiting the release of this information under the ATIA, constitutes a clear acknowledgment by Parliament that these alternative methods of accessing information operate to the exclusion of the ATIA (*Minister of Industry* at para. 75). The appropriate recourse was therefore the one set out in subsection 17(2) of the *Statistics* Act (*Minister of Industry* at para. 76). This reasoning so far as it goes is unimpeachable particularly when regard is had to the statutory objective set out in subsection 2(2) of the ATIA which confirms that the ATIA is intended to complement and not replace existing procedures for access to government information.

[14] However, the situation with which we are confronted is entirely different in that, as the appellant itself asserts, "the DPA does not in any way deal with a mechanism to request or to disclose documents" (Memorandum of the appellant at para. 41). It follows that construing subsection 24(1) of the ATIA as the appellant suggests would leave the person who is seeking the release of the subject information in the present case without any statutory method for accessing it, even though the appellant has consented to its release.

[15] This cannot have been the intent of Parliament when regard is had to subsection 2(1) of the ATIA which provides for a right of access to government information subject only to "necessary exceptions". Rather, it seems clear that when the disclosure of information is restricted by a

statutory provision set out in Schedule II of the ATIA in circumstances where no alternative method for accessing this information is provided in the statute enacting the restriction, subsection 24(1) of the ATIA must be construed as incorporating the restriction.

[16] We note that this reading is consistent with the decision of the Federal Court in *Siemens Canada Ltd. v. Canada (Minister of Public Works and Government Services)*, 2001 FCT 1202 [*Siemens*] later affirmed by this Court (2002 FCA 414), which was decided on the basis that section 30 of the DPA had been so incorporated (*Siemens* at paras. 12 and 18 to 20).

[17] The Federal Court judge proceeded on proper principle when he considered the restriction set out in section 30 of the DPA and ordered the disclosure of the unit prices on the basis that this information was not "restricted" within the meaning of subsection 24(1) of the ATIA by reason of the consent given by the appellant.

[18] The appeal is accordingly dismissed with costs which we fix on consent at $1,500.

"Marc Noël"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-255-11
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR JUSTICE BEAUDRY OF THE FEDERAL COURT DATED JUNE 7, 2011, DOCKET NO. T-724-10.	
STYLE OF CAUSE:	TOP ACES CONSULTING INC. and THE MINISTER OF NATIONAL DEFENCE
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 7, 2012
REASONS FOR JUDGMENT OF THE COURT BY:	NOËL, GAUTHIER, STRATAS JJ.A.
DELIVERED FROM THE BENCH BY:	NOËL J.A.

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