DOCKET: 30820
DATE: 20060707

SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

2006 SCC 31

B E T W E E N:	
Ministry of Correctional Services Appellant	Sara Blake and Lise Favreau, for the appellant
- and -	
David Goodis, Senior Adjudicator, and Jane Doe, Requester Respondents	William S. Challis, for the respondent David Goodis
	M. Philip Tunley and Christine Lonsdale, for the respondent Jane Doe
- and -	
Attorney General of Canada Intervener	Christopher M. Rupar, for the intervener
	Heard: April 18, 2006
	Judgment: July 7, 2006

The judgment of the Court was delivered by

ROTHSTEIN J.:—

I. Introduction

[1] The primary issue in this appeal is whether a judge reviewing a decision of the Ontario Information and Privacy Commissioner ("Commissioner") may grant the requester's counsel access to records, which are subject to a claim of solicitor-client privilege ("*secret professionel de l'avocat*" in the French version of the relevant statutory provision), for purposes of arguing whether those records should be disclosed under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("Access Act").

[2] The Ontario Access Act serves two stated purposes. One is "to provide a right of access to information" under the control of government (s. 1(a)). The other is "to protect the privacy of individuals with respect to personal information" (s. 1(b)). This appeal is about access to information.

[3] A judge of the Divisional Court ordered disclosure of the records to the requester's counsel. A panel of the Ontario Divisional Court and the Ontario Court of Appeal found that the judge had the discretion to order disclosure. In their view, the records, even those claimed to be solicitor-client privileged, could be disclosed to counsel for the requester subject to an appropriate confidentiality undertaking.

[4] I am of the opinion that disclosure to a requester's counsel of records subject to a claim of solicitor-client privilege may only be ordered where absolutely necessary. The Ontario courts erred by not applying the absolute necessity test. Had the proper test been applied, the disclosure of records claimed to be subject to solicitor-client privilege would not have been ordered.

II. Facts

[5] The procedural history leading to this appeal is somewhat complicated. It is not necessary to refer to every detail. The requester, Jane Doe, is a journalist. Pursuant to the Access Act, she requested all records relating to allegations of sexual abuse of offenders by probation officers employed by the Ontario Ministry of Correctional Services in Cornwall, Ontario. The Ministry identified 459 pages of relevant records but refused to disclose them on various grounds. The requester appealed the Ministry's decision to the Commissioner. By Order PO-1999 dated March 13, 2002, an adjudicator in the office of the Commissioner ordered disclosure of 19 of the 459 pages.

[6] The Ministry filed an application for judicial review in the Ontario Divisional Court seeking to quash the Commissioner's Order PO-1999 ordering disclosure of the 19 pages. By order dated April 22, 2003, the 459 pages were sealed (the private record).

[7] On October 20, 2003, the requester filed a notice of motion in the Divisional Court for an order granting her access to the private record upon the filing of a confidentiality undertaking. The motion came before Blair J. (as he then was). Blair J. treated the motion as one for access for the requester's counsel in order to enable counsel to argue the judicial review and not for access to the requester herself.

[8] In his endorsement of October 24, 2003, Blair J. acknowledged the Ministry's submission that the 19 pages ordered disclosed were subject to solicitor-client privilege and that those were the only pages at issue in the judicial review. While he noted that "the matter is not free from doubt", he ordered disclosure of the entire private record to the requester's counsel subject to a confidentiality undertaking. He wrote:

> I include all 458 [*sic*] pages of the Private Record because it is not entirely clear to me -- notwithstanding the submission that the judicial review is limited to the 19 pages -- that the remaining documents in the Private Record, or some of them may not have relevance on the appeal.

In making his order, Blair J. ([2003] O.J. No. 4621 (QL), at para. 7) relied on the principles enunciated and the practices referred to in such cases as *Fuda v. Ontario (Information and Privacy*

Commissioner) (2003), 65 O.R. (3d) 701 (Div. Ct.), and *Hunter v. Canada (Consumer and Corporate Affairs)*, [1991] 3 F.C. 186 (C.A).

[9] The Ministry moved before a panel of the Divisional Court to set aside the order of Blair J. The motion was dismissed on January 26, 2004: [2004] O.J. No. 894 (QL). In its endorsement, the panel does not refer to solicitor-client privilege but only to the Ministry's argument that under the Access Act, the court is limited to the powers vested in the Commissioner. In the view of the panel, a judge of the Divisional Court has jurisdiction to control the court's process and to ensure procedural fairness to all parties. The panel accepted the argument that "it may be of assistance, both to counsel and to the court, to see the documents ordered produced as well as those that were not to make what he or she [counsel for the requester] can of any distinctions and to provide context" (para. 4). The panel found that Blair J. did not commit a palpable and overriding error that would justify interfering with his discretionary order.

[10] By order dated January 14, 2005, the Ontario Court of Appeal dismissed the Ministry's appeal of the order of the panel of the Divisional Court: [2005] O.J. No. 66 (QL). In the view of the Court of Appeal, Blair J., as a judge of the Divisional Court, had jurisdiction to control the process of the court and to ensure procedural fairness to all parties. Blair J.'s disclosure order was a discretionary one made within his jurisdiction.

III. Analysis

[11] There are two issues in this appeal:

(a) Can the records in issue be disclosed to counsel for the requester notwithstanding the Ministry's claim of solicitor-client privilege?

(b) Is the Divisional Court bound by the provisions of the Access Act such that the prohibition on the Commissioner's disclosing records applies to the court?

A. *Solicitor-Client Privilege*

(1) Introduction

[12] The Ministry has claimed that all the documents in the private record are exempt from disclosure under s. 19 of the Access Act, which provides:

> **19.** A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 applies to two categories of documents: (1) communications between a solicitor and his or her client and (2) documents prepared in contemplation of or for use in litigation. Section 19 recognizes these common law privileges: solicitor-client communication privilege and litigation privilege.

[13] In their submissions to this Court on appeal, the parties have restricted their arguments to solicitor-client privilege. They have not addressed litigation privilege. This decision, therefore, will deal solely with solicitor-client privilege, i.e., communications between solicitor and client and not with litigation privilege.

(2) Jurisprudence

[14] In a series of cases, this Court has dealt with the question of the circumstances in which communications between solicitor and client may not be disclosed. In *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 875, Lamer J., on behalf of an unanimous Court, formulated a substantive rule to apply when communications between solicitor and client are likely to be disclosed without the client's consent:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstance of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

[15] The substantive rule laid down in *Descôteaux* is that a judge must not interfere with the confidentiality of communications between solicitor and client "except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation". In *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, it was found that a provision of the *Criminal Code*, R.S.C. 1985, c. C-46, that authorized the seizure of documents from a law office was unreasonable within the meaning of s. 8 of the *Canadian Charter of Rights and Freedoms* because it permitted the automatic loss of solicitor-client privilege. That decision further emphasized the fundamental nature of the substantive rule. It is, therefore, incumbent on a judge to apply the "absolutely necessary" test when deciding an application for disclosure of such records.

[16] This strict approach has been followed more recently in *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14. At p. 459, Major J. stated:

> However, 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.

[17] Of particular significance is that the question of disclosure of solicitor-client privileged communications does not involve a balancing of interests on a case-by-case basis. By contrast, Blair J. followed the decision of the Divisional Court in *Fuda* where Lang J. laid out different principles for the disclosure of records to a requester's counsel for the purpose of arguing the judicial review of an access to information decision. At para. 33 of *Fuda*, Lang J. states:

> In other words, the decision on whether to grant access to the private record is fact specific... . A balancing is needed; a balancing between on the one hand, ensuring that a court operating in an adversarial context has the benefit of full and informed submissions, and, on the other hand, ensuring that highly sensitive information is not improperly accessed, particularly, where such access would cause harm to uninvolved third parties. [Emphasis added.]

[18] While a fact-specific balancing may have been appropriate in *Fuda*, it cannot, having regard to this Court's categorical jurisprudence, apply where the records involve communications between solicitor and client.

[19] Although raised, it appears from the record that the question of solicitor-client privilege was not the primary focus of argument before the Ontario Courts. It is perhaps for that reason that the Ontario Courts were of the view that procedural fairness required disclosure of the records to the counsel for the requester. However, in *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, 2004 SCC 31, Major J. explained that privilege and procedural fairness co-exist without being at the expense of each other. As he stated at para. 31:

> Procedural fairness does not require the disclosure of a privileged legal opinion. [Privilege and procedural fairness] may co-exist without being at the expense of the other... . The concept of fairness permeates all aspects of the justice system, and important to it is the principle of solicitor-client privilege.

(3) Meaning of Absolute Necessity

[20] Absolute necessity is as restrictive a test as may be formulated short of an absolute prohibition in every case. The circumstances in which the test has been met exemplify its restrictive nature. In *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 841, for example, it was found that subject to strict safeguards, mail received by an inmate at a penitentiary could be inspected to maintain the safety and security of the penitentiary. Similarly, in *McClure*, it was found that documents subject to privilege could be disclosed where there was a genuine danger of wrongful conviction because the information was not available from other sources and the accused could not otherwise raise a reasonable doubt as to his guilt.

[21] While I cannot rule out the possibility, it is difficult to envisage circumstances where the absolute necessity test could be met if the sole purpose of disclosure is to facilitate argument by the requester's counsel on the question of whether privilege is properly claimed. Hearing from both sides of an issue is a principle to be departed from only in exceptional circumstances. However, privilege is a subject with which judges are acquainted. They are well equipped in the ordinary case to determine whether a record is subject to privilege. There is no evidence in this case that disclosure of records to counsel for the purpose of arguing whether or not they are privileged is absolutely necessary.

(4) Judicial Workload

[22] It is suggested that the need to examine many records could place an undue burden on the reviewing judge. It is not obvious that disclosure to the requester's counsel will necessarily reduce that workload. In any event, there are techniques available to help reduce the volume of information that must be reviewed. At a minimum, for example, the 459 pages could be organized in categories that exhibit common characteristics relevant to the solicitor-client privilege. Nor do I see how an increase in judicial workload or other administrative considerations make absolutely necessary disclosure to the requester's counsel for the purpose of arguing the judicial review application. Convenience is not a reason to release information subject to a claim of solicitor-client privilege.

(5) Conclusion on Solicitor-Client Privilege

[23] In sum, I agree with the Ministry that there is no justification for establishing a new or different test for disclosure of records subject to a claim for solicitor-client privilege in an access to information case.

[24] I am of the respectful opinion that the Ontario courts were in error in permitting disclosure of all the documents in this case. The appropriate test for any document claimed to be subject to solicitor-client privilege is "absolute necessity". That test was not applied. Had it been, disclosure of all the records would not have been ordered.

[25] I am mindful that openness of the court's process is a recognized principle. However, as with all general principles, there are exceptions. Records that are subject to a claim of solicitor-client privilege in an access to information case are such an exception. Absent absolute necessity in order to achieve the end sought by the enabling legislation, such records may not be disclosed. As stated, the evidence disclosed no such absolute necessity in this case.

B. *Access Act*

[26] The Ministry has argued that a court hearing a judicial review of the Commissioner's decision is bound by the provisions of the Access Act that prohibit the Commissioner from disclosing any records until a final decision is made. I am unable to agree.

(1) Textual Analysis

[27] The provisions of the Access Act which the Ministry cites are specifically referable to the Commissioner: Access Act, s. 55 and ss. 52(3), 52(4), 52(5), 52(13), and 54(2). If it had been the intention of the Legislature that the courts be subject to the same strictures, it would have been very easy and indeed, very obvious, for the Legislature to have stated such intention in express terms. The Ontario Legislature did not do so even though there is no doubt that a decision of the Commissioner could be subject to judicial review.

[28] Moreover, there are provisions in the Access Act applicable to the Commissioner that could never be applicable to the court. For example, under s. 52(6), a head may *require* the Commissioner to examine a document at its site. It would be highly unusual that a court be *required* to inspect documents on site. By contrast, s. 10 of the *Judicial Review Procedures Act*, R.S.O. 1990, c. J.1, which by virtue of s. 2(1) is directly applicable to the court's proceedings, requires that the record of the Commissioner be filed with the court.

[29] Similarly, under s. 52(8), the Commissioner may summon and examine on oath any person who in the Commissioner's opinion may have information relating to the inquiry. In a matter involving the Access Act, the court is conducting a judicial review and, except in extraordinary circumstances, witnesses will not be examined. In any event, the court will not summon and examine witnesses on its own initiative.

[30] On a textual analysis of the Access Act, therefore, I do not see that its procedural provisions applicable to the Commissioner apply to the court. There is no express reference to the judicial review of a decision of the Commissioner under the Access Act and some of the provisions could not logically have been intended to bind the court on judicial review. Rather, I think it must follow that the court is bound by the legislation governing the court's procedures on judicial review, the *Judicial Review Procedures Act* and the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The *Courts of Justice Act* provides that the court may order the exclusion of the public from hearings (s. 135(2)) or that any document filed before it be treated as confidential, sealed and not form part of the public record (s. 137(2)) as was done in this case.

(2) Jurisdiction on Judicial Review

[31] In support of its position that the court is bound by the provisions of Access Act, the Ministry submits that, on judicial review, a court cannot have more powers than the decision-maker under review. In this case, the decision-maker under review is the Commissioner. While it is true that a court sitting on judicial review does not have more substantive decision-making powers than the Commissioner, it does not follow that the court is bound by the procedures applicable to the Commissioner. The provisions that allow for the Commissioner's hearing to be held in private or prohibit the Commissioner from disclosing records prior to deciding that they must be disclosed are procedural in nature. The procedure of the court is governed by the provisions of the relevant statutes and rules that apply to the court.

(3) Protection for Documents under the Access Act

[32] I acknowledge that if the procedures in the Access Act that apply to the Commissioner are not directly applicable to the court on judicial review, the matter of disclosure is left to the discretion of the court (subject to statutory and common law rules such as those pertaining to documents over which privilege is claimed). However, in the case of judicial review proceedings relating to the Access Act, it is obvious that the court's adjudicative process must not result in disclosure of contested documents and thereby pre-empt the court's substantive ruling on the issue. Where no common law rule prescribes the manner in which to deal with records, the court must adopt a procedure that will protect the confidentiality of records until a substantive decision is made.

[33] The precise terms upon which disclosure may be ordered to the requester's counsel for purposes of arguing a judicial review is within the discretion of the judge. In this case, Blair J. considered the appropriateness of the confidentiality undertaking and that there was no attack on the integrity of counsel providing the undertaking. These were relevant considerations. To the extent records are not subject to a claim for solicitor-client privilege, but confidentiality is claimed on some other basis, I agree with the approach of Blair J. However, in the case of documents subject to solicitor-client privilege, the approach adopted by Blair J. is not appropriate unless the "absolute necessity" test is met.

IV. Conclusion

[34] I would allow the appeal and quash the decisions of the Ontario courts allowing the disclosure of the entire private record to the requester's counsel. Any records claimed to be subject to solicitor-client privilege should not be disclosed to the requester's counsel. Disclosure to counsel for purposes of arguing the judicial review of records not subject to a claim of solicitor-client privilege or that are found by the judge not to be so privileged, are, provided they are not governed by any other statutory or common law rule, subject to the discretion of the judge, having regard to the objective of protecting the confidentiality of records until a substantive decision is made and to considerations such as the appropriateness of a confidentiality undertaking. The matter should be remitted to the Divisional Court for redetermination in accordance with these reasons. The Ministry expressly did not request costs and none are ordered.

APPENDIX
Relevant Statutory Provisions

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

19. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

52. ...

(3) The inquiry may be conducted in private.

(4) In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and II of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.

(5) The Commissioner shall not retain any information obtained from a record under subsection (4).

(6) Despite subsection (4), a head may require that the examination of a record by the Commissioner be of the original at its site.

...

(8) The Commissioner may summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry, and for that purpose the Commissioner may administer an oath.

...

(13) The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

54. ...

(2) Where the Commissioner upholds a decision of a head that the head my refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part.

55. The Commissioner or any person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their powers, duties and functions under this or any other Act.

Courts of Justice Act, R.S.O. 1990, c. C.43

135. ...

(2) The court may order the public to be excluded from a hearing where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public.

137. ...

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and form part of the public record.

Judicial Review Procedures Act, R.S.O. 1990, c. J.1

2. (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.

2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

10. When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made.

Appeal allowed.

Solicitor for the appellant: Attorney General of Ontario, Toronto.

Solicitor for the respondent David Goodis: Information and Privacy Commissioner, Toronto.

Solicitors for the respondent Jane Doe: McCarthy Tétrault, Toronto.

Solicitor for the intervener: Attorney General of Canada, Ottawa.