Date: 20071212

Docket: A-309-03

Citation: 2007 FCA 397

CORAM: **DESJARDINS J.A.**
SHARLOW J.A.
TRUDEL J.A.

BETWEEN:

SNC LAVALIN INC.

Appellant

and

THE MINISTER FOR INTERNATIONAL CO-OPERATION and THE MINISTER OF FOREIGN AFFAIRS

Respondents

and

THE INFORMATION COMMISSIONER OF CANADA

Intervener

Heard at Ottawa, Ontario, on December 12, 2007.

Judgment delivered from the Bench at Ottawa, Ontario, on December 12, 2007.

REASONS FOR JUDGMENT OF THE COURT BY: SHARLOW J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on December 12, 2007)

SHARLOW J.A.

[1] This is an appeal of the judgment of Justice Gibson dated May 30, 2003 (2003 FCT 681) dismissing the application of SNC Lavalin Inc. ("SNC") under section 44 of the *Access to Information Act*, R.S.C. 1985, c. A-1.

[2] The determination of a section 44 application is a question of mixed law and fact. The standard of appellate review is palpable and overriding error, unless an extricable error of law can be identified, in which case the standard of review is correctness (*Janssen-Ortho Inc. v. Canada (Minister of Health)*, 2007 FCA 252 at paragraph 5; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paragraphs 27-28).

[3] SNC's appeal has been presented on the basis of an error of law. However, our view is that, except in relation to section 19 of the *Access to Information Act*, the appeal essentially challenges Justice Gibson's appreciation of the evidence and his assessment of the weight to be given to it. Therefore, the applicable standard of review is palpable and overriding error, except for the issues relating to section 19.

[4] The section 44 application that is the subject of this appeal was the result of a notice to SNC that it was a third party with an interest in the decision of the respondent Ministers to disclose certain records in response to an application for access to information. The Ministers were acting through the Access to Information Coordinator for the Canadian International Development Agency ("CIDA"). The request for information sought auditors' working papers in relation to a certain project involving SNC and CIDA.

[5] The only items remaining in dispute are four statements found in the minutes of a meeting between SNC employees and CIDA officials. In support of its argument that those four items

should not be disclosed, SNC relies on paragraphs 20(1)(*b*) and (*c*) and section 19 of the *Access to Information Act*. Any item that comes within any of those provisions cannot be disclosed.

Paragraph 20(1)(*b*)

[6] Justice Gibson found that the disputed items are not "confidential information" within the meaning of paragraph 20(1)(*b*). In the leading case on paragraph 20(1)(*b*), *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194, Justice MacKay proposed three questions to be considered in determining whether information is "confidential information". The three questions are as follows (at page 210, paragraph [42]):

> […] whether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, namely:
>
> a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,
>
> b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and
>
> c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.

[7] Although Justice Gibson did not specifically cite the *Air Atonabee* questions, his reasons clearly answer the second and third questions in the negative. That conclusion must stand absent palpable and overriding error. The only evidence on this point is the affidavit submitted by SNC in

which the affiant expressed the opinion that the disputed items were intended by all of the meeting participants to be kept confidential, and that the public interest in open and frank communications between SNC and CIDA would be fostered by keeping the information confidential. That evidence is not contradicted. The question, however, is whether it is sufficient. As we understand Justice Gibson's reasons, he was not satisfied that the evidence was sufficient. We are unable to detect a palpable and overriding error in that conclusion.

[8] SNC refers to Justice Gibson's statements to the effect that there was no evidence that SNC communicated to CIDA its wish to keep the information confidential, or that there was any mutual understanding or accepted practice that the information would be treated as confidential. SNC argues that Justice Gibson erred in law by concluding that the absence of such evidence was fatal to a section 44 application based on paragraph 20(1)(*b*).

[9] In our view, this argument is based on a misinterpretation of Justice Gibson's reasons. We do not accept that he altered or intended to alter the principles to be applied in considering a section 44 application based on paragraph 20(1)(*b*), as summarized in *Air Atonabee*. He was simply commenting on what was absent from the record, as he was entitled to do. Those comments form a cogent part of his reasons and disclose no error of law.

[10] We conclude that Justice Gibson made no reviewable error in dismissing the section 44 application of SNC in so far as it was based on paragraph 20(1)(*b*) of the *Access to Information Act*.

Paragraph 20(1)(*c*)

[11] *Air Atonabee* is also the leading case on paragraph 20(1)(*c*), which Justice MacKay explained as follows at page 210 (at paragraph [34], citations omitted):

> In the case of s. 20(1)(*c*) there are two circumstances under either of which, as alternatives to the criteria in other subsections and to each other, information is exempt from disclosure, that is:
>
> 1) where the disclosure of the information could reasonably be expected to result in material financial loss or gain to a third party, or
>
> 2) where the disclosure of the information could reasonably be expected to prejudice the competitive position of a third party.
>
> Both of these latter circumstances require a reasonable expectation of probable harm […] and speculation or mere possibility of harm does not meet that standard […].

[12] SNC argues that the evidence it submitted in support of its position on paragraph 20(1)(*c*) was sufficient to establish a reasonable expectation of probable harm. The evidence, the same affidavit referred to above, contains the affiant's opinion of the harm he believed could result if the disputed items were disclosed. Justice Gibson concluded that the evidence was too speculative to meet the test in paragraph 20(1)(*c*). In our view, Justice Gibson made no palpable and overriding error in reaching that conclusion. We conclude that Justice Gibson made no reviewable error in dismissing the section 44 application of SNC in so far as it was based on paragraph 20(1)(*c*) of the *Access to Information Act*.

Section 19

[13] Justice Gibson dismissed the application in relation to section 19 on the basis that, as a matter of statutory interpretation, section 19 could not be invoked in a section 44 application. Justice

Gibson's reasons are ambiguous as to whether, despite reaching that conclusion on the scope of section 44, he went on to consider the merits of the application of SNC insofar as it relied on section 19. For the purposes of this appeal, we will assume that he did not consider the merits.

[14] Justice Gibson did not have the benefit of the decision of the Supreme Court of Canada in *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006] 1 S.C.R. 441. In that case, it was determined that section 19 can be invoked in a section 44 application. The issue now before this Court is whether the disputed information is personal information as defined in section 3 of the *Privacy Act*. SNC argues that it is. The Ministers and the intervener, the Information Commissioner, argue that the disputed items fall outside the definition because of the exemption in paragraph (*k*) of the definition, which reads as follows:

(*k*) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services […].	*k*) un individu qui, au titre d'un contrat, assure ou a assuré la prestation de services à une institution fédérale et portant sur la nature de la prestation, notamment les conditions du contrat, le nom de l'individu ainsi que les idées et opinions personnelles qu'il a exprimées au cours de la prestation […].

[15] Based on our reading of the disputed items in their context, we agree with the Ministers and the Information Commissioner on this point.

[16] SNC also argues that the disputed items are capable of identifying certain other individuals, and that in relation to those individuals, none of the exemptions apply. The Ministers argue that the words used in the disputed items are too general to accept that interpretation. Again, we agree with the Ministers.

[17] We conclude that the section 44 application should be dismissed insofar as it is based on section 19 of the *Access to Information Act*.

Conclusion

[18] This appeal will be dismissed with costs.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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