Federal Court Cour fédérale

Date: 20160112

Docket: T-840-15

Citation: 2016 FC 36

Ottawa, Ontario, January 12, 2016

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

THE INFORMATION COMMISSIONER OF CANADA

Applicant

and

THE MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT

Respondent

PUBLIC JUDGMENT AND REASONS
(Confidential Judgment and Reasons issued January 12, 2016)

[1] This is an application for judicial review pursuant to paragraph 42(1)(a) of the *Access to Information Act*, RSC 1985, c A-1 [*ATIA*], of a decision by Employment and Social Development Canada [ESDC] to refuse disclosure of portions of a Discussion Paper following an access to information request for records related to Canada Pension Plan [CPP] credit splitting.

I. Facts

A. *Access to Information request*

[2] On August 10, 2006, Service Canada received an access to information request from Vincent Calderhead, a lawyer with Nova Scotia Legal Aid. Mr. Calderhead sought a variety of records concerning the application rate by former spouses for a Division of Unadjusted Pensionable Earnings [DUPE] under the CPP. The request was transferred to ESDC, known as Human Resources and Social Development Canada at the time, in early September 2006.

[3] On September 11, 2006, ESDC began to respond to the request. Following consultations with the Department of Justice [DOJ], it decided to exclude the discussion paper from the record, on the grounds that solicitor-client privilege exempted the document pursuant to s 23 of the *ATIA*. ESDC undertook a final release of documents in 2008.

B. *Complaint to the Office of the Information Commissioner*

[4] On June 27, 2008, Mr. Calderhead complained to the Office of the Information Commissioner of Canada [OIC] about the exemptions that had been applied to the records in response to his request.

[5] In 2010, the complaint was narrowed down to focus exclusively on the discussion paper, titled "Erroneous Advice Discussion Paper". This paper was likely drafted between 1988 and 1990 by an employee of the Programs Policy and Legislation Section at National Health and

Welfare Canada, a predecessor to ESDC. It reviewed the development of DUPE and possible governmental actions including numerous options.

[6] In December 2010, ESDC consulted anew with DOJ regarding the application of s 23 *ATIA* to the discussion paper and again refused to disclose it.

[7] OIC representatives met with ESDC officials in February 2012 to provide their views on which parts of the paper could be disclosed. In June 2012, ESDC once again consulted with DOJ and maintained the complete exemption of the document.

[8] Further discussions between OIC and ESDC led to disclosure of parts of the discussion paper on June 20, 2014. Thereafter, OIC informed Mr. Calderhead that they remained of the view that ESDC was still withholding information which did not fall within the scope of solicitor-client privilege.

C. *Further disclosure*

[9] OIC recommended that additional parts of the discussion paper be disclosed. On October 14, 2014, ESDC accepted these recommendations in part. It declined to waive privilege in response to OIC's additional recommendations following the disclosure. ESDC maintained solicitor-client privilege over:

1. The majority of the part of the discussion paper that discusses the implication of option two (1786-1791; AR vol. I confidential version at 302-307);

2. The majority of the part of the discussion paper that is a summary section of the paper (1793-1794; AR vol. I confidential version at 309-310);

3. Other specific segments of the discussion paper, in various sections of the confidential version.

[10] On March 31, 2015, OIC provided Mr. Calderhead with the Report of Findings for its investigation and indicated that his complaint was well-founded but not resolved, as ESDC had not fully implemented their recommendations. OIC stated that they were prepared to bring an application for judicial review on his behalf.

[11] On April 23, 2015, Mr. Calderhead authorized OIC to proceed with this application for judicial review.

[12] At the hearing on December 14, 2015, the Respondent with the Applicant's consent filed an amended affidavit relating to the status of Ms. Helena Orton. It indicated that Mrs. Orton was in fact the Litigation Director for the Woman's Legal Education and Action Fund ("LEAF") and not for the DOJ. Therefore, solicitor-client privilege does not apply to the advice she provided in 1988.

II. Issues

[13] The issues in this case are as follows:

1. Are the parts of the Discussion Paper which remain at issue subject to solicitor-client privilege?

2. Did the Minister reasonably exercise his discretion in refusing to disclose certain portions of the record?

III. Relevant Provisions

[14] The relevant provisions of the *ATIA* are reproduced in Schedule "A" to these reasons.

IV. Submissions of the Parties

A. *The Applicant*

[15] The Applicant submits that the Respondent bears the burden of proof in establishing that on a standard of correctness ESDC is authorized to refuse disclosure of parts of the discussion paper. This burden should be examined in light of the purpose of the *ATIA*. A requester's right to access to government information is subject only to limited and specific exceptions.

[16] Solicitor-client privilege is not defined in the *ATIA*, but can be found at common law (*Blank v Canada (Minister of Justice)*, 2006 SCC 39 [*Blank 39*]). Three criteria were established in *Solosky v R*, [1980] 1 SCR 821 [*Solosky*].

[17] Given that the Respondent has already admitted that the discussion paper was not drafted by a legal advisor and that it has disclosed significant segments, it must be shown that the remaining parts undisclosed constitutes a communication from a legal advisor, and that the disclosure would have the effect of revealing legal advice requested or received. The Applicant underscores that the Respondent has failed to meet this burden.

[18] There is also no indication that ESDC has weighed the factors in the jurisprudence when it decided that solicitor-client privilege could be applied here (*Leahy v Canada (Citizenship & Immigration)*, 2012 FCA 227 [*Leahy*]).

B. *The Respondent*

[19] The Respondent advances that the legislative framework recognizes necessary exceptions to the right of access to information, and that the strict interpretations of these exceptions was rejected by the Supreme Court *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 2 SCC 53, [2002] 2 SCR 773. Therefore, ESDC was authorized to refuse disclose of certain parts of the discussion paper because it was subject to solicitor-client privilege.

[20] All segments of the discussion paper at issue meet the criteria in *Solosky*. They concerned written or oral legal advice on what should be done in a relevant legal context from a solicitor, DOJ, to a client, ESDC (*Descôteaux v Mierzwinski*, [1982] 1 SCR 860). These communications were within the continuum of communications between a solicitor and a client, and are therefore protected (*Canada (Information Commissioner) v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 104 [*MPSEP*]).

[21] The Respondent also adds that the exercise of discretion is not reviewable if (1) it was exercised in good faith and not based on irrelevant or extraneous factors and (2) all appropriate factors were considered. As long as there is evidence that the discretion was in fact exercised, a

refusal to disclose based on solicitor-client privilege is not subject to any further inquiry. Moreover, the segments were severed according to the case law applicable in similar cases.

V. Standard of Review

[22] The Court agrees with the parties that whether the solicitor-client privilege exemption applies should be reviewed under the standard of correctness. The exercise of discretion in refusing to waive privilege falls under the standard of reasonableness (*MPSEP* at para 18).

VI. Analysis

A. *The legislative scheme*

[23] The purpose of the *ATIA* is to provide a right of access to information for records under the control of government institution (s 2(1) *ATIA*). This right is defined in s 4(1) *ATIA*. The presumption is that information will be released unless the party resisting disclosure can show that an exemption recognized in the *ATIA* applies (*Toronto Sun Wah Trading Inc v Canada (Attorney General)*, 2007 FC 1091 at paras 8-9; *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 at para 83, LeBel J (concurring)). Solicitor-client privilege is one such exemption (s 23 *ATIA*).

[24] If solicitor-client privilege is established, s 25 *ATIA* requires that the head of a government institution authorized to refuse disclosure then review the record and disclose any part which may reasonably be severed. The Federal Court of Appeal has provided guidance on how section 25 should be applied. First, partial disclosure that would provide clues about the exempted communications or factual assumptions should not be undertaken (*Blank v Canada (Department of Justice)*, 2007 FCA 87 at para 13). Second, there should be no disclosure unless such disclosure is meaningful and coherent (*Blank v Canada (Minister of Environment)*, 2007 FCA *289* at para 7).

B. *The solicitor-client privilege exemption*

[25] Canadian Courts have long recognized the importance of solicitor-client privilege (*Blank* *39* at para 26). The term is well defined in the case law. This privilege includes both the "litigation privilege" and the "legal advice privilege". Only legal advice privilege applies in the case at bar.

[26] The three criteria for the solicitor-client privilege established in *Solosky* at 837 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." Legal advice privilege protects all communications between a solicitor and a client related to the seeking, formulating or giving of legal advice and extends to other communications within that continuum (*MPSEP* at para 26; *Samson Indian Nation and Band v Canada*, [1995] 2 FC 762 (FCA) at page 769).

[27] To evaluate whether solicitor-client privilege applies to the record at issue, the Court should consider "the nature of the relationship, the subject matter of the advice and the circumstances in which it is was sought and rendered" (*R v Shirose*, [1999] 1 SCR 565, [1999] SCJ No 16 at para 50).

C. *Issues :*

(1) Are the parts of the Discussion Paper which remain at issue subject to solicitor-client privilege?

[28] Having read the record and having in mind the law and jurisprudence applicable here, the Court will look at each of the portion of the discussion paper at issue in turn.

(a) Implications of Option 2 (1786-1791; AR vol. I confidential version at 302-307)

[29] The Applicant argues that these parts communicate policy advice and should be disclosed. Moreover, the parts can be severed […]. The Respondent alleges that the specific issues discussed in this part are based on confidential legal opinions (Campbell and Brathwaite opinions) which had specifically been requested by ESDC on June 11, 1987.

[30] The Court is of the opinion that this portion of the record constitutes policy advice stemming from legal opinions received by ESDC. Disclosing this portion of the record would provide clues about privileged communications, […]. The Court is not convinced by the Applicant's argument that severing the document the way it proposes would give any fewer clues about the privileged information even if it would remove explicit references to the fact this

policy advice is based on legal opinions. This is not like *MPSEP* on which the Applicant relied at the hearing, as these portions of the record are not "the product of negotiation and compromise" and their disclosure would in fact "undercut the purposes served by solicitor-client privilege" (*MPSEP* at paras 38-39).

[31] This portion is subject to solicitor-client privilege.

(b) The Summary (1793-1794; AR vol. I confidential version at 309-310)

[32] The Court is of the opinion that disclosing this part of the record would not reveal any privileged information or give any clues on such information. Other than the parts which the Applicant has agreed should not be disclosed, the Court finds that the summary merely contains policy advice including the primary author's suggestion about which option should be followed.

[33] The fact that the erroneous advice provision was discussed by ESDC and the DOJ at length does not preclude mentioning the erroneous advice provision, especially when this discussion provides no clues as to what was actually discussed by those parties.

[34] This portion is not subject to solicitor-client privilege.

(c) Various other segments

[35] The Applicant submits that these portions should be disclosed. The Respondent argues that the Applicant's argument that portions of the discussion paper must exactly match request for legal advice and written opinions to meet the exception should not be the standard.

(i) Headnote (1763; AR vol. Confidential version I at 279)

[36] The parties now agree that this portion should not be disclosed. The Court shares their view.

(ii) Implications of the Preece decision (1772; AR vol. I confidential version at 288)

[37] This portion of the record should be disclosed. It does not contain or reveal any clues about privileged materials and the same information is already publicly available in other portions of the record and in ESDC's *Canada Pension Plan Credit Splitting Guide for the Legal Profession*.

(iii) Current issue (1779; AR vol. I confidential version at 295)

[38] The Court believes that this portion of the record is subject to solicitor-client privilege. These two sentences give details about the questions which were submitted to legal counsel […]. Disclosing these sentences would reveal the legal advice that was sought out and provided, […].

(iv) Description of Option 1-B (1785, last sentence before "implications"; AR vol. Confidential version I at 301)

[39] This segment of the record is not privileged. The Respondent has failed to show how this sentence is anything more than the primary author's personal opinion. Though retroactivity is discussed in the legal opinions provided to the Minister, there is no indication that any legal risk assessment of the LEAF Charter challenge was ever sought or given, considering in particular that the Respondent no longer claims that the Orton opinion is privileged.

(v) Implications of Option 1-B (1785-186; AR vol. I confidential version at 301-302)

[40] Similarly, the Respondent has failed to establish that the content of this portion was based on a legal opinion. Although the expression "the Minister's defense, in brief, would be…" might suggest that this comment was based on legal advice, the last sentence in this passage shows that the entire segment is in fact policy advice. This portion is not subject to solicitor-client privilege.

(vi) Implications of Option 4 (1793; AR vol. I confidential version at 309)

[41] The indirect evidence relied on by the Respondent does not support his position that this segment reveals privileged information. This portion is not subject to solicitor-client privilege.

[42] In summary, the following portions of the discussion paper should be disclosed as they are not subject to solicitor-client privilege:

1. The Summary (1793-1794; AR vol. I confidential version at 309-310);
2. Implications of the Preece decision (1772; AR vol. I confidential version at 288);
3. Description of Option 1-B (1785) last sentence before "implications"; AR vol. I confidential version at 301);
4. Implications of Option 1-B (1785-186; AR vol. I confidential version at 301-302);
5. Implications of Option 4 (1793; AR vol. I confidential version at 309).

[43] Those portions of the record that are subject to solicitor-client privilege are:

1. Implications of Option 2 (1786-1791; AR vol. I confidential version at 302-307);
2. Headnote (1763; AR vol. I confidential version at 279);
3. Current issue (1779; AR vol. I confidential version at 295).

(2) Did the Minister reasonably exercise his discretion in refusing to disclose certain portions of the record?

[44] Section 23 *ATIA* provides for a discretionary right of refusal to disclose privileged information. The Applicant argues that the Minister has failed to identify which criteria were taken into account and whether these criteria were met (*Leahy* at para 141).

[45] In that case, the Federal Court of Appeal held there was a paucity of evidence in the record. In the postscript (paras 138 to 145) on which the Applicants rely the Court gave guidance as to which documents are needed by a reviewing court. However, in the case at hand, the record is sufficient to allow the Court to be satisfied that the Minister exercised his discretion in a

reasonable manner in refusing to disclose certain portions of the discussion paper (see for example the letter from Mr. Ian Shugart to Ms. Suzanne Legault, dated October 14, 2014; AR vol. I confidential version at 195).

[46] Although the Applicant is not seeking costs, the Respondent requests a lump sum in the amount of $ 2,000.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review be allowed in part;
2. The following portions of the discussion paper are to be disclosed:
    - The Summary (1793-1794; AR vol. I confidential version at 309-310);
    - Implications of the Preece decision (1772; AR vol. I confidential version at 288);
    - Description of Option 1-B (1785) last sentence before "implications"; AR vol. I confidential version at 301);
    - Implications of Option 1-B (1785-186; AR vol. I confidential version at 301-302);
    - Implications of Option 4 (1793; AR vol. I confidential version at 309);
3. The following portions of the discussion paper are subject to solicitor-client privilege:
    - Implications of Option 2 (1786-1791; AR vol. I confidential version at 302-307);
    - Headnote (1763; AR vol. I confidential version at 279);
    - Current issue (1779; AR vol. I confidential version at 295);
4. As both parties have been successful, no award for costs is granted.

"Michel Beaudry"

Judge

SCHEDULE A: Relevant provisions

Access to Information Act, RSC 1985, c A-1

Purpose	*Objet*
2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.	**2. (1)** La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.
Right to access to records	*Droit d'accès*
4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is	**4. (1)** Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande :
(a) a Canadian citizen, or	**a)** les citoyens canadiens;
(b) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, has a right to and shall, on request, be given access to any record under the control of a government institution.	**b)** les résidents permanents au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés.

Solicitor-client privilege

23. The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

Secret professionnel des avocats

23. Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements protégés par le secret professionnel qui lie un avocat à son client.

Severability

25. Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.

Prélèvements

25. Le responsable d'une institution fédérale, dans les cas où il pourrait, vu la nature des renseignements contenus dans le document demandé, s'autoriser de la présente loi pour refuser la communication du document, est cependant tenu, nonobstant les autres dispositions de la présente loi, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.

Information Commissioner may apply or appear

42. (1) The Information Commissioner may

Exercice du recours par le Commissaire, etc.

42. (1) Le Commissaire à l'information a qualité pour :

(a) apply to the Court, within the time limits prescribed by section 41, for a review of any refusal to disclose a record requested under this Act or a part thereof in respect of which an investigation has been carried out by the Information Commissioner, if the Commissioner has the consent of the person who requested access to the record;

a) exercer lui-même, à l'issue de son enquête et dans les délais prévus à l'article 41, le recours en révision pour refus de communication totale ou partielle d'un document, avec le consentement de la personne qui avait demandé le document;

[…]

[…]

Court to take precautions against disclosing

Précautions à prendre contre la divulgation

47. (1) In any proceedings before the Court arising from an application under section 41, 42 or 44, the Court shall take every reasonable precaution, including, when appropriate, receiving representations ex parte and conducting hearings in camera, to avoid the disclosure by the Court or any person of

47. (1) À l'occasion des procédures relatives aux recours prévus aux articles 41, 42 et 44, la Cour prend toutes les précautions possibles, notamment, si c'est indiqué, par la tenue d'audiences à huis clos et l'audition d'arguments en l'absence d'une partie, pour éviter que ne soient divulgués de par son propre fait ou celui de quiconque :

(a) any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act; or

a) des renseignements qui, par leur nature, justifient, en vertu de la présente loi, un refus de communication totale ou partielle d'un document;

(b) any information as to whether a record exists where the head of a government institution, in refusing to disclose the record under this Act, does not indicate whether it exists.

b) des renseignements faisant état de l'existence d'un document que le responsable d'une institution fédérale a refusé de communiquer sans indiquer s'il existait ou non.

Burden of proof

48. In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned.

Charge de la preuve

48. Dans les procédures découlant des recours prévus aux articles 41 ou 42, la charge d'établir le bien-fondé du refus de communication totale ou partielle d'un document incombe à l'institution fédérale concernée.

Order of Court where no authorization to refuse disclosure found

49. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

Ordonnance de la Cour dans les cas où le refus n'est pas autorisé

49. La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou partielle d'un document fondée sur des dispositions de la présente loi autres que celles mentionnées à l'article 50, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; la Cour rend une autre ordonnance si elle l'estime indiqué.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-840-15
STYLE OF CAUSE:	INFORMATION COMMISSIONER OF CANADA v MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 14, 2015
PUBLIC JUDGEMENT AND REASONS:	BEAUDRY J.
DATED:	JANUARY 12, 2016

APPEARANCES:

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Ms. Korinda McLaine	FOR THE RESPONDENT

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