Federal Court  Cour fédérale

Date: 20200320

Docket: T-1542-12

Citation: 2020 FC 399

Ottawa, Ontario, March 20, 2020

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

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 MEMBERS OF THE SECHELT INDIAN BAND AND THE SECHELT INDIAN BAND, VIOLET CATHERINE GOTTFRIEDSON, DOREEN LOUISE SEYMOUR, CHARLOTTE ANNE VICTORINE GILBERT, VICTOR FRASER, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, ABIGAIL MARGARET AUGUST, SHELLY NADINE HOEHNE, DAPHNE PAUL, AARON JOE AND RITA POULSEN

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] This is a class proceeding brought by the representative Plaintiffs seeking damages for alleged harm caused by Canada's role in the administration of residential day schools, mainly in the form of language and cultural deprivations. The period of time contemplated by the action runs between 1920 to 1979. Needless to say, the documentary record pertaining to the issues raised by the Plaintiffs is substantial and much of it is made up of old handwritten and typewritten documents of poor quality and resolution. I am told by the parties that Canada's documentary production is expected to run to at least 132,000 documents.

[2] As initially framed, this motion by the Plaintiffs sought an Order compelling Canada to produce, as a supplement to its documentary productions, its associated database fields and field content. This information is said to be needed by the Plaintiffs to effectively and efficiently search through and organize the Defendant's voluminous documentary record, a large part of which is unreadable by optical character recognition [OCR] technology.

[3] For purposes of this motion, I accept the estimate given by Pamela Fontaine that, of Canada's initial disclosure of 49,562 documents, about 70% are unreadable by OCR. Of the remaining 30% that are technically readable, the reliability of the results will vary from document to document. This variability is borne out by the samples that were subjected to OCR analysis by Charles Saddington as discussed at paragraphs 15 and 16 of his affidavit dated January 8, 2020.

[4] To their credit, the parties have entered into an electronic document exchange agreement setting out a protocol for their production of documents. That agreement appears to be modelled on the Canadian Judicial Council National Model Practice Direction For the Use of Technology in Civil Litigation [CJC Protocol].

[5] Canada has agreed to make available a limited number of primary fields and associated field content (i.e. date, document number, names of staff and students, school names, region and other "objective" fields directly related to a primary field such as attachment, source, carbon copy, etc.) but it refuses to produce more on the basis of concerns about solicitor-client and litigation privilege.

[6] At the opening of argument on the motion, the Plaintiffs reduced the scope of their claim to relief, seeking, for the time being, only the names of the remaining fields employed by Canada and the rules that were applied to populate those fields with searchable content. Notwithstanding that concession, Canada maintained its position that the requested information would compromise its litigation privilege.

[7] I do not agree with the Plaintiffs that this motion stands to be decided under *Federal Courts Rules*, SOR/98-106 [Rules], Rules 222 and 223, which deal with the scope and form of documentary production. This is not a dispute about what evidence Canada must disclose or the form in which that evidence must be presented. Rather, it is 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.

[8] In much, if not most, document-laden litigation, the relevant documents will be machine readable and the receiving party can apply its own technology to the task of searching for content. This case is different because a large part of Canada's production is made up of poor and optically unreadable historical records that cannot be searched except by tedious human intervention.

[9] Over many years, Canada has reviewed, categorized and summarized the records that it is now obliged to disclose to the Plaintiffs. That field content was created by Canada for litigation and document management purposes. As documents were reviewed, they were coded under field names that allow later reviewers to more efficiently select for and access content based on the earlier coding. Unfortunately, the documents do not appear to have been coded for solicitor-client or litigation privilege. In the result, allowing open access to the Plaintiffs to all of Canada's field content risks the disclosure of any privileged information included in those entries. This is not an insignificant problem.

[10] The Plaintiffs modified claim to relief is, however, limited to the disclosure of additional field names and the rules that Canada applied to populate those fields with searchable content. With this information, the Plaintiffs say that they can better understand Canada's document management system with the view to being more selective about the documents that are likely to be the most important to the prosecution of their claims. For instance, if they know there are 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.

[11] There are no Rules that directly apply to the relief the Plaintiffs are seeking. The CJC Protocol, however, speaks to the use of technology with a view to the "efficient conduct" of litigation. Article 2.6.2 provides for a party producing electronic material to take steps to enable access where the receiving party is not reasonably able to do so. Article 4.1.2 sets out a list of default fields that should be made available with a party's schedule of discoverable documents. Article 4.2 contemplates the departure from the default standard while maintaining the expected resolution standards. Article 6.1.4.1 speaks to the need for proportionality. The CJC Protocol does not, however, confront the problem arising in this case in the form of a huge production that is mainly unreadable by OCR. Where a production is OCR readable, there is obviously no need to produce anything more than the default fields called for in the CJC Protocol.

[12] The British Columbia Supreme Court has developed a similar practice direction dealing with electronic evidence. That document also includes an enablement provision authorizing the Court to order a party to facilitate access to its documents if the receiving party is not "reasonably able" to do so (see affidavit of Deanna Wissman at Exhibit B, p 4, Article 2.9.2).

[13] The idea that a party may have a positive obligation to assist the opposing party to better manage and understand a large document production also has some jurisprudential support.

[14] In *Bronson v Hewitt*, 2007 BCSC 1705, 75 BCLR (4th) 124, the Court was dealing with the problem of a large, disorganized documentary production. The aggrieved party sought and obtained an order compelling the disclosing party to re-organize the documents chronologically and to distinguish originals from copies. In concluding that a document production must be presented in a way that is convenient to the receiving party, the Court applied several earlier authorities including *Canadian Engineering &Surveys (Yukon) Ltd v Banque Nationale de Paris (Canada),* (1995) 43 CPC (3d) 277 (Alta QB), aff'd (1996), 8 CPC (4th) 190 (Alta CA), and *GWL Properties Ltd v WR Grace & Co of Canada Ltd,* [1993] BCJ No 1062, 14 CPC (3d) 74 (BCSC).. The latter decision speaks to the obligation to produce "a meaningful, reliable and complete disclosure as well as an effective aid to retrieving the documents produced…".

[15] Even more to the point is the decision in *Wilson v Servier Canada Inc,* [2003] OJ No 157, 119 ACWS (3d) 915 (ONSC), where the Court recognized a larger obligation than the one accepted by Canada in this case:

> [8] The plaintiff's task in seeking meaningful production has been made particularly difficult by the defendants' general approach to the litigation. On the simple premise, as expressed by the defendants' lead counsel, that litigation is an adversarial process, the defendants have been generally uncooperative and have required the plaintiff to proceed by motion at virtually every stage of the proceeding to achieve any progress in moving the case forward.
>
> [9] I take exception to this. In contrast with other features of the civil litigation process in Ontario, the discovery of documents operates through a unilateral obligation on the part of each party to disclose all relevant documents that are not subject to privilege. The avowed approach of the defendants' counsel is contrary to the very spirit of this important stage of the litigation process.
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> [10] Following this contrary approach, the defendants took the position in the first instance that the CD-ROMs and electronic data base (used in conjunction with the *Summation* legal data

> processing system) defendants' counsel had prepared at significant expense for themselves in respect of their own documents (so as to organise meaningfully the documents they disclosed in their affidavits) were not to be shared with the plaintiff. Later, in the course of a case conference, the defendants provided an index in word format but plaintiff's counsel asserted that the voluminous documents were simply not searchable. The production of voluminous documentation in a form that does not provide meaningful access is not acceptable. *Solid Waste Reclamation Inc. v. Philip Enterprises Inc.* (1991), 2 O.R. (3d) 481 (Gen. Div.). An ongoing dispute culminated in the plaintiff bringing a motion July 12, 2002.
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> **The Order dated August 2, 2002 as it relates to Canadian Production.**
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> [11] In response to a motion July 12, 2002 by the plaintiff, after protracted submissions, this Court ordered that the defendants share with the plaintiff the objective fields of their electronic database relating to their production.
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> [12] In my view, it is implicit to an affidavit as to documents that a defendant gives meaningful access to its documents through its electronic database when that has been prepared by that defendant. The database functions as an index to provide meaningful access to the documents. In this Court's view, 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. (The situation in which there is no existing database prepared by the defendant need not be considered here.) This approach is particularly appropriate when a party is faced with some 500,000 pages of documents by the opposite party.

[16] There is no evidence before me suggesting 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. Canada contends, however, that the disclosure of this information will compromise its litigation privilege. In particular, Canada asserts that its creation of field names “reflects [its] litigation strategy” and is akin to the subfolders or tabs used to organize a litigator’s brief [see para 89 of Canada’s Written Representation, Respondent’s

Motion Record, Vol 3]. Canada also says that the disclosure of this type of information might inadvertently reveal aspects of its litigation strategy through a so-called mosaic effect. It cites the decision in *British Columbia (Attorney General) v Lee*, 2017 BCCA 219 at paras 39-40, 414 DLR (4th) 635, where this type of concern was recognized and where the disclosure of part of a communication string between a solicitor and client was said to create a risk that otherwise privileged information might be inferred.

[17] I accept that some field content may fall within Canada's litigation privilege or contain solicitor-client communications. I do not agree, however, that the mere disclosure of field names or the rules applied to populate those fields with content fall within Canada's claim to litigation privilege. This is purely factual information that could assist the Plaintiffs' to better understand how Canada's documents have been organized and categorized. The disclosure of this information will not impose any undue burden on Canada or compromise its litigation interests.

[18] It is important to appreciate that litigation privilege has a limited scope. It is intended to protect counsel's zone of privacy around litigation strategy, observations, thoughts and opinions. It does not apply to evidence which may be compellable: see *Blank v Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 SCR 319, and *R v Assessment Direct Inc*, 2017 ONSC 5686 at paras 10 and 11, 142 WCB (2d) 59.

[19] 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.

[20] The question that remains is whether, in the absence of express authority in the Rules, the Court should order Canada to produce this information to the Plaintiffs. This question must be addressed with the principles of economy, fairness and proportionality in mind. In an age of massive documentary productions, strident adversarialism may, in appropriate cases, be expected to give way to cooperation and efficiency. Indeed, both the CJC and British Columbia Protocols speak to the use of technology in the service of greater efficiency in litigation. Rule 3 directs that the Rules be applied to achieve the least expensive determination. This Court's Notice to the Profession concerning proportionality also requires litigants in case-managed proceedings to act cooperatively at all stages of an action and, particularly, where discovery is concerned.

[21] Having regard to the fact that this litigation is under case management and considering the broad authority conferred by Rule 4, the Court will order Canada to disclose to the Plaintiffs all of the field names it has used in the organization and management of its documents and, to the extent they are known, the rules that Canada utilized to populate those fields with content.

[22] In consideration of my finding that the disclosure of the above information will not breach a litigation or solicitor-client privilege, Canada is also ordered to disclose any content in its confidential affidavits that pertains to the creation, organization, collection and management of its evidence database. This excludes from disclosure content that would fall within a zone of

privilege including but not limited to paragraphs 14 and 15 of affidavit #2 of Rosemary Schipizky and paragraph 23 of the affidavit #2 of Deanna Wissman.

ORDER IN T-1542-12

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.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1542-12
STYLE OF CAUSE:	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 MEMBERS OF THE SECHELT INDIAN BAND AND THE SECHELT INDIAN BAND, VIOLET CATHERINE GOTTFRIEDSON, DOREEN LOUISE SEYMOUR, CHARLOTTE ANNE VICTORINE GILBERT, VICTOR FRASER, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, ABIGAIL MARGARET AUGUST, SHELLY NADINE HOEHNE, DAPHNE PAUL, AARON JOE AND RITA POULSEN v HER MAJESTY THE QUEEN
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