

**Date: 20080325**

**Docket: T-323-07**

**Citation: 2008 FC 376**

**Vancouver, British Columbia, March 25, 2008**

**PRESENT: The Honourable Madam Justice Simpson**

**BETWEEN:**

**MR. M. ROBIN QUINN**

**Applicant**

**and**

**THE MINISTER OF JUSTICE  
ATTORNEY GENERAL OF CANADA**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

**Background**

[1] The self-represented applicant, Mr. Robin Quinn (the Applicant), has made requests under the *Access to Information Act*, R.S.C. 1985, c. A-1 (the Access Requests) seeking documents from the Department of Justice which include advice given during its examination of the *National Capital Commission Animal Regulations*, S.O.R./2002-164 (the Animal Regulations). That examination was undertaken pursuant to subsection 3(2) of the *Statutory Instruments Act*, R.S.C. 1985, c. S-22 (the SIA).

### This Application

[2] This application is for judicial review of a decision made by the Minister of Justice in which he declined to release certain documents in response to the Applicant's Access Requests. During the hearing of this application, it became clear that only the documents withheld on the basis of solicitor-client privilege (the Exempt Material) were of concern to the Applicant. Most of those documents are included in the material found in confidential exhibit 33 to the affidavit of Diane Leroux, sworn April 3, 2007. However, there were additional documents which are subject to a claim of solicitor and client privilege which were produced by the Respondent at the opening of the hearing. They were filed by the Court Registrar.

[3] The Court was not asked to undertake a review of the Exempt Material to ensure that the claims of solicitor-client privilege are well founded. Rather, the Applicant's submissions were to the effect that solicitor and client privilege cannot be claimed in the circumstances of this case.

### The Exempt Material

[4] The *Access to Information Act* (the Act) provides in section 23 that documents covered by solicitor-client privilege are exempt from production pursuant to an access request. It reads as follows:

**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.

**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.

[5] The Exempt Material is in the form of communications between two Department of Justice lawyers (the Justice Lawyers) and lawyers at the National Capital Commission (the NCC), written in the course of drafting and examining the Animal Regulations under subsection 3(2) of the SIA (the Examination). The Exempt Material also includes communications between lawyers in the Department of Justice and the Clerk of the Privy Council (the Clerk) in connection with the examination of the draft Animal Regulations under subsection 3(2) of the SIA.

### The Law

[6] The SIA provides as follows:

**3.** (1) Subject to any regulations made pursuant to paragraph 20(*a*), where a regulation-making authority proposes to make a regulation, it shall cause to be forwarded to the Clerk of the Privy Council three copies of the proposed regulation in both official languages.

#### Examination

(2) On receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that

(*a*) it is authorized by the statute pursuant to which it is to be made;

**3.** (1) Sous réserve des règlements d'application de l'alinéa 20*a*), l'autorité réglementante envoie chacun de ses projets de règlement en trois exemplaires, dans les deux langues officielles, au greffier du Conseil privé.

#### Examen

(2) À la réception du projet de règlement, le greffier du Conseil privé procède, en consultation avec le sous-ministre de la Justice, à l'examen des points suivants :

*a*) le règlement est pris dans le cadre du pouvoir conféré par sa loi habilitante;

*b*) il ne constitue pas un usage inhabituel ou inattendu du pouvoir ainsi conféré;

(b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;

(c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and

(d) the form and draftsmanship of the proposed regulation are in accordance with established standards.

Advise regulation-making authority

(3) When a proposed regulation has been examined as required by subsection (2), the Clerk of the Privy Council shall advise the regulation-making authority that the proposed regulation has been so examined and shall indicate any matter referred to in paragraph (2)(a), (b), (c) or (d) to which, in the opinion of the Deputy Minister of Justice, based on that examination, the attention of the regulation-making authority should be drawn.

c) il n'empiète pas indûment sur les droits et libertés existants et, en tout état de cause, n'est pas incompatible avec les fins et les dispositions de la *Charte canadienne des droits et libertés* et de la *Déclaration canadienne des droits*;

d) sa présentation et sa rédaction sont conformes aux normes établies.

Avis à l'autorité réglementante

(3) L'examen achevé, le greffier du Conseil privé en avise l'autorité réglementante en lui signalant, parmi les points mentionnés au paragraphe (2), ceux sur lesquels, selon le sous-ministre de la Justice, elle devrait porter son attention.

### The Evidence

[7] When this matter came on for hearing, there was no information in the Record describing whether and, if so, in what manner there had been compliance with section 3 of the SIA. I therefore asked the Respondent to file a post-hearing affidavit describing the examination undertaken for the Animal Regulations.

### The Tooke Affidavit

[8] Further to the Court's request, the Respondent filed an affidavit sworn by Tania Tooke on October 31, 2007 (the Tooke Affidavit). Therein, the Respondent set out the steps followed during the drafting, examination and enactment of the Animal Regulations. The Applicant declined an opportunity to make further oral submissions on the Tooke Affidavit and instead filed written submissions dated December 6, 2007.

[9] The Tooke Affidavit showed that the significant events in the development of the Animal Regulations were as follows:

1. In December of 1999, through its legal counsel, the NCC provided draft Animal Regulations to the Regulations Section of the Legislative Services Branch of the Department of Justice (the Regulations Section).
2. The examination of the Animal Regulations under section 3 of the SIA was assigned to two Department of Justice lawyers in the Regulations Section.
3. From December 1999 to May 2001, the Justice Lawyers drafted and undertook the Examination in consultation with the NCC's legal staff.

4. The NCC also sent the Animal Regulations and its draft of the Regulatory Impact Analysis Statement (RIAS) to the Regulatory Affairs Division of the Regulatory Affairs and Orders in Council Secretariat (the Secretariat). It represents the Clerk of the Privy Council in the regulatory process. Officials in the Regulatory Affairs Division conducted an initial review of the Animal Regulations to ensure that they complied, *inter alia*, with the requirements of subsection 3(2) of SIA.
5. Once the Regulations Section completed its Examination, the Animal Regulations were “blue stamped”. Blue Stamping, in this case, served to communicate to the Secretariat that the Regulations Section has completed the Examination and that there were no outstanding issues. A covering letter dated May 30, 2001 to the NCC from the Regulations Section confirmed that the Examination had been conducted.
6. The Minister of Canadian Heritage then signed the Animal Regulations. This had the effect of formally recommending that the Governor in Council pre-publish them in the *Canada Gazette*.
7. The NCC then sent the “blue stamped” copies of the Animal Regulations to the Secretariat and both its Regulatory Affairs Division and its Order in Council Division (together the Divisions) verified the completion of the Examination.

8. Then the Animal Regulations and related documents were sent to a Cabinet Committee called The Special Committee of Council (the Special Committee). It authorized the pre-publication of the Animal Regulations in the Part I of the *Canada Gazette*. That occurred on August 18, 2001.
9. The Animal Regulations were “blue stamped” a second time on February 13, 2002. Each page bore a Department of Justice logo and the words: “Examined by the Regulations Section of the Department of Justice – Examiné par la Section de la réglementation du ministère de la Justice”.
10. The “blue stamped” copies received a recommendation for enactment from the Minister of Heritage and were returned to the Secretariat with all the supporting documents. Both Divisions again reviewed them. In that review, the Regulatory Affairs Division acted on the Clerk’s behalf to ensure that there had been an examination under subsection 3(2) of the SIA. The Secretariat then prepared a briefing note for the Special Committee and it recommended to the Governor General that the Animal Regulations be made.
11. The Governor General then made the Animal Regulations. Thereafter, they were registered with the Registrar of Statutory Instruments on April 25, 2002 as S.O.R./2002-164 and were published in the *Canada Gazette* Part I on Wednesday, May 8, 2002.

[10] Based on this evidence, it is my view that the Justice Lawyers performed two functions in tandem. They completed the drafting of the Animal Regulations for the NCC and, while drafting, they conducted the Examination pursuant to subsection 3(2) of the SIA.

### The Issue

[11] The issue is whether the communications which contained the advice given by the Justice Lawyers to the NCC during the drafting and Examination of the Animal Regulations and the communications which contained the advice given to the Clerk by or on behalf of the Deputy Minister of Justice during the Examination are exempt under section 23 of the Act on the basis of subject and solicitor-client privilege.

[12] It is noteworthy that the Applicant is not interested in advice given concerning drafting issues. His sole interest is the advice given by the Justice Lawyers to the NCC and to the Clerk about whether the NCC could properly make the Animal Regulations. The Applicant's thesis is that the Animal Regulations cover a broad range of topics which the NCC has no authority to regulate.

### The Standard of Review

[13] Solicitor and client privilege is an issue at the heart of the administration of justice and for this reason decisions about the existence of the privilege will often be reviewed on a standard of correctness. However, in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 60, the Supreme Court of Canada suggests that even such fundamental questions may be reviewed on a reasonableness standard if the subject matter is within an adjudicator's area of expertise.



[14] In this case, it was the Minister of Justice or his delegates who decided that the Exempt Material was privileged. Such a decision was well within their expertise and therefore it will be reviewed using reasonableness as the standard of review.

#### Applicant's Submissions

[15] The Applicant says that no solicitor and client relationship was created between the NCC and the Clerk when the NCC submitted the Animal Regulations for Examination. For this reason, he says that no privilege existed when the Justice Lawyers provided their opinions during the Examination.

[16] In the alternative, the Applicant said that the Clerk's letter of May 30, 2001 advising the NCC that the Examination had been completed without issue, waived privilege in the advice the Clerk had received from lawyers in the Department of Justice.

#### Discussion

[17] The four fundamental conditions necessary to establish that communications are subject to solicitor-client privilege appear in *Wigmore on Evidence*, 3rd ed. (McNaughton Revision, 1961), vol. 8 at para. 2285. They have been adopted by the Supreme Court of Canada. In *Slavutych v. Baker*, [1976] 1 S.C.R. 254, the Court described the conditions as follows:

1. The communications must originate in a confidence that they will not be disclosed.
2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

[18] On the necessity of solicitor-client privilege, I note the following statement by the Supreme Court of Canada in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809. There, at paragraph 18, the Court adopted the following language which had been used by Arbour J. and Major J. in earlier decisions:

...solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis in original]

[19] Further, in *Pritchard* at paragraph 19, the Supreme Court considered the position of government lawyers. It said:

Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency: see *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 49...where government lawyers give legal advice to a “client department” that traditionally would engage solicitor-client privilege, and the privilege would apply...

[20] Applying these principles to this case, I agree with the Applicant that there was no solicitor and client relationship between the NCC and the Clerk. However, that conclusion does not dispose of the matter because, in my view, the facts of this case disclose two solicitor and client relationships. The first existed between the Clerk and the Justice Lawyers. When the Clerk was

provided with their advice about whether the Animal Regulations complied with subsection 3(2) of the SIA, it was a privileged communication. The second solicitor and client relationship was formed between the NCC and the Justice Lawyers when they advised the NCC about compliance with subsection 3(2) of the SIA in the context of drafting the Animal Regulations. Those communications were also privileged.

[21] I have also considered whether the Clerk's letter to the NCC waived privilege and have concluded that it did not constitute a waiver because it did not disclose any of the advice he had been given by the Justice Lawyers. It simply reported that he had fulfilled his statutory obligation under section 3(2) of the SIA.

#### Other Submissions

[22] The Applicant has also asked me to determine whether the Examination was properly conducted and whether the Clerk was obliged to issue a report when the examination was complete. However, I have concluded that these issues are not relevant because, under s. 41 of the Act, this application is limited to a review of the Respondent's decision to withhold the Exempt Material.

Conclusion

[23] For all these reasons, I have concluded that the Decision is reasonable because the Exempt Material is the subject of solicitor and client privilege and by reason of section 23 of the Act need not be produced in response to the Applicant's Access Requests.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** this application is hereby dismissed.

“Sandra J. Simpson”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-323-07

**STYLE OF CAUSE:** MR. M. ROBIN QUINN v. THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** Ottawa, ON

**DATE OF HEARING:** October 17, 2007

**REASONS FOR JUDGMENT AND JUDGMENT:** Simpson J.

**DATED:** March 25, 2008

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