Federal Court of Appeal Cour d'appel fédérale

Date: 20180112

Docket: A-84-16

Citation: 2018 FCA 11

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
WOODS J.A.

BETWEEN:

SUNCOR ENERGY INC.

Appellant

and

CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD

Respondent

and

THE INFORMATION COMMISSIONER OF CANADA

Respondent

Heard at St. John's, Newfoundland and Labrador, on June 27, 2017.

Judgment delivered at Ottawa, Ontario, on January 12, 2018.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRING REASONS BY: GAUTHIER J.A.
CONCURRED IN BY: WOODS J.A.

Federal Court of Appeal Cour d'appel fédérale

Date: 20180112

Docket: A-84-16

Citation: 2018 FCA 11

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
WOODS J.A.

BETWEEN:

SUNCOR ENERGY INC.

Appellant

and

CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD

Respondent

and

THE INFORMATION COMMISSIONER OF CANADA

Respondent

REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal of a judgment of the Federal Court of Justice Heneghan (the Judge) dismissing Suncor Energy Inc.'s (Suncor) application under section 44 of the *Access to*

Information Act, R.S.C. 1985, c. A-1 (the *Access Act*) for judicial review of a decision of the Canada-Newfoundland and Labrador Offshore Petroleum Board (the Board) to release certain records with limited redactions (*Suncor Energy Inc. v. Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2016 FC 168 (Reasons)).

[2] At issue in this case, just as in the companion case released concurrently with the present decision (*Husky Oil Operations Limited v. Canada-Newfoundland and Labrador Offshore Petroleum Board and the Information Commissioner,* 2018 FCA 10 (*Husky Oil*)), is whether the fact that employees' names and their association with their employer, a third-party organization, are publicly available on the internet, authorizes the disclosure of these employees' names contained in records responsive to an access request under the *Access Act*. The originating access request is the same as the one considered in *Husky Oil*.

[3] For the reasons given in *Husky Oil*, I am of the view that the names of Suncor's employees and their association with their employer, in the context of the requested records, do not meet the definition of "personal information" in the *Privacy Act*, R.S.C. 1985, c. P-21 which refers to section 19 of the *Access Act*. I am further of the opinion that in any event, the Board did not err in finding that the records at issue did not disclose anything more about the employees than what had previously been made publicly available on the internet, and could therefore lawfully exercise its discretion to disclose that information.

I. Facts

[4] The facts are not in dispute and are similar to those in *Husky Oil*. Suncor is a Canadian energy corporation based in Calgary, Alberta. It engages in oil exploration and production activities in the offshore area of Newfoundland and Labrador. The respondent Board is mandated under the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, S.C. 1987, c. 3 to regulate oil exploration and production activities in the offshore area of Newfoundland and Labrador, including those of Suncor. The respondent Information Commissioner of Canada (the Information Commissioner) is an officer of Parliament appointed pursuant to subsection 54(1) of the *Access Act* and is authorized under section 30 to receive and investigate complaints made under that same act. The Information Commissioner was granted leave to participate in the Federal Court proceeding in accordance with paragraph 42(1)(c) of the *Access Act*.

[5] In February of 2014, the Board received an access request as follows:

> 1. Please provide the submitted application forms, correspondence, board response, work credit amounts granted, and all associated items and attachments for each program number on the attached March 13, 2012 CNLOPB letter (attached).
>
> 2. Provide all records of any viewing, disclosure, borrowing, and copies being made of these same program numbers (attached) including but not limited to liability agreements, correspondence, transmittals, copy disposition forms, emails and invoices.
>
> Access to Information Request Form, Appeal Book (Public Version), Tab 4.

[6] Some of the requested records pertained to a program number operated by Sun Oil Company, an entity related to Suncor. Pursuant to section 27 of the *Access Act*, the Board gave written notice to Suncor about the access request, and attached the documents that were

responsive to it. The Board invited Suncor to provide submissions on whether the information contained in the records should be withheld or redacted, and if so, on what basis.

[7] In April 2014, Suncor provided the Board with its views regarding the access request. Of particular relevance to this appeal is Suncor's position that the requested records were prohibited from disclosure under subsection 19(1) of the *Access Act*. Suncor alleged that some of the information was personal in nature as it involved the names and affiliations of a number of its employees who had communicated with the Board to request geophysical information on behalf of their employer in 2009. As can be seen from section 19, the *Access Act* presumptively prevents personal information from being disclosed, unless it can be shown, *inter alia*, that the personal information was publicly available. Three of the Suncor employees named in the requested records had LinkedIn profiles displaying their association with Suncor to the public. The names of these employees is the personal information at issue in the current appeal. In essence, Suncor advocated for an expansive interpretation of what constitutes personal information, and argued that the names of its employees, taken in the greater context of permitting the identification of those Suncor employees who communicated with the Board in 2009, constituted personal information that was not available to the public.

[8] On May 15, 2014, the Board communicated its decision to Suncor. For some of the requested records, the Board determined that the names of the Suncor employees would be disclosed on the basis that this personal information was publicly available. The Board nevertheless redacted most of the contact information for these employees.

II. Decision of the Federal Court

[9] Suncor raised a number of arguments before the Judge in support of its position that certain parts of the requested records ought to be redacted. As the only issue before us is Suncor's submission that some of the information is personal in nature, I will only deal with those aspects of the decision addressing this particular question.

[10] Suncor contended that the names, positions and/or contact information for a number of its current and former employees constituted personal information under the *Access Act*, and did not fit into any of the exceptions from non-disclosure found under paragraph 19(2)(b) of that same act. Suncor reiterated its earlier stated position that although the names and positions of its employees are on LinkedIn, nothing in their public profiles related to the email correspondence included in the records. In addition, Suncor argued that having LinkedIn profiles did not mean that its employees were waiving their right to privacy. Further, Suncor submitted that given its concerns over the personal safety of its employees being identified, arising from litigation involving Suncor and that may be related to the access request, its employees' right to privacy should trump the public's right to access in this case.

[11] For the purpose of subsection 19(1) of the *Access Act*, pursuant to which personal information in a record shall not be disclosed, the Judge identified the standard of review as being that of correctness (*Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8 at para. 19, [2003] 1 S.C.R. 66 (*Commissioner of the RCMP*)). As for subsection 19(2), the provision which deals with the discretionary decision

to disclose personal information in a limited number of circumstances, the Judge found that the reasonableness standard applies (*Information Commissioner of Canada v. Canada (Natural Resources)*, 2014 FC 917 at para. 52, 464 F.T.R. 308).

[12] On the merits, the Judge noted that "personal information" is to be read broadly (*Commissioner of the RCMP* at para. 23, referring to *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at paras. 68-69, 148 D.L.R. (4th) 385). Accordingly, she agreed with the parties that the names, contact information and business titles of the employees met the definition of "personal information" as found under the *Privacy Act*. She then found that it was an unreasonable exercise of the Board's discretion to not redact the name of an employee whose affiliation with Suncor was not publicly available from certain email correspondence, along with the contact information for two other Suncor employees. As for the name of the three Suncor employees who had LinkedIn profiles, she found that this information was clearly in the public domain. Accordingly, she determined that it was reasonable for the Board to disclose this personal information on the basis that it was publicly available.

III. Issues

[13] The following appeal raises the issues of (1) whether the Federal Court erred in its interpretation of what constitutes "personal information" under subsection 19(1) of the *Access Act*, and (2) whether the Board erred in exercising its discretion to disclose personal information under paragraph 19(2)(b) of that same act.

IV. Analysis

[14] For the reasons already given in *Husky Oil*, I am of the view that the decision of this Court in *Blank v. Canada (Justice)*, 2016 FCA 189, [2016] F.C.J. No. 694 (QL) governs with respect to the applicable standard of review. As a result, the standard of appellate review of a Federal Court judge's decision in a judicial review under section 41 of the *Access Act* is the standard generally used in appeals of judicial review proceedings, as set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559. As in *Husky Oil*, it is not in dispute that the Judge correctly identified the applicable standard of review, being correctness, when deciding whether the information is "personal information" pursuant to subsection 19(1) and reasonableness, when deciding whether the information is publicly available and may be disclosed.

[15] Stepping into the shoes of the Judge, I must therefore decide whether she correctly determined that the personal information at issue was simply the names of Suncor's employees and their affiliations with Suncor, as the Board found, instead of looking beyond the employees' names to find that the personal information contained in the records extended to the entire context under which the names were found. In other words, it is Suncor's submission that when properly interpreted, the scope of personal information at issue does not only encompass the names of Suncor's employees, but also their involvement with the Board regarding Suncor's procurement of copies of the geophysical information. This information, according to Suncor, is "information about an identifiable individual" within the meaning of the definition of "personal information" set out in section 3 of the *Privacy Act*.

[16] I fully appreciate that the parties, both before the Judge and before this Court, acknowledge that the names, contact information and business titles of Suncor's employees at issue in this proceeding constitute personal information within the meaning of the *Privacy Act*. That being said, courts are not bound by the litigants' agreement on issues of law. Moreover, the Commissioner strongly urged this Court to clarify what it perceives to be conflicting precedents with respect to the concept of "personal information" and to resolve the apparent contradiction between *Information Commissioner of Canada v. Canadian Transportation Accident Investigation and Safety Board*, 2006 FCA 157, [2007] 1 F.C.R. 203 and *Janssen-Ortho Inc. v. Canada (Minister of Health)*, 2007 FCA 252, 367 N.R. 134.

[17] Not only do I think that we ought to clarify as much as possible such a crucial and fundamental notion as "personal information", but I believe it is logically a precondition before embarking upon an analysis of the discretionary power conferred on the head of a government institution to disclose a record containing personal information. As a matter of fact, Suncor's first argument is that the Judge erred in excluding from "personal information" the information that appears with the employees' names about their involvement in the procurement of the geophysical information, and in confining that concept to the employees' names and their association with their employer. To be sure, Suncor's position is that "personal information" should have been interpreted more broadly by the Judge, and not, as I propose, more narrowly to take into account the purpose of the *Access Act* and of the *Privacy Act*. Suncor's submission nevertheless illustrates that a proper understanding of what is "personal information" in the context of a record is essential, and indeed unavoidable, before turning to the application of subsection 19(2) of the *Access Act*.

[18] For the reasons set out in *Husky Oil*, I find that the names and titles of Suncor's personnel, as well as the information revealing the employees' involvement in Suncor's procurement of certain geophysical information from the Board, do not meet the definition of "personal information" in the *Privacy Act* and therefore do not fall within the purview of subsection 19(1) of the *Access Act*.

[19] In any event, I also find that the Judge did not err in concluding that the Board reasonably exercised its discretion concerning the disclosure of the disputed information pursuant to paragraph 19(2)(b). The Board could determine that information that is posted on LinkedIn is in the public domain. The onus was on Suncor to demonstrate that the records at issue disclosed something more about the employees than what had previously been made publicly available on the internet. Suncor vaguely attempted to argue that its employees could be subject to harassment if their involvement with the Board was disclosed, as a result of an ongoing litigation between Suncor and other undisclosed parties. As noted by the Board, there was insufficient evidence put forward by Suncor to substantiate that claim, which in effect amounted to no more than speculation.

[20] For all of the foregoing reasons, I would therefore dismiss this appeal and deny Suncor's request for an order that the Board redact the employees' names and job titles from the records at issue, prior to their disclosure. Costs should be awarded to the Board only.

"Yves de Montigny"

J.A.

GAUTHIER J.A. (Concurring Reasons)

[21] I had the opportunity to review de Montigny J.A.'s reasons, and agree with how he proposes to dispose of this appeal. However, as in *Husky Oil*, I cannot concur with my learned colleague's views that the names of Suncor's employees and their association with their said employer do not meet the definition of "personal information" under the *Privacy Act*. In my view, it is no more necessary to deal with this issue here than it was in *Husky Oil* (see my concurring reasons). Considering the terms of the judgment of the Federal Court in the present appeal, it is even more important not to do so here.

[22] As mentioned by my colleague, the Federal Court agreed with the three parties before it that the name, contact information, and relationship between the individuals involved and Suncor were "personal information" protected under the *Privacy Act*. In fact, the Federal Court found that the Board missed some personal information that should have been deleted pursuant to subsection 19(1) (see Federal Court reasons at para. 80). The Federal Court ordered that part of this information which was not in the public domain, such as the name of an employee who had no profile on the internet, be redacted. This part of the judgment has not been appealed.

[23] Although I agree that a court is not legally bound by the parties' agreement on points of law, it should not, in my view, decide an appeal on an issue that was not included in the Notice of Appeal or the memoranda, as the parties did not have an opportunity to submit their arguments on this point.

[24] That said, I do agree with my colleague that Suncor has not met its burden of establishing a reviewable error in the Board's decision to release the documents without deleting the names of the three employees because their names and relationships with Suncor were publicly available. I concur with his finding at paragraph 19 of his reasons.

[25] I conclude that the appeal should be dismissed because Suncor has not met its burden of establishing that the "information" the Board intended to release was more than the information that was already publicly available pursuant to subsection 19(2) of the *Access Act*.

[26] As discussed at paragraph 62 of my reasons in *Husky Oil*, the only standard of review relevant to this finding is reasonableness and the approach set out by the Supreme Court of Canada in *Agraira* applies.

[27] I do not accept Suncor's argument that one does not need any evidence to conclude that the fact that one corresponded with the Board for whatever reason and however insignificant the nature of the communication (such as information about printing costs that are already on the website of the Board) does not fall within paragraph 19(2)(*b*) unless the said correspondence was itself publicly available. As mentioned in *Husky Oil*, it would, in my view, render paragraph 19(2)(*b*) meaningless to construe it so restrictively and to decide such matters in a total vacuum.

[28] As noted in *Husky Oil*, such issue should not be decided without any evidence as to exactly what was actually made publicly available in respect of the three employees involved here, especially considering that the names of three of the employees involved only appear as

copied (cc) recipients in the chain of emails. For example, are we dealing with the disclosure that a person publicly known to be a financial clerk at Suncor was copied on an email dealing with the cost of copying some material? In my view, to assess if the Board's decision falls within the range of defensible outcomes, one needs proper context. One certainly needs to know the role at Suncor with which these individuals were publicly associated. We have no information from or about these employees. There is no real evidence that the information contained in such emails disclosed anything more about their work at Suncor; we do not really know how extensive the profiles available on the internet were.

[29] Finally, I note that it is somewhat surprising to me that there is no evidence that anybody sought the views of these employees. When one considers that Suncor had even asked the Board to delete the name of the Board's own employees from this correspondence, one wonders what this debate is really about. In any event, it appears that paragraph 19(2)(*a*) exists to avoid such sterile debate. It is quite important that individuals who use social media and put their profile and other personal information on the internet be made aware of the potential impact of such behaviour on their right to privacy. Hopefully, the possible application of this provision will be investigated more frequently in the future when the matter also involves the use of social media.

"Johanne Gauthier"

J.A.

"I agree

J. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-84-16
STYLE OF CAUSE:	SUNCOR ENERGY INC. v. CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD AND THE INFORMATION COMMISSIONER OF CANADA
PLACE OF HEARING:	ST. JOHN'S, NEWFOUNDLAND AND LABRADOR
DATE OF HEARING:	JUNE 27, 2017
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRING REASONS BY:	GAUTHIER J.A.
CONCURRED IN BY:	WOODS J.A.
DATED:	JANUARY 12, 2018

APPEARANCES:

Douglas B. Skinner Alexander Templeton	FOR THE APPELLANT
Amy M. Crosbie	FOR THE RESPONDENT CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD
Louisa Garib Aditya Ramachandran	FOR THE RESPONDENT THE INFORMATION COMMISSIONER OF CANADA

SOLICITORS OF RECORD:

McInnis Cooper Barristers and Solicitors St. John's, Newfoundland and Labrador	FOR THE APPELLANT
Curtis, Dawe Barristers and Solicitors St. John's, Newfoundland and Labrador	FOR THE RESPONDENT CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD
Office of the Information Commissioner Gatineau, Quebec	FOR THE RESPONDENT THE INFORMATION COMMISSIONER OF CANADA