Federal Court of Appeal  Cour d'appel fédérale

Date: 20130417

Docket: A-375-12

Citation: 2013 FCA 104

CORAM: **EVANS J.A.**
STRATAS J.A.
NEAR J.A.

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS and THE MINISTER OF JUSTICE OF CANADA

Appellants

and

THE INFORMATION COMMISSIONER OF CANADA

Respondent

Heard at Ottawa, Ontario, on April 9, 2013.

Judgment delivered at Toronto, Ontario, on April 17, 2013.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: EVANS AND NEAR JJ.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The Ministers appeal from a decision of the Federal Court (*per* Justice Gleason) dated July 12, 2012: 2012 FC 877.

[2] Acting under the *Access to Information Act*, R.S.C. 1985, c. A-1, the Federal Court ordered that all of a particular protocol should be disclosed to a person seeking access to it. The Protocol sets

out the procedures to be followed by the Department of Justice and the RCMP when RCMP documents are sought in civil litigation against the federal Crown.

[3] In this Court, the appellant Ministers submit that none of the Protocol should be disclosed. All is covered by the solicitor-client exemption under the Act. The respondent Information Commissioner says that all of the Protocol should be disclosed. None of it is covered by the solicitor-client exemption under the Act.

[4] For the reasons set out below, I largely agree with the Information Commissioner. All but a small portion of the Protocol should be disclosed. That small portion is covered by the exemption for solicitor-client privilege. Accordingly, I would allow the appeal in part.

[5] As a matter of discretion, the access coordinators of the Department of Justice and the RCMP could decide to disclose the small portion covered by solicitor-client privilege. Accordingly, I would remit the small portion to the access coordinators for their reconsideration.

A. The request for the Protocol

[6] The RCMP and the Department of Justice received a request under the Act for the Protocol. They disclosed it, but excised everything except its title and the signatories to the document.

[7] The Protocol is entitled "Principles to Implement Legal Advice on the Listing and Inspection of RCMP Documents in Civil Litigation." It is available to relevant personnel in the

RCMP and the Department of Justice. The Protocol sets out the roles of the RCMP and the Attorney General and the procedures to be followed when the RCMP possesses documents relevant to civil litigation against the federal Crown. The signatories are Assistant Commissioner William Lenton, RCMP Director of Federal Services, and James D. Bissell, Assistant Deputy Attorney General.

[8] In resisting disclosure under the Act, the RCMP and the Department of Justice invoked two exemptions: "solicitor-client privilege" (section 23) and "advice or recommendations developed by or for a government institution or a minister of the Crown" (paragraph 21(1)(*a*)).

B. Proceedings before the Information Commissioner of Canada

[9] Faced with the refusal of the RCMP and the Department of Justice to disclose the substance of the Protocol, the requester complained to the Information Commissioner under section 30 of the Act, alleging that the Protocol does not fall within any exemptions to disclosure under the Act.

[10] The Information Commissioner conducted an investigation, examined the Protocol and a number of documents leading up to it, and concluded that the Protocol did not fall within the exemptions.

[11] Having reached that conclusion, the Information Commissioner applied to the Federal Court under section 42 of the Act, seeking disclosure of the Protocol.

C. Proceedings in the Federal Court

[12] The Federal Court granted the Information Commissioner's application, agreeing with her that the Protocol did not fall within the exemptions.

[13] First, on the issue of solicitor-client privilege, the Federal Court noted that certain formal matters worked against the existence of the privilege (at paragraph 25):

> …the Protocol was negotiated; legal advice is not the subject of negotiation between solicitor and his or her client. In addition, the Protocol is signed by both the putative lawyer (the DOJ) and the putative client (the RCMP); a communication providing or seeking legal advice is not typically signed by both the client and the lawyer.

[14] However, in the core of its decision, the Federal Court concluded that the Protocol does not contain legal advice, nor is it concerned with providing legal advice. Instead (at paragraph 25),

> …it is an agreement [in which]…the parties have moved past the stage of seeking or providing advice and have entered into a document that reflects their understanding as to their respective roles and obligations regarding the way in which they will operate when the RCMP is in possession of documents, obtained through its criminal investigative powers, that might be relevant in civil litigation against the federal Crown.

[15] The Federal Court concluded that the Protocol was no different from other memoranda of understanding or agreements that the Department of Justice has entered into with other departments.

[16] Next, on the issue of the exemption for advice, the Federal Court found that the Protocol was not, in itself, advice but rather an agreement setting out respective roles and responsibilities. Further, the Federal Court noted that it could not tell from the text of the Protocol whether it

reflected earlier legal advice obtained by the DOJ. Accordingly, in the Court's view, disclosing the Protocol would "in no way harm the interests that the exemption…is designed to protect" (at paragraph 32).

[17] The Ministers appeal to this Court. They submit that the solicitor-client exemption applies. Further, they submit that the access to information coordinators properly exercised their discretion not to disclose the Protocol.

D. Analysis

(1) The standard of review

[18] The parties agree on the standard of review. The question whether the exemptions apply is reviewed on the basis of correctness. The question whether the discretion was properly exercised is reviewed on the basis of reasonableness. See, for example, *Canada (Information Commissioner) v. Canada (Minister of Industry)*, 2001 FCA 254 at paragraph 47.

[19] In this Court, the parties agreed that the Federal Court's characterizations of the Protocol, to the extent they are suffused by matters of fact, can only be set aside on the basis of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401.

(2) The solicitor-client privilege exemption (section 23)

(a) A preliminary consideration

[20] In their memorandum of fact and law, the Ministers addressed the issue of solicitor-client privilege as an all-or-nothing matter: either the whole Protocol is privileged or none of it is privileged.

[21] This overlooks the fact that sometimes only part of a document is privileged. Further, the Act does not regard disclosure as an all-or nothing matter. Indeed, under section 25 of the Act, a head of a government institution must sever any part of a record that does not contain exempt material if it can be reasonably severed. If only part of the Protocol is privileged, the issue of severance must be addressed.

(b) General principles

[22] The parties broadly agree on the general principles to be applied. Indeed, the Ministers conceded that at paragraphs 15-22 of its reasons the Federal Court correctly stated the general principles.

[23] Throughout their submissions in this Court, the Ministers stressed the importance of solicitor-client privilege, relying upon broad statements in cases such as *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, *Pritchard v. Ontario (Human*

Rights Commission), 2004 SCC 31, [2004] 1 S.C.R. 809, and *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574.

[24] However "fundamental," "all-encompassing" and "nearly absolute" the privilege may be, these cases confirm that not everything uttered by a lawyer to a client is privileged: see, *e.g.*, *Pritchard*, *supra*, at paragraph 20; *Blood Tribe*, *supra*, at paragraph 10. Before us, counsel for the Ministers quite properly conceded that comments by lawyers to clients about matters wholly unrelated to their solicitor-client relationship are not privileged.

[25] Rather, communications must be viewed in light of the context surrounding the solicitor-client relationship and the relationship itself: *Pritchard*, *supra* at paragraph 20; *Miranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193 at paragraph 32. In particular, heed must be paid to the nature of the relationship, the subject-matter of what is said to be advice, and the circumstances of the document in issue: *R. v. Campbell*, [1999] 1 S.C.R. 565 at paragraph 50.

[26] All communications between a solicitor and a client directly related to the seeking, formulating or giving of legal advice are privileged, along with communications within the continuum in which the solicitor tenders advice. See *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 at paragraph 8.

[27] Part of the continuum protected by privilege includes "matters great and small at various stages…includ[ing] advice as to what should prudently and sensibly be done in the relevant legal context" and other matters "directly related to the performance by the solicitor of his professional

duty as legal advisor to the client." See *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at page 1046 *per* Taylor L.J.; *Three Rivers District Council v. Governor and Company of the Bank of England*, [2004] UKHL 48 at paragraph 111.

[28] In determining where the protected continuum ends, one good question is whether a communication forms "part of that necessary exchange of information of which the object is the giving of legal advice": *Balabel*, *supra* at page 1048. If so, it is within the protected continuum. Put another way, does the disclosure of the communication have the potential to undercut the purpose behind the privilege – namely, the need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them?

[29] For example, where a Director of a government department receives legal advice on how certain proceedings should be conducted and the director so instructs those conducting proceedings, the instructions, essentially cribbed from the legal advice, form part of the continuum and are protected: *Minister of Community and Social Services v. Cropley* (2004), 70 O.R. (3d) 680 (Div. Ct.). Disclosing such a communication would undercut the ability of the director to freely and candidly seek legal advice.

[30] In some circumstances, however, the end products of legal advice do not fall within the continuum and are not privileged. For example, many organizations develop document management and document retention policies and circulate them to personnel within the organization. Often these are shaped by the advice of counsel. However, such policies are usually disclosed, without

objection, because they do not form part of an exchange of information with the object of giving legal advice. Rather, they are operational in nature and relate to the conduct of the general business of the organization.

[31] Similarly, an organization might receive plenty of legal advice about how to draft a policy against sexual harassment in the workplace. But the operational implementation of that advice – the policy and its circulation to personnel within the organization for the purpose of ensuring the organization functions in an acceptable, professional and business-like manner – is not privileged, except to the extent that the policy communicates the very legal advice given by counsel.

[32] In argument before us, counsel for the Ministers quite properly conceded that policies of these sorts are not covered by the privilege.

[33] It follows, then, that I agree with the Federal Court's suggestion (at paragraph 25) that documents and actions shaped by legal advice are not necessarily themselves legal advice and do not necessarily form part of the protected continuum of communication. There are occasions where parties have moved "past the stage of seeking or providing advice," *i.e.*, beyond the protected continuum, and start to act on the advice for the purposes of conducting their regular business.

(c) The Federal Court's application of these principles

[34] As previously mentioned, the Federal Court characterized the Protocol not as legal advice or within the continuum of legal advice but rather as a statement of the respective roles of the RCMP

and the Department of Justice and the procedures they will follow when RCMP documents may be relevant in civil litigation.

[35] For the purposes of this appeal, I would divide the seventeen paragraph Protocol into two parts: the first three paragraphs and the last fourteen paragraphs. In my view, there is no ground to interfere with the Federal Court's characterization of the last fourteen paragraphs of the Protocol. That characterization is founded upon a number of factual findings made by the Federal Court (at paragraphs 25-26) that stand absent any demonstration of palpable and overriding error. The Ministers have not demonstrated any such error. However, the first three paragraphs embody legal advice and are covered by solicitor-client privilege.

The last fourteen paragraphs of the Protocol

[36] The last fourteen paragraphs of the Protocol are a negotiated and agreed-upon operational policy formulated after any legal advice has been given and after any continuum of communication that is necessary to be protected in light of the purposes behind the privilege. They resemble the sort of document management policy seen in many organizations. As the Federal Court found, the fourteen paragraphs define the respective roles of the RCMP and the Department of Justice and set out procedures they should follow concerning documents held by the RCMP. The fourteen paragraphs guide personnel in the RCMP and the Department of Justice who are engaged in the day-to-day, operational business of locating RCMP documents for the purpose of disclosing them in litigation. Nothing is said about any legal obligations.

[37] The Protocol itself is an agreement. This is not just an insignificant matter of form. Rather, it affects how one characterizes the substance of the communication: the roles and procedures defined in the Protocol are a product of negotiation and compromise. They do not necessarily embody or reflect any advice previously given.

[38] On this, the Federal Court noted that it impossible to say whether the matters set out are consistent with or conflict with any earlier legal advice. I agree. Indeed, it is impossible to tell whether or not they are based on any earlier legal advice. Thus, disclosing this policy discloses nothing about the content of any earlier legal advice or related communications and does not in any way undercut the purposes served by solicitor-client privilege.

[39] In this regard, the case at bar differs from *Cropley*, *supra*. In *Cropley*, the instructions disseminated by the Director embodied the legal advice and were not the product of negotiation and compromise. I agree and adopt the Federal Court's conclusion on this point (at paragraph 27):

> [*Cropley*] involved requests for disclosure of standing instructions and advice to counsel regarding the way in which litigation was to be conducted, which were drafted by in-house counsel for the Ministry and were intended to be provided to counsel retained to act on behalf of the Ministry. Here, on the other hand, the Protocol does not provide advice or instructions, but, as noted, reflects an agreement between the DOJ and the RCMP regarding their respective roles and responsibilities.

[40] The Ministers submitted that the Federal Court fastened only on whether the Protocol gave legal advice and not whether the Protocol was part of the continuum of communication associated with the giving and receiving of legal advice. I disagree. The Federal Court was alive to the fact that there is a protected continuum of communication, as is well-seen by its consideration of the *Cropley* case.

[41] Were the Ministers' submissions on the scope of the protected continuum accepted, all acts and communications taking place after legal advice is dispensed and relating to any subject-matters covered by the legal advice would be confidential. As a result, many departments' operational policies and memoranda of agreement between departments – currently public – might suddenly become confidential even though they do not disclose advice or other communications essential to the purposes served by the privilege.

[42] In my view, that would overshoot the mark. The scope of confidentiality would be extended beyond any of the purposes served by solicitor-client privilege – there would simply be secrecy for secrecy's sake.

[43] Accordingly, like the Federal Court, and for many of its reasons, I find the last fourteen paragraphs of the Protocol are not privileged.

The first three paragraphs of the Protocol

[44] The first three paragraphs of the Protocol are different. They memorialize, as background, the content of certain legal obligations of the federal Crown for the benefit of the RCMP and the Department of Justice and their personnel engaged in document management.

[45] This is legal advice falling under the exemption in section 23 of the Act. Accordingly, the first three paragraphs of the Protocol are privileged and can be kept confidential.

(3) The access coordinators' discretion not to disclose the Protocol

[46] I have found that the last fourteen paragraphs of the Protocol are not exempt and should be released to the requester. However, the first three paragraphs remain exempt. That is not the end of the matter – as a matter of discretion, the access coordinators could still release those three paragraphs.

[47] As previously mentioned, the access coordinators exercised their discretion earlier against disclosing the whole Protocol, a document they viewed as wholly exempt. Now, in light of these reasons, the vast majority of the document is not exempt and must be disclosed.

[48] Certain new questions for the consideration of the access coordinators now arise. Given these reasons, might they now release the first three paragraphs? Might the disclosure of the first three paragraphs bolster in the eyes of the public the credibility and soundness of the documentary procedures the RCMP and Department of Justice are following? Might there now be a greater public interest in disclosing the paragraphs? Or are there still important considerations that warrant keeping the first three paragraphs confidential?

[49] These questions are for the access coordinators to decide afresh. That discretion is to be exercised mindful of all of the relevant circumstances of this case, the purposes of the Act, and the principles set out in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 at paragraph 66.

E. Proposed disposition

[50] For the foregoing reasons, I would allow the appeal in part. In paragraph 2 of the Federal Court's judgment, after the words "[t]he respondents shall disclose," I would add the words "the last fourteen paragraphs of."

[51] I would remit to the access coordinators of the RCMP and Department of Justice the question whether, as a matter of discretion, the first three paragraphs of the Protocol should be disclosed even though they are exempt from disclosure under the Act under section 23 of the Act as privileged solicitor-client communications.

[52] The respondent Information Commissioner has not sought her costs and so none shall be awarded.

"David Stratas"

J.A.

"I agree.
John M. Evans J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-375-12
APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE GLEASON DATED JULY 12, 2012, NOS. T-146-11 AND T-147-11	
STYLE OF CAUSE:	The Minister of Public Safety and Emergency Preparedness and the Minister of Justice of Canada v. The Information Commissioner of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 9, 2013
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Evans and Near JJ.A.
DATED:	April 17, 2013

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