Date: 20090512

Docket: A-476-07

Citation: 2009 FCA 150

CORAM: **DÉCARY J.A.**
LÉTOURNEAU J.A.
TRUDEL J.A.

BETWEEN:

GABRIEL FONTAINE

Appellant

and

ROYAL CANADIAN MOUNTED POLICE

Respondent

Heard at Québec, Quebec, on May 6, 2009.

Judgement delivered at Ottawa, Ontario, on May 12, 2009.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: DÉCARY J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues

[1] The appellant is representing himself. He is appealing a decision of the Federal Court rendered by the Honourable Justice Tremblay-Lamer (judge) on October 4, 2007.

[2] I am reproducing the issues the appellant wishes to raise on appeal as he formulated them:

a) the Court refused or failed to consider the effect of the passage of time;

b) the Court refused or failed to consider all the documents requested;

c) the Court refused or failed to contact the third parties who provided information in order to request their consent to the disclosure of documents;

d) the Court refused or failed to consider that solicitor-client privilege cannot be claimed when there is a violation; and

e) the Court refused or failed to consider the items of evidence provided to it regarding the commission of an offence concerning the disclosure of incriminating documents or things.

[3] It will be clear that the dispute concerns a request for access to information under the *Access to Information Act*, R.S.C. 1985, c. A-1 (Act), involving paragraph 16(1)(*a*) and sections 19 and 23 of that Act. Some context is required to understand where this appeal originated and how it has unfolded.

Facts and proceedings

[4] In 1988 and 1989, the appellant was the subject of criminal investigations by the Royal Canadian Mounted Police (RCMP), the Québec Commercial Crime Section, the RCMP

Commercial Crime Branch in Ottawa, and the Economic Crime Directorate at the Headquarters in Ottawa.

[5] The appellant's investigation file was opened on or around December 5, 1988. The appellant filed a request for access to information in his file with the RCMP. The RCMP received the request around May 6, 2004. More specifically, the appellant asked that he be sent a continuation report of the investigation.

[6] In response to his request for access, the RCMP gave the appellant some documents. But, using the discretion granted to it under paragraph 16(1)(*a*) and section 23 and bowing to the duty imposed by section 19 of the Act, it refused access to several of the documents. All the documents came into existence less than twenty (20) years prior to the request (paragraph 16(1)(*a*)). Some of the documents refused were refused because they contained personal information (section 19) or were protected by solicitor-client privilege (section 23).

[7] The appellant brought the refusal to disclose before the Information Commissioner of Canada (Commissioner). Upon investigation and verification, the Commissioner found that the refusal was justified. He informed the appellant of this in a letter dated January 10, 2006.

[8] This gave rise to the application for review made to the Federal Court under section 41 of the Act to have the RCMP's decision set aside.

Decision of the Federal Court

[9] The judge ruled that all documents requested had been prepared by the RCMP as part of a criminal investigation to determine whether the appellant had committed an offence. Moreover, according to the judge, all these documents met the time requirement under paragraph 16(1)(*a*): they all came into existence less than twenty (20) years prior to the request, meaning that the RCMP was allowed to deny access to them.

[10] She also noted that some of the documents contained personal information and that none of the exceptions under paragraphs 3(*j*) to 3(*m*) of the *Privacy Act*, R.S.C. 1985, c. P-21, applied. She accepted the respondent's argument that the exceptions under subsection 19(2) of the Act did not apply, meaning that the denial of access was mandatory under subsection 19(1), and therefore justified.

[11] Lastly, she was of the opinion that some of the documents grouped under the heading "solicitor-client privilege" of section 23 of the Act, were actually subject to litigation privilege. As the litigation had ended, they could have been given to the appellant according to *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, if it had not been for the fact that they qualified for refusal under paragraph 16(1)(*a*) of the Act.

The paragraph 16(1)(a) exception and the Federal Court's alleged refusal to consider the effect of the passage of time

[12] At the RCMP's discretion, paragraph 16(1)(*a*) limits for up to twenty (20) years access to records containing information that it obtained or prepared in the course of lawful investigations pertaining to the suppression of crime, the enforcement of federal and provincial laws and the protection of Canada's security. It reads as follows:

Law enforcement and investigations	Enquêtes
16. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains	**16.** (1) Le responsable d'une institution fédérale peut refuser la communication de documents:
(*a*) information obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to (i) the detection, prevention or suppression of crime, (ii) the enforcement of any law of Canada or a province, or (iii) activities suspected of constituting threats to the security of Canada within the meaning of the Canadian Security Intelligence Service Act, if the record came into existence less than twenty years prior to the request;	*a*) datés de moins de vingt ans lors de la demande et contenant des renseignements obtenus ou préparés par une institution fédérale, ou par une subdivision d'une institution, qui constitue un organisme d'enquête déterminé par règlement, au cours d'enquêtes licites ayant trait: (i) à la détection, la prévention et la répression du crime, (ii) aux activités destinées à faire respecter les lois fédérales ou provinciales, (iii) aux activités soupçonnées de constituer des menaces envers la sécurité du Canada au sens de la *Loi sur le Service canadien du renseignement de sécurité*;

[Emphasis added]

[13] In this instance, it appears that the file was opened in December 1988. Yet, according to paragraph 16(1)(*a*), the length of the twenty- (20-) year moratorium, or, if you will, the age of the

records to which access is sought, is calculated from the date on which the access request is made and not the date on which that request is subject to a subsequent final decision. The appellant submitted his request in May 2004, resulting in all the records having come into existence less than twenty (20) years prior to the request and all falling within the discretion of the respondent.

[14] This acceptance of the clear language of paragraph 16(1)(*a*) on the calculation of the time disposes of the appeal. But as the appellant can make another request that would evade in whole or in part the time constraint of section 16, I find it useful, for the benefit of the appellant, to examine his other grounds of appeal.

Refusal or failure to consider that solicitor-client privilege can be claimed only in the case of an offence

[15] The judge did not determine whether an offence had been committed that can result in losing solicitor-client privilege. She did not do so because she was not asked to address it. She can therefore not be faulted for it.

[16] As I understand the appellant's argument, the prosecutor, at the time of the criminal proceedings against the appellant, had [TRANSLATION] "hidden important and significant information" from him, consisting in the failure to disclose to him that incriminating evidence was missing and the failure to clarify the chain of custody of that evidence.

[17] In discharging the role of the prosecuting Crown, counsel for the prosecution has the duty to disclose to the defence, when the defence so requests, the evidence it has to allow the accused to exercise his or her right to make full answer and defence. The Crown's duty is strictly correlative to the defence exercising its right to request disclosure: *R. v. Stinchcombe,* [1991] 3 S.C.R. 326, at page 343.

[18] But the Crown's failure to fully or partially meet this duty is not necessarily an offence. It can give rise, however, to administrative penalties, such as an adjournment, an award of costs (see *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575), the evidence in question being inadmissible and, ultimately, if the right to make full answer and defence is jeopardized, a stay of proceedings.

[19] It seems that in this case, according to what the appellant describes, counsel for the prosecution had difficulty at the time in obtaining in a timely manner the originals of certain incriminating items of evidence from many stakeholders. It is not obvious to me how this organizational problem that the prosecution may have had, and the fact that it may have hidden the problem from the defence, can be an offence thus attracting the right to access documents protected by section 23 of the Act on the grounds of solicitor-client privilege.

[20] The appellant submits that he would not have pleaded guilty if he had been informed of the prosecution's difficulty. But the last-minute difficulty does not change the fact that the evidence against the appellant had been disclosed to him and his counsel. It was on the basis of that evidence that the decision to plead guilty was made.

[21] With respect, I am of the view that the appellant is confusing the rules governing the disclosure of evidence in a criminal trial with those governing the disclosure of records when a request for access to information is made. First, the rules governing these two processes are not interchangeable because of their respective purposes. Second, the rules governing the protection of solicitor-client privilege, with exceptions that do not apply here, transcend the two processes through their purpose and apply equally well to both processes.

[22] Consequently, I see no merit in this ground of appeal.

The Court refused or failed to contact the third parties that provided information in order to request their consent to the disclosure of documents

[23] It is necessary to state from the outset that, if there is an obligation under subsection 19(2) of the Act to seek consent from third parties, the onus is not upon the court but upon the federal institution concerned: see *Ruby v. Canada (Solicitor General)*, [2000] 3 F.C. 589 (F.C.A.), at paragraphs 109 and 110.

[24] We were referred to this passage from *Ruby*: “Political and practical considerations pertaining, among others, to the nature and volume of the information may make it impractical to seek consent on a case-by-case basis and lead to the establishment of protocols which respect the spirit and the letter of the Act and the exemption”.

[25] It should not be forgotten that, in *Ruby*, section 19 of the *Privacy Act* was at issue and that that provision is concerned with personal information obtained in confidence from the government of a foreign state, an international organization, the government of a province or a municipal or regional government. In that context, it is easier to seek consent and, where necessary, to do so using protocols.

[26] The issue is not the same and becomes trickier under section 19 of the *Access to Information Act* where, for example, as in the case at bar, a large-scale police investigation may involve a considerable number of third parties from whom information concerning those third parties, the appellant or other third parties may have been obtained. One can immediately see the practical difficulties entailed in finding each and every one of these third parties to seek their consent. At most, one could impose an obligation of means, that is, as this Court said at paragraph 110 of *Ruby*, "to make reasonable efforts" to seek the consent of the third party affected by the information in question.

[27] In the case at bar, this was never an issue given the time limit of twenty (20) years under paragraph 16(1)(*a*) of the Act.

[28] Whatever the case, even when third-party consent has been obtained, the government institution has discretion to refuse the disclosure of records containing personal information: see *Canadian Jewish Congress v. Canada*, [1996] 1 F.C. 268, at pages 282 and 283 (F.C.T.D.).

[29] In the case at bar, the information from third parties was obtained as part of an investigation that led to the laying of criminal charges against the appellant.

[30] The judge did not rule on the application of paragraph 19(2)(*a*) of the Act since the argument the appellant is raising now is not one that he submitted when he applied for judicial review. This in itself is enough to dispose of the matter. But I would add the following. The respondent was of the view that it was in the interests of justice and, more specifically, in the interests of the effective suppression of crime, not to identify, in this instance, its information sources. I could not say that, in the circumstances, the respondent engaged in an unlawful exercise of its discretion.

The Court refused or failed to consider all of the records requested

[31] The appellant bases this argument on the fact that, at paragraph 22 of the reasons for her decision, the judge found that the information which the respondent considered appropriate to keep confidential is essentially information which reveals the identity of its sources of information.

[32] With respect, this passage does not have the meaning that the appellant gives it. What the judge says here is that most of the information fit into a refusal category and the rest into other supporting categories, without specifying which ones. It cannot be read to mean that she did not examine the other records.

[33] To the contrary, at the end of the hearing of the case, the judge expressed her deep commitment to carefully examining each of the records:

> [TRANSLATION]
>
> Mr. Fontaine, Ms. Bertrand has answered the questions I had about the way in which the records were submitted. This is important for me in order to understand the file.
>
> I told Ms. Bertrand that, to date, I have been able to examine about two thirds of the records.
>
> Clearly, this is an extremely difficult task as there are so many of them and I want, given that you are representing yourself, I find it all the more important, considering that you don't have access to any of them, that I review everything to ensure that the records in question are truly covered by the exceptions that have been mentioned.
>
> I am therefore taking the matter under reserve and will finish reviewing the records in question, but I can assure you that the Court will be extremely meticulous in its review.
>
> So, I reserve my decision.

I have no reason to doubt that she did not comply.

Conclusion

[34] For these reasons I would dismiss the appeal without costs in the circumstances.

"Gilles Létourneau"
J.A.

"I agree
Robert Décary J.A."

"I agree
Johanne Trudel J.A."

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-476-07
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PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	May 6, 2009
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	DÉCARY J.A. TRUDEL J.A.
DATED:	May 12, 2009

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