Date: 20090210

Docket: T-1529-07

Citation: 2009 FC 131

Ottawa, Ontario, February 10, 2009

PRESENT: The Honourable Madam Justice Layden-Stevenson

BETWEEN:

**ENVIRONMENTAL DEFENCE CANADA,
GEORGIA STRAIT ALLIANCE,
WESTERN CANADA WILDERNESS COMMITTEE
and DAVID SUZUKI FOUNDATION**

Applicants

and

**MINISTER OF FISHERIES
AND OCEANS**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The respondent Minister of Fisheries and Oceans (the Minister) appeals the order of Prothonotary Lafrenière dated November 4, 2008. The prothonotary ordered the Minister to provide the applicants with a certified unredacted copy of the Memorandum for the Deputy Minister of Fisheries and Oceans dated July 18, 2007 (the Action Memorandum). Prothonotary Lafrenière concluded that the Minister had failed to establish that the redacted passage is protected by solicitor-client privilege. I am of the same view. Therefore, the Minister's motion will be dismissed.

Background

[2] The Nooksack dace is a small freshwater minnow that is known to inhabit four rivers in the Fraser Valley area of British Columbia. In 1996, the Nooksack dace was designated as an endangered species by the Committee on the Status of Endangered Wildlife in Canada. As a result, it was included on the List of Wildlife Species at Risk in Schedule 1 of the *Species at Risk Act*, S.C. 2002, c. 29 (SARA) when the provisions of the SARA dealing with recovery planning came into force. This inclusion triggers various obligations under the SARA. One such obligation requires the Minister, within specified timelines, to prepare a recovery strategy for extirpated, endangered or threatened species and a management plan for species of special concern.

[3] The underlying judicial review application arises from the July 23, 2007 decision of the Deputy Minister to approve a recovery strategy for the Nooksack dace. More specifically, the applicants (environmental groups that work to advance the conservation of species-at-risk in Canada) claim that the recovery strategy fails to comply with paragraph 41(1)(c) of the SARA in that it did not identify the Nooksack dace's critical habitat to the extent possible. The applicants claim that the Minister lacks authority to remove scientists' critical habitat maps from recovery strategies for the purpose of enabling the Department of Fisheries and Oceans (DFO) to first internally 'peer review' this information.

[4] In their notice of application for judicial review, the applicants requested the record of material that was before the Minister and DFO relevant to the preparation and approval of the Nooksack dace recovery strategy. Mr. Pardeep Ahluwalia, on behalf of the Minister, transmitted to

the Court and to the applicants pursuant to Rule 318 of the *Federal Courts Rules*, SOR/98-106, a certified copy of the material relevant to the application that was in the possession of the Minister and not in the possession of the applicants (the Record). The Record includes the Action Memorandum of slightly more than three pages in length. Two sentences comprising six lines of the Action Memorandum are redacted. The Minister claims solicitor-client privilege with respect to the redacted portion.

[5] Before the prothonotary, the applicants challenged, among other things, the Minister's claim to solicitor-client privilege. The prothonotary examined the redacted portion of the Action Memorandum and concluded that it was not privileged. He noted that the memorandum had not been prepared by a solicitor and that the source and content of the legal advice could not be determined. In the prothonotary's view, the Minister had failed to establish that the impugned passage is confidential and directly related to seeking, formulating or giving legal advice. Further, he held that any privilege that may have existed had been waived by the disclosure of closely-related information in the remainder of the Action Memorandum.

[6] On the return of this motion, the applicants seek to introduce new evidence, specifically the affidavit of Ranj Dhaliwal, affirmed December 19, 2008, to which is exhibited an Action Memorandum in another proceeding (Court File No. T-1552-08). This Action Memorandum came into the applicants' possession on November 6, 2008, two days after Prothonotary Lafrenière's order.

Issues

[7] The factual context gives rise to three issues:

(a) the proposed admission of the "new evidence";

(b) the standard of review applicable to Prothonotary Lafrenière's decision; and

(c) the alleged error of the prothonotary in failing to find the redacted portion of the Action Memorandum is protected by solicitor-client privilege.

New Evidence

[8] The criteria for filing new evidence are delineated in *Atlantic Engraving Ltd. v. Lapointe Rosenstein* (2002), 299 N.R. 244 (F.C.A.) (*Atlantic Engraving*). The applicants must demonstrate that the evidence to be adduced will serve the interests of justice, will assist the court and will not cause substantial or serious prejudice to the other side. Additionally, it must be shown that the evidence was not available before cross-examination. The discretion of the Court to permit the filing of additional material should be exercised with great circumspection: *Mazhero v. Canada (Industrial Relations Board)* (2002), 292 N.R. 187 (F.C.A.) (*Mazhero*).

[9] Although the applicants have satisfied me that Exhibit "A" to the Dhaliwal affidavit was not previously available to them, I am not persuaded that its admission will serve the interests of justice or that it will assist the court. First, the admission of the document is not essential to demonstrate the purpose for which it is tendered. The label describing a document is not determinative; it is merely a factor to be considered: *Abrams v. Grant*, [1978] O.J. No. 2283; 5 C.P.C. 308 (*Abrams*). Moreover, the jurisprudence contains sufficient reference to the "labelling" of Action Memoranda to enable the applicants to make their point: *Chatham-Kent (Municipality) v. Canada (Minister of*

Indian Affairs and Northern Development), [2002] 1 C.N.L.R. 103 (Fed. T.D.), aff'd. (2002), 289 N.R. 123 (F.C.A.) (*Chatham-Kent*); *Telus Communications Inc. v. Canada (Attorney General)* (2002), 329 N.R. 96 (F.C.A.) (*Telus*). The "new" Action Memorandum was not before the Minister, it was drafted one year after the Action Memorandum in question, it relates to a different species under a different section of the SARA. Its relevance, if any, is marginal. For these reasons, the applicants' motion is dismissed.

The Standard of Review

[10] Discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless the questions raised in the motion are vital to the final issue of the case or the orders are clearly wrong in the sense that the exercise of discretion by the prothonotary was based on a wrong principle or upon a misapprehension of the facts: *Merck & Co. Inc. v. Apotex Inc.*, [2004] 2 F.C.R. 459 (C.A.) (*Merck*), leave to appeal dismissed, [2004] S.C.C.A. No. 80; *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C.R. 425 (C.A.) (*Aqua-Gem*). There is no suggestion that the prothonotary's determination is vital to the final issue in this matter.

[11] The Minister claims that the decision is clearly wrong because it is based on an error of law and a misapprehension of the facts. Therefore, it ought to be reviewed *de novo*. The applicants contend that since the prothonotary made no error of legal principle and did not misapprehend the facts, it makes no difference whether the order is reviewed under the *de novo* standard or otherwise. The applicants note that determination as to whether the redacted passage is subject to solicitor-client privilege is hardly a discretionary matter. Thus, it takes no exception to a *de novo* review. Because I arrive at the same result as the prothonotary, I see no need to dwell on this issue.

Solicitor-Client Privilege

[12] The basic principles underlying the concept of solicitor-client privilege are not in dispute. It is common ground that the Supreme Court has repeatedly recognized the sanctity of solicitor-client privilege: *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 (*Descôteaux*); *R. v. Campbell*, [1999] 1 S.C.R. 565 (*Campbell*); *R. v. McClure*, [2001] 1 S.C.R. 445 (*McClure*); *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209 (*Lavallee*); *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 (*Pritchard*); *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32 (*Goodis*); *Minister of Justice v. Blank et al*, [2006] 2 S.C.R. 319 (*Blank*).

[13] The noted jurisprudence establishes that solicitor-client privilege is a substantive right. It is a privilege that exists between a client and his or her lawyer. It will generally apply as long as the communication falls within the usual and ordinary scope of the professional relationship. Once established, the privilege is broad and nearly all-encompassing. The principle "once privileged, always privileged" applies. However, the privilege is not absolute and it will yield in some narrowly prescribed circumstances that are not relevant here.

[14] In the private sector, the relationship between a lawyer and his or her client is usually evident. In circumstances involving public lawyers in government agencies, the relationship must be assessed on a case-by-case basis. In *Campbell*, Justice Binnie explained that, owing to the nature of the work, in-house counsel will often have both legal and non-legal responsibilities. Where government lawyers give policy advice outside the realm of their legal responsibilities, such advice

is not protected by solicitor-client privilege. Only those communications directly related to the seeking, formulating or giving of legal advice are protected.

[15] Privilege is a subject with which judges are acquainted: *Goodis*. In adjudicating a claim of privilege, the court must examine the actual statements said to be privileged in order to draw a conclusion as to whether privilege arises or whether it has been waived. The onus lies on the party claiming the privilege to demonstrate that the privilege exists: *1185740 Ontario Ltd. v. Canada (Minister of National Revenue)* (1999), 247 N.R. 287 (F.C.A.) (*1185740*); *British Columbia (Securities Commission) v. B.D.S.* (2003), 13 B.C.L.R. (4th) 107 (C.A.) (*B.D.S*).

[16] Guided by these principles, I turn to the circumstances of this matter. Notably, in my view, this case is not about whether communications that are protected by solicitor-client privilege should yield to a greater interest. Put another way, this case is not an exercise in balancing interests. The Minister's forceful submissions regarding the paramountcy of solicitor-client privilege are accurate and are not disputed. However, that is not what concerns us. The issue is whether solicitor-client privilege does exist in relation to two redacted sentences in the Action Memorandum. That is a threshold question and the burden is on the Minister to demonstrate that the conditions precedent to sustain the claim of solicitor-client privilege are met.

[17] The prerequisites for a valid claim of solicitor-client privilege were delineated by Mr. Justice Dickson, as he then was in *Solosky v. R.*, [1980] 1 S.C.R. 821 (*Solosky*) at p. 837. They are:

> (i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[18] In *Solosky*, an inmate attempted to invoke solicitor-client privilege to prevent the Director of Millhaven Institution from censoring his correspondence with his lawyer. The solicitor-client relationship was not an issue. As noted earlier, this is not always so for government lawyers.

[19] Mr. Ahluwalia's affidavit details his perception regarding the redactions. Paragraphs one to three contain identifying information such as his role as the Director General of the DFO Species at Risk Directorate and his involvement in the preparation of the Action Memorandum. Paragraphs four and five read as follows:

> The redacted portion of the Memorandum reflect the legal advice obtained from counsel with the Department of Justice ("DOJ") requested by the DFO in confidential communications between myself and other DFO officials and the DOJ counsel for the purposes of seeking and obtaining legal advice.
>
> I expected these communications between the DOJ counsel and the DFO officials to be and to remain confidential.

[20] These statements track the wording of the conditions precedent prescribed by Justice Dickson. In my view, the comments are not dispositive.

[21] Whether solicitor-client privilege is properly claimed is a substantive issue to be determined by the court: *Goodis*. If I were to accept paragraphs four and five of Mr. Ahluwalia's affidavit as conclusive, I would be abdicating my judicial responsibility to determine the substantive issue. That

is not to say that Mr. Ahluwalia's evidence is to be disregarded. Rather, it is a question of the weight that ought to be assigned to it.

[22] I agree with Prothonotary Lafrenière that, on its face, the redacted portion of the Action Memorandum does not appear to be privileged. The Minister is correct that the memorandum need not be authored by a solicitor: *Telus*. Additionally, as stated earlier, the label describing the document as "unclassified" is but a factor to consider although I note that the Minister's affiant, Ms. Webb, on cross-examination, stated that the document was not confidential.

[23] These circumstances involve government lawyers. In *Pritchard*, Mr. Justice Major referred to Justice Binnie's comments in *Campbell* and reiterated the indicia for determining claims of solicitor-client privilege in circumstances when government in-house counsel are involved. At paragraph 20, he stated:

> Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject-matter of the advice, and the circumstances in which it is sought and rendered. (my emphasis)

[24] The Minister, in my view, has fallen short of this standard and has failed to provide the information required for a proper assessment. Regarding the Minister's submission that disclosure of the name of the lawyer is tantamount to disclosure of that which is subject to solicitor-client privilege, I would think that if that were so, it ought to have been stated in Mr. Ahluwalia's affidavit. Simply put, the Minister has not met the burden of establishing the existence of solicitor-

client privilege with respect to the redacted passage of the Action Memorandum. The prothonotary did not err as alleged.

Waiver

[25] My determination regarding solicitor-client privilege is dispositive. However, Prothonotary Lafrenière concluded that, even if the privilege exists, it was waived. Therefore, I will briefly address the issue of waiver.

[26] Waiver of solicitor-client privilege is established when it is demonstrated that the possessor of the privilege knows of the existence of the privilege and voluntarily evinces an intention to waive it: *K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs)* (1996), 106 F.T.R. 210 (T.D.) (*K.F. Evans*). Waiver may also occur by implication. The latter concept is addressed in Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* 2d ed. (Toronto: Butterworths, 1999) at 758:

> 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.

[27] In *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* (1983), 35 C.P.C. 146, 45 B.C.L.R. 218 (S.C.) (*S&K)* , Madam Justice McLachlin, as she then was, described it in this way:

> (W)aiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advise is lost: *Rogers v. Hunter*, [1982] 2 W.W.R. 189.
> ...
> [10] ... In the 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 ...

[28] In *Bank Leu Ag v. Gaming Lottery Corp*. (1999), 43 C.P.C. (4th) 73 (Ont. S.C.) (*Bank Leu Ag*), at paragraph 5, Mr. Justice Ground stated that privilege "will be 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".

[29] In *Apotex Inc. v. Canada (Minister of Health)*, [2004] 2 F.C.R. 137 (F.C.) (*Apotex*), Mr. Justice Lemieux concluded that the jurisprudence does not support the proposition that reliance on the contents or substance of the legal advice received is conclusive. Further, fairness to a party is a guiding principle when determining whether solicitor-client privilege is deemed to have been waived. Balancing that element of fairness against the values underlying the privilege depends on the circumstances.

[30] Prothonotary Lafrenière found that any privilege that may have existed with respect to the redacted portion of the Action Memorandum was waived because of the disclosure of closely-related information. I am of the same mind.

[31] I accept the Minister's position that there is no explicit reference to legal advice to be found in the unredacted portion of the Action Memorandum, or for that matter, in any of the Minister's documentation. However, the record, particularly Ms. Webb's affidavit and to a lesser extent her cross-examination, contains information akin to the redacted sentences of the Action Memorandum.

[32] It is not open to the Minister to assert that the content of the redacted portion contains legal advice and is therefore privileged and, at the same time, assert that the same information contained elsewhere in the Minister's record is not a disclosure of legal advice. The Minister argues that there was no implied waiver because the Minister's pleadings do not rely on the legal advice contained in the redaction, as was the situation in *K.F. Evans* and *Campbell*. I reject that argument. Reliance is not, in and of itself, determinative of the issue of implied waiver: *Bank Leu Ag*; *Apotex*.

[33] In my view, given the Minister's disclosure, elsewhere in the record, of information closely-related to that in the redacted sentences, it would be unfair and inconsistent for the Minister to withhold the redacted portion of the Action Memorandum. Consequently, the prothonotary was quite right to conclude that any privilege that exists in the redacted sentences has been implicitly waived by the Minister.

JUDGMENT

The motion is dismissed. The redacted sentences contained in the Action Memorandum will remain redacted pending the expiration of the appeal period, or if an appeal is taken, until the appeal is determined by the Federal Court of Appeal.

"Carolyn Layden-Stevenson"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Mrs. Lara Tessaro Mr. Judah Harrison	FOR THE APPLICANTS
Ms. Marja K. Bulmer Ms. B.J. Wray	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ecojustice Canada Vancouver, B.C.	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT