

Federal Court



Cour fédérale

Date: 20100525

Docket: T-536-04

Citation: 2010 FC 564

Ottawa, Ontario, May 25, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

**OMAR AHMED KHADR
by his Next Friend FATMAH ELSAMNAH**

Plaintiff

and

**HER MAJESTY THE QUEEN
IN THE RIGHT OF CANADA**

Defendant

REASONS FOR ORDER AND ORDER

[1] By motion in writing dated April 1st, 2010, the plaintiff seeks an Order pursuant to rule 225 of the *Federal Courts Rules*, SOR/98-106 directing : (1) that the defendant disclose in an affidavit of documents all of the material that was submitted by any agencies of the defendant to the Security Intelligence Review Committee (SIRC) in relation to the inquiry or proceeding which resulted in the *SIRC Study 2008-05* of July 8, 2009, entitled *CSIS's Role in the Matter of Omar Khadr* (the

Report); (2) that the defendant disclose in an affidavit of documents an unredacted copy of the Report; and (3) that the plaintiff have his costs of this motion.

[2] The Statement of Claim in this action was filed on March 15, 2004 and has since been amended twice. Among other claims, the plaintiff alleges that Canadian officials interviewed him in Guantanamo Bay, Cuba, in September 2003 and February 2004 for the purpose of assisting the United States' prosecution against him and in so doing violated his rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (U.K.), 1982, c.11 (the "Charter").

[3] The actions of Canadian Security Intelligence Service (CSIS) officials in relation to the interviews at Guantanamo were examined by SIRC under its mandate pursuant to section 54 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, to review any matter that relates to the performance of its duties and functions. Such reports are submitted to the Minister of Public Safety and Emergency Preparedness. The only copy of the Report available to the plaintiff is the redacted version on the SIRC website.

[4] On January 29, 2010 the Supreme Court of Canada released its decision in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] S.C.J. No. 3, in which the Court held that the CSIS interviews constituted a violation of the plaintiff's rights under section 7 of the *Charter*. At paragraphs 20 and 24 of its decision, the Supreme Court referenced certain findings contained in the SIRC Report.

[5] The plaintiff submits that the Report and the materials reviewed by the SIRC in preparing the Report, are relevant documents in the possession of, or under the control of the defendant and should therefore be disclosed in the discovery process.

[6] The defendant's position is that documents reviewed by the SIRC would be produced to the extent that they are relevant and subject to whatever privileges or immunities apply. The defendant argues that the scope of the SIRC review encompassed a time-frame and events broader than those that are the subject of this action and that the content of the Report is beyond the parameters of relevance fixed by the former case management judge in a 2005 document production order. Moreover, the defendant submits, the Report itself is not a document that could be tendered as evidence. It consists of an analysis conducted by a specialized body for a specific statutory purpose. As such, its findings would not be admissible on the trial of the action.

[7] In reply, the plaintiff objects to the defendant determining the relevance of any documents considered by the SIRC and submits that they should be produced to the Court in unredacted form for the Court to review as the first stage of an application to consider whether any information in the documents should be protected under claims of public interest privilege as set out in section 38.04 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, or whether other claims of privilege apply.

ISSUES:

[8] This motion raises the following issues:

- a. Is the defendant required to disclose in its affidavits of documents all of the material in its possession related to the plaintiff that was reviewed by the SIRC in the preparation of the Report?

- b. Is the defendant required to disclose in its affidavits of documents an unredacted copy of the SIRC Report?

ANALYSIS:

The defendant is not required to disclose in its affidavits of documents all of the material reviewed by the SIRC.

[9] Discovery of documents in Federal Court actions is governed by Rules 222 to 233 of the *Federal Courts Rules*. The test as to which documents are required to be produced by a party is relevance (Rule 222(2)). A document is relevant if it either directly or indirectly advances a party's case or damages that of its adversary or may fairly lead to a "train of inquiry" that may have either of these two consequences: *Apotex Inc. v. Canada*, 2005 FCA 217, [2005] F.C.J. No. 1021.

[10] There are limits to the reach of the "train of inquiry" line of discovery. The test is whether there is a reasonable likelihood that a document sought for production would lead to information relevant under Rule 222(2): *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2008 FCA 287, [2008] F.C.J. No. 1372. The focus of the rule is clearly on matters that are necessary and relevant for the trial: *AstraZeneca Canada Inc. v. Apotex Inc.*, 2008 FC 1301, [2008] F.C.J. No. 1696, at para 6.

[11] Relevance is to be determined by reference to the issues of fact which separate the parties, as defined by the pleadings: *Merck Frosst Canada Inc. v. Canada (Minister of Health)*, (1997), 146 F.T.R. 249, [1997] F.C.J. No. 1847, at para. 7. In this case, the statement of claim has been amended since the June 20, 2005 case management order was issued. By order dated May 13, 2009 the plaintiff was granted leave to file a further amended Statement of Claim expanding the grounds on which he was seeking a remedy.

[12] The defendant can not, therefore, simply rely on the terms of the 2005 order, as it proposes, without regard to whether the subsequent amendments to the pleadings have altered the landscape of what may be relevant to the issues at trial. But the initial determination of what is relevant and must be listed and produced must, as a practical matter, rest with the defendant, its affiants and its solicitors.

[13] The Rules set out the requirements for each party's affidavit and supplementary affidavits of documents. The parties are under a continuing obligation to serve and file supplementary affidavits where they become aware of deficiencies or inaccuracies in the original disclosure.

[14] The plaintiff seeks an order for the disclosure of all of the material submitted by any agency of the defendant to SIRC in relation to the inquiry which resulted in the Report. According to the section of the Report dealing with the methodology of its review, SIRC examined all electronic and hard-copy documentation held by CSIS and related directly or incidentally to the plaintiff for the period of May 1, 2002 to September 30, 2005, inclusive. From that description of its methodology, I infer that the documents that were examined in the course of the SIRC review were not submitted to

SIRC by government agencies but were accessed by SIRC staff in either electronic or paper form in the course of their examination of CSIS records. SIRC staff have access to CSIS records and maintain an office at CSIS headquarters for such purposes.

[15] As conceded by the defendant, there are undisclosed records which were reviewed by SIRC for the purposes of the 2008 review. I doubt that all of the material reviewed by the SIRC would be legally relevant in the sense contemplated by Rule 222(2), that is that it could assist in determining whether or not the remedies being sought by the plaintiff in the action should be granted: *Altagas Marketing Inc. v. Canada*, 2004 FC 910, [2004] F.C.J. No. 1161, at para. 16. But it appears clear that there is some relevant material that remains to be disclosed.

[16] In my view, ordering disclosure of all of the material reviewed by SIRC that relates “directly or incidentally” to the plaintiff would inevitably produce documents and information that would be outside the issues delineated by the pleadings. I do not consider that it would be an economical use of the Court’s time for it to review whatever there may be in the CSIS records related to the plaintiff to determine whether there are documents relevant to this action. I do not intend, therefore, to issue the type of broad, sweeping order requested by the plaintiff.

[17] The defendant must, however, respect its obligations to ascertain the potential relevance of all of its documents including those that were reviewed by the SIRC in preparing its 2008 Report and produce those that are relevant. The Court takes judicial notice that CSIS holds its records very closely and that knowledge of their content is restricted on a need to know basis. Solicitors for the defendant may not be aware of the existence of relevant documents. The question remains,

therefore, how is the Court to be satisfied that adequate disclosure has been achieved, subject to any legitimate claims of privilege?

[18] As set out in Rule 224, the deponent of an affidavit of documents must make reasonable inquiries of any present or former officer, servant, agent or employee of the party who might reasonably be expected to have knowledge relating to any matter in question to the action. The solicitors of record must certify that they have explained the necessity of making full disclosure under Rule 223 and the possible consequences of failing to do so.

[19] The SIRC is an independent body that reports to Parliament through the Minister of Public Safety and Emergency Preparedness, its members are appointed by Order-in-Council and it is treated as a government institution for administrative purposes and application of access to information and privacy statutes. While I do not need to determine whether it is part of the defendant Crown for present purposes, I am satisfied that it is a "federal board, commission or tribunal", as defined in section 2 of the *Federal Courts Act*. The committee exercises powers conferred under an Act of Parliament, in particular broad rights of access to the information held by CSIS granted by section 39 of the *Canadian Security Intelligence Service Act*. The small group of officials that support the committee are subject to the *Public Service Employment Act* S.C. 2003, c. 22. I am satisfied that the committee's staff fall within the class of "officer, servant, agent or employee" of the defendant who might reasonably be expected to have knowledge relating to this action as contemplated by Rule 224(2).

[20] As the requirement to disclose documents is to be interpreted liberally, I think it appropriate to order that the defendant file a supplementary affidavit of documents and that the affidavit include a statement that the deponent has made reasonable inquiries of present or former SIRC staff and CSIS officials to ensure that all relevant documents relating to the plaintiff in the possession of the defendant that were examined in the course of the SIRC review and preparation of the 2008 Report have been identified and listed in a schedule to the affidavit. That will not require disclosure of the documents pending a determination of any claims of privilege that may attach to the documents or the information they contain. I recognize that the SIRC may have reviewed documents obtained from other sources that are not in the possession of the defendant.

The defendant is required to list an unredacted copy of the SIRC Report in its affidavit of documents

[21] As noted above, the 2008 Report was a special review conducted by SIRC under section 54 of the *Canadian Security Intelligence Service Act* and the Report was submitted to the Minister of Public Safety and Emergency Preparedness. I am satisfied, therefore, that the unredacted version of the Report is a document within the “possession, power or control” of the defendant as specified by Rule 223(2)(a)(i).

[22] The defendant objects to production of an unredacted version of the 2008 Report principally on the ground that it would not be admissible evidence at trial and is, therefore, outside the proper scope of document production. The defendant submits the Report was created well after the events at issue in this action and reviews time periods outside the scope of the action. Where it touches on

the subject of the litigation, the statements that reference the events at issue are analogous to opinion evidence going to the ultimate issue to be determined by the Court.

[23] The plaintiff argues that the Report contains findings of facts derived from the evidence that was before SIRC, most of which is not in the plaintiff's possession. In his view, it is necessary to have the Report included in the evidentiary record for trial rather than in a Book of Authorities as it was in the proceedings before the Supreme Court of Canada. Additionally, the plaintiff argues, the unredacted version of the SIRC Report and its supporting materials may lead to a "train of inquiry" giving rise to relevant evidence independent from the SIRC's own findings.

[24] Counsel have filed excerpts of the transcript of the oral hearing before the Supreme Court in which questions were raised as to the status of the Report in those proceedings. It appears from those excerpts that it was not clear to the Supreme Court whether the Report was to be treated as part of the evidentiary record. That question does not appear to have been resolved during the hearing although I note that findings in the Report were referenced twice by the Court in its reasons for decision: *Khadr*, above, at paragraphs 20 and 24.

[25] I doubt that the Report is admissible as proof of the statements of fact that it contains. At first impression, it does not appear to meet the tests of admissibility of public documents. But that is a question that would have to be decided at trial or on a pre-trial motion under Rule 220. And relevance, not admissibility, is the test for discovery: *Steier v. University Hospital Board (Sask. C.A.)*, (1988), 67 Sask.R. 81, [1988] S.J. No. 138.

[26] As discussed above, a party is entitled to discovery of documents that may reasonably lead to information that would assist its case, undermine that of its adversary or lead, on inquiry, to such information. Disclosure of a relevant document in an affidavit does not determine its admissibility and it remains open to the opposing party to raise that issue at trial: *Glaxo Group Ltd. v. Novopharm Ltd.* (1996), 122 F.T.R. 192 (T.D.), [1996] F.C.J. No. 1423.

[27] I am satisfied that the unredacted version of the Report must be listed in schedule 2 of the defendant's supplementary affidavit of documents. The document itself need not be disclosed to the plaintiff until such time as any possible claims of public interest privilege with respect to the information redacted from the public version of the report are resolved on application to the Court under subsection 38.04(1) of the *Canada Evidence Act*.

ORDER

THIS COURT ORDERS that:

1. The plaintiff's motion is granted:
 - (a) The defendant shall list the 2008 SIRC Report entitled *CSIS's Role in the Matter of Omar Khadr* in schedule 2 of its supplementary affidavit of documents and file an unredacted version of the Report with the Designated Proceedings Registry of the Court;
 - (b) The deponent of the defendant's supplementary affidavit shall consult present and former members of the SIRC staff to ensure that all relevant documents in the possession of the Canadian Security Intelligence Service that were reviewed by SIRC in the preparation of the Report are listed in the supplementary affidavit;
 - (c) Any participant in this proceeding who is required to disclose information in the Report or relevant documents in the possession of CSIS or in the affidavit and schedule to be filed, that the participant has reason to believe is sensitive or potentially injurious shall notify the Attorney General of Canada who may consent to the disclosure of the information or bring an application to the Court under section 38.04 of the *Canada Evidence Act* for an order to protect the information;
 - (d) The defendant shall file redacted and unredacted copies of the documents in the Designated Proceedings Registry of the Court for the determination of any application brought by the Attorney General of Canada

2. The plaintiff shall have his costs of this motion in any event of the cause.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-536-04

STYLE OF CAUSE: OMAR AHMED KHADR by his Next
Friend FATMAH EL-SAMNAH v. HER
MAJESTY THE QUEEN IN RIGHT OF
CANADA

**CONSIDERED AT OTTAWA, ONTARIO, MOTION IN WRITING WITHOUT
PERSONAL APPEARANCE OF THE PARTIES**

PLACE OF HEARING: Ottawa, Ontario

**REASONS FOR ORDER
AND ORDER:** MOSLEY J.

DATED: May 25, 2010

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