Federal Court  Cour fédérale

Date: 20130705

Docket: T-1790-10

Citation: 2013 FC 757

Ottawa, Ontario, July 5, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

DEVERYN DONALD ALEXANDER ROSS

Applicant

and

THE MINISTER OF JUSTICE
AND
ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR ORDER AND ORDER

[1] This is a motion for an order under section 318(4) of the *Federal Courts Rules*, SOR/98-106, with respect to an objection by the respondents to the disclosure of material that is in the possession of the Minister in connection with an application for judicial review.

[2] The underlying matter is an application under s 18(1) of the *Federal Courts Act*, RSC 1985, c F-7, of a decision to deny a ministerial review under section 696.1 of the *Criminal Code*, RSC

1985, c C-46 [the Code]. The applicant had applied to the Minister for the review of two fraud convictions he received in relation to an investment scheme in Brandon, Manitoba. The convictions were imposed following a trial in 1995 and were upheld by the Manitoba Court of Appeal. The applicant filed his application for review in 2004.

[3] Pursuant to s 696.2 of the Code, the Minister has the powers of a commissioner under the *Inquiries Act*, RSC 1985, c I-11, ss 4-5, to investigate an application for ministerial review. Under s 696.2(3) he may delegate those powers to a lawyer, retired judge or other qualified individual. In this instance, the Minister retained Mr. Alex Pringle, Q.C., of Edmonton, Alberta, to conduct the investigation. In carrying out that investigation, Mr. Pringle conducted interviews with witnesses and assembled an extensive documentary record of what had been a fairly complex fraud investigation and prosecution.

[4] On May 15, 2008, Mr. Pringle provided a document entitled "Investigative Report" (the "First Investigative Report") to counsel for the applicant and to the Manitoba Department of Justice. Extensive written representations were submitted to Mr. Pringle by the applicant and Manitoba Justice in response to the First Investigative Report. Mr. Pringle then provided his final findings and recommendations to the Minister on June 22, 2009 in a document entitled "Final Investigative Report". The Final Investigative Report was not disclosed to the applicant in any form prior to these proceedings.

[5] The Minister communicated his decision regarding the application for ministerial review in a letter to the applicant's counsel dated September 29, 2010. The Minister was not satisfied that

there was a reasonable basis to conclude that a miscarriage of justice had likely occurred and, exercising his discretion pursuant to s 696.3(3)(*b*) of the Code, he dismissed the application.

[6] In his Notice of Application for judicial review of the Minister's decision, the applicant requested that the Minister provide him with a copy of Mr. Pringle's Final Investigative Report pursuant to Rule 317 of the *Federal Courts Rules*. Counsel for the respondents objected to the disclosure request on the basis that the document was protected by solicitor-client privilege.

[7] When the application came on for hearing before the Court on April 15, 2013, the applicant renewed his request for production of Mr. Pringle's Final Investigative Report. The Court directed that the respondents file the Final Investigative Report in a sealed form with written representations in support of the asserted claim of privilege. The applicant was given an opportunity to respond in writing and the Minister a right of reply.

[8] Subsequent to the hearing, the respondents elected to disclose the Final Investigative Report in a redacted form. They disclosed 603 paragraphs of the report but continued to assert privilege with respect to paragraphs 556, 567, and 606 to 613, on the basis that the redacted paragraphs contained Mr. Pringle's legal advice and recommendations to the Minister as to what decision to take in response to the review application.

[9] The respondents rely on the nature of Mr. Pringle's appointment as a lawyer acting as the Minister's delegate to conduct the investigation. Mr. Pringle was no mere fact-finder, the respondents submit. His task involved both fact-finding and legal analysis and the application of

legal principles governing wrongful convictions to the facts found by him following his document review and examinations under oath of several individuals.

[10] The applicant acknowledges that in his Memorandum of Fact and Law on the application to set aside the Minister's decision, he submitted that the Minister could claim privilege in the final report for "legal advice provided on the disposition of the application itself." He also acknowledges that the Minister can assert privilege regarding the advice of his Special Advisor on applications for ministerial review. The Special Advisor oversees the conviction review process and reviews investigation reports. The position, an appointment by Order-in-Council, is independent from the public service and the staff of the Department of Justice. The Special Advisor may provide advice and recommendations to the Minister that differ from those of the investigating lawyer. Such advice and recommendations, if any were provided, are not the subject of this motion.

[11] The applicant submits, however, that s 5(1) of the *Regulations Respecting Applications for Ministerial Review-Miscarriages of Justice*, SOR/2002-416 [the Regulations] requires that the entire Final Investigative Report be disclosed without redactions.

[12] Subsection 5(1) reads as follows:

5. (1) After completing an investigation under paragraph 4(1)(*a*), the Minister shall prepare an investigation report and provide a copy of it to the applicant and to the person acting on the applicant's behalf, if any. The Minister shall	**5.** (1) Une fois l'enquête visée à l'alinéa 4(1)*a*) terminée, le ministre rédige un rapport d'enquête, dont il transmet copie au demandeur et, le cas échéant, à la personne qui présente la demande en son nom. Le ministre doit informer

indicate in writing that the applicant may provide further information in support of the application within one year after the date on which the investigation report is sent.	par écrit le demandeur que des renseignements additionnels peuvent lui être fournis à l'appui de la demande dans un délai d'un an à compter de la date d'envoi du rapport d'enquête.

[13] The applicant contends that the disclosed paragraphs in the Final Investigative Report are replete with findings of mixed fact and law and their disclosure amounts to a waiver by the Minister of any claim to solicitor-client privilege over paragraphs whose contents are likely substantially the same and which are directed to the same issues. He argues that the application for judicial review in this Court has proceeded on the basis that the Minister applied an incorrect legal test in coming to his decision because he was incorrectly advised on legal principles and that his decision should be set aside for that reason. Statements in the First Investigative Report that would support that argument do not appear in the disclosed paragraphs of the Final Investigative Report.

[14] The applicant submits that he is entitled to know whether the Minister, in referring only to the First Investigative Report in his decision letter, disregarded critical passages and conclusions in Mr. Pringle's Final Investigative Report.

[15] The respondents' position is that the report disclosed to the applicant's counsel in May of 2008 constitutes the "investigation report" prepared within the meaning of s 5(1) of the Regulations. The investigation had been completed at that stage, and the invitation to submit further comments from the applicant and Manitoba Justice was what the duty of fairness and the Regulations required. The document which is the subject of this motion (i.e., the "Final Investigative Report") was a brief

for the Minister on the investigation report, the comments received in response and Mr. Pringle's legal advice.

[16] The respondents contend that they have not conceded that disclosure of the Final Investigation Report was required by virtue of s 5(1) of the Regulations nor have they waived privilege over those portions that were redacted for solicitor-client privilege. In providing the redacted report, they were merely responding to the Court's direction to disclose such portions of the document for which privilege was not asserted.

[17] I agree with the respondents that the investigation report referenced by s 5(1) of the Regulations in the context of this matter was that disclosed to the applicant in May of 2008. That conclusion is consistent with the language of the Regulation which requires that such a report be provided to the applicant and that the Minister advise the applicant that he or she has one year within which to submit additional information in support of the application. The Regulations do not require that any final report containing the results of the investigation (including any additional information provided by the applicant) and the recommendations of the investigating lawyer be disclosed to the applicant before the Minister makes his decision.

[18] That is not to say that procedural fairness would not require disclosure of the final report where it differs significantly from that provided to the applicant for review. That would appear to be what Justice Gauthier had in mind in *Bilodeau v Canada (Minister of Justice)*, 2011 FC 886, when she suggested at paragraph 110 that disclosure of an unredacted final report may be required in the

interests of procedural fairness. I do not need to determine that question on this motion as it concerns the question of production under Rules 317 and 318.

[19] Production of the Final Investigative Report was required when it was requested under Rule 317 for the purpose of the application for judicial review of the Minister's decision. Rule 317 is intended to ensure that the record that was before the decision-maker is before the Court on judicial review: *1185740 Ontario v Canada (Minister of National Revenue)* (1999), 247 NR 287, 91 ACWS (3d) 922 (FCA). Rule 318 sets out a procedure for the determination of any objection to a request under Rule 317.

[20] In disclosing the report when directed to do so by the Court under Rule 318, the respondents did not waive their claim to solicitor-client privilege with respect to any of the information in the report. Rules 317 and 318 are subordinate legislative instruments of a general nature. They cannot be interpreted so as to abrogate solicitor-client privilege absent a clear expression of intent in the enabling legislation to that effect: *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31, at paras 32-35. There is no such expression of intent in the *Federal Courts Act*.

[21] Having read the redacted paragraphs, I am satisfied that they meet the test for determining whether solicitor-client privilege attaches to a communication as set out in *Pritchard* at para 15: the communication was between a solicitor, Mr. Pringle, and his client, the Minister; it entailed the giving of legal advice by Mr. Pringle, and it was intended to be confidential by both him and his client.

[22] As set out in the letter of appointment, Mr. Pringle was asked to "… provide a legal opinion to the Minister of Justice on the merits of the application". Mr. Pringle himself apparently assumed that his final opinion would be privileged, as he indicated in correspondence to counsel for the applicant. And in the Final Investigative Report he noted that he was appointed by the Minister to "provide an opinion concerning this matter."

[23] This matter is analogous, as the respondents argue, to the decisions of the Federal Court in *Bilodeau*, above, and *Slansky v Canada (Attorney General)*, 2011 FC 1467, in which solicitor-client privilege was found to attach in the context of investigations by delegates.

[24] Accordingly, the objection to production of paragraphs 556, 567 and 606 to 613 of the Final Investigative Report on the ground of solicitor-client privilege is upheld.

[25] The applicant requested a further opportunity to make submissions to the Court on the merits of the application for judicial review when a decision was made on the objection to disclosure of the information for which privilege was asserted. The Court will schedule a hearing when counsel have advised the Registry of their availability and the time required to make further oral submissions.

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ORDER

THIS COURT ORDERS that:

1. the objection to the request for production of the redacted paragraphs in the Final Investigative Report is upheld;
2. costs will be in the cause.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1790-10
STYLE OF CAUSE:	DEVERYN DONALD ALEXANDER ROSS AND THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 15-16, 2013
REASONS FOR ORDER AND ORDER:	MOSLEY J.
DATED:	July 5, 2013

APPEARANCES:

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