Federal Court  Cour fédérale

Date: 20091211

Docket: T-802-09

Citation: 2009 FC 1272

Ottawa, Ontario, December 11, 2009

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

PETER SCARCELLA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] In April, 2006, the Applicant, Mr. Peter Scarcella, was sentenced to nine years incarceration at a federal penitentiary (see *R. v. Scarcella*, [2006] O.J. No. 1555). The sentence was imposed following his conviction of conspiracy to commit murder and conspiracy to commit an aggravated assault. These convictions are related to a shooting incident in which Mr. Scarcella was involved and where an innocent bystander was seriously injured.

[2] Upon his admission to the federal penitentiary system, Mr. Scarcella was subjected to an Intake Offender Assessment process. As part of that intake process, a Security Intelligence Officer with Correctional Services Canada (the Service) completed a referral sheet under Commissioner's Directive (CD) CD 568-3: *Identification and Management of Criminal Organizations* (CD 568-3) that identified Mr. Scarcella as "boss" of the "Scarcella Traditional Organized Crime Group". Mr. Scarcella disputes this Traditional Organized Crime (TOC) designation. He has pursued all remedies available to him to dispute the designation, right up to and including a Third-level Grievance.

[3] Before the Court in this application is the Third-level Grievance Decision of the Senior Deputy Commissioner (SDC) of the Service, dated April 28, 2009. The SDC denied the grievance and upheld the TOC designation of Mr. Scarcella, as contemplated by CD 568-3.

II. Issues

[4] This application raises the following issues:

1) Is Mr. Scarcella entitled to rely on the contents of a legal opinion of counsel to the Service that was inadvertently disclosed to him?

2) Is the Third-level Grievance Decision unreasonable in that there was insufficient reliable evidence to apply the TOC designation to Mr. Scarcella?

3) Was the Third-level Grievance Decision made contrary to s. 24 of the *Corrections and Conditional Release Act*, S.C. 1992, c.20 (*CCRA*) which requires the Service to ensure that information it uses is accurate, complete and up to date?

III. Disclosure of Legal Opinion

[5] The first question before this Court is whether the Applicant should be able to rely on the contents of a legal opinion that inadvertently fell into his hands, and was subsequently sent to his counsel, Mr. Hill. The brief answer is "no".

[6] The concept of solicitor-client privilege is firmly entrenched in our legal system; protecting this privilege is in the public interest. Strong support for the importance of this privilege can be seen in two recent Supreme Court of Canada cases – *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319 at paragraph 26; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574 (*Blood Tribe*). The privilege is necessary and essential for the proper functioning of our legal system. Thus, the protection of solicitor-client confidentiality and privilege ought to be as close as possible to being absolute. Furthermore, solicitor-client privilege applies to all interactions between a client and the lawyer; not merely to parts of legal opinion, but the whole advice or recommendation (*Blood Tribe*, above, at para. 10).

[7] In my view, this letter is clearly subject to solicitor-client privilege. The document itself contains, in a prominent position at the top, the notation that "This document and all attachments are protected by solicitor-client privilege". Further, having reviewed the document, I am satisfied that it

was a legal opinion provided by the Department of Justice lawyer to the Service. The opinion was given in the context of on-going litigation involving Mr. Scarcella; it was not merely policy advice. The inadvertent disclosure did not result in a waiver of the privilege. Given the importance of solicitor-client privilege to the operation of our justice system, I am satisfied that any use of the information contained in the opinion is not permissible in this judicial review.

[8] Accordingly, the document will not be admitted into these proceedings.

IV. Reasonableness of the Decision

A. *Background*

[9] The background to the Third-level Grievance Decision is the TOC classification of Mr. Scarcella. That designation was done pursuant to CD 568-3.

[10] The purposes of CD 568-3 (and the designation of TOC members) are stated, in the document, to be as follows:

- to recognize that criminal organizations pose a threat to the safety and management of the Service's institutions;

- to recognize that membership and association in criminal organizations are significant risk factors;

- to prevent members of criminal organizations to exercise influence and power in the Service's institutions;

- to encourage members to break their ties with criminal organizations.

[11] CD 568-3 defines a criminal organization (at para. 9) as:

> A group or association that is involved in ongoing illegal activities. This includes groups, organizations, associations or other bodies that were established in the community before their members were incarcerated, as well as groups established in our institutions.

[12] A member or associate of a criminal organization is a "person associated to or involved with a criminal organization" (at para. 8).

[13] Mr. Scarcella does not dispute the validity or provisions of CD 568-3. Rather, he objects to how it was applied to him. His objection is understandable – CD 568-3 provides that "membership and association with a criminal organization shall be considered a significant risk factor when making any decision related to the offender" (at para. 19). Thus, a TOC designation will be one factor in decisions such as transfers, security classification, availability of temporary releases and others. It should be noted, however, that improper use of information on an inmate's file may be the subject of judicial review before this Court (see *Brown v. Canada (Attorney General)* 2006 FC 463, 200 F.T.R. 143).

B. *Standard of Review*

[14] The parties are agreed that the standard of review of the decision – insofar as this issue is concerned – is reasonableness. As described by Justice Binnie in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47, a reasonable decision incorporates a number of elements:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

C. *Analysis*

[15] The key argument of Mr. Scarcella is that the TOC designation is based on speculation, allegations and suspicions, rather than fact.

[16] In his argument to the Third-level Grievance and to this Court, Mr. Scarcella appears to ask that a criminal law standard be applied to any TOC finding. This argument is seriously flawed. It is true that Mr. Scarcella has never been convicted of an organized crime offence. However, a finding under the *Criminal Code*, R.S.C. 1985, c. C-46, is not necessary for a TOC determination. Further, the SDC is not required to make any finding beyond a reasonable doubt as would be the case in criminal proceedings. In this regard, I agree with the views of the SDC:

> A designation under CD 568-3 is not analogous to a criminal conviction and thus the policy does not require an offender to be

> convicted of a criminal organization offence in order to be designated. Rather, the designation can be supported from a number of different sources including police information, reliable source information, criminal involvement in a criminal organization activity, court documentation, etc.

[17] In the context of CD 568-03, the SDC was required to determine, based on the evidence before him, whether Mr. Scarcella met the definition of TOC set out in CD 568-03. The question is: based on the evidence before the SDC, does the TOC designation fall within the range of possible, acceptable outcomes?

[18] As referenced in his decision, the SDC had a significant body of evidence before him. A review of his decision demonstrates that the SDC reviewed and assessed the quality of all of the evidence before him. I can do little better than to refer to, with approval, the following analysis of the SDC:

> The threshold for designation under CD 568-3 is determined largely by the quality and completeness of the information obtained as well as the reliability of the source from which the information was received. In your case, the police information relied on by CSC came from the York Regional Police Intelligence Bureau and the Ontario CFSEU [Combined Forces Special Enforcement Unit]. These are specialized units with in-depth knowledge of the composition and functioning of criminal organizations and are often involved in complex criminal investigations. Information from these sources is generally considered very reliable and it is not the role of CSC security intelligence officers to “re-investigate” the work done by the police. In particular, the information provided by the CFSEU, which is summarized in the SIR, is comprehensive and describes in detail your activities and criminal affiliations. It also received a reliability rating of “completely reliable” . . .

[19] In sum, there was an ample factual record to support the TOC designation. The reasons of the SDC show the existence of justification, transparency and intelligibility within the

decision-making process. The decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

V. Application of s. 24 of the *CCRA*

[20] In reaching his decision, the SDC was required to comply with s. 24(1) of the *CCRA*, which provides that:

24. (1) The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible.	**24.** (1) Le Service est tenu de veiller, dans la mesure du possible, à ce que les renseignements qu'il utilise concernant les délinquants soient à jour, exacts et complets.

[21] Mr. Scarcella observes that the information relied on by the SDC in reaching the Third-level Grievance Decision dates back to 2006, whereas the decision under review was only made in 2009. Accordingly, Mr. Scarcella submits that the SDC was in breach of s. 24(1) by not ensuring that the information was "up to date".

[22] There is no doubt that s. 24(1) of the *CCRA* places an obligation on the Service to make sure that information used by its staff to make decisions on offenders is accurate, complete and current (see *Tehrankari v. Canada (Correctional Service)* (2000), 188 F.T.R. 206, 38 C.R. (5th) 43, at para. 50). Parliament used the plain words of s. 24(1) to make sure that "reliance on erroneous and faulty information is contrary to proper prison administration, incarceration and rehabilitation" (*Tehrankari*, above, at para. 51). Perfection is not required; rather, the Service must take

"reasonable steps" to meet this obligation. Mr. Scarcella does not dispute the accuracy of the information that was considered by the SDC. Instead, he complains that the data was not necessarily up to date.

[23] The problem with Mr. Scarcella's position is that there is no evidence that any further information was available or that the information considered was somehow erroneous. Mr. Scarcella could have adduced further evidence to show that, while he may have been associated or involved with a criminal organization, that was no longer the case. He did not do so. Given the nature of the information and the fact that nothing new was brought forward by Mr. Scarcella, I am satisfied that the SDC was entitled to rely on information before it as "accurate, up to date and complete". There was, on these facts, no obligation on the Service to go so far as to ask the police to re-investigate its initial opinions, or to conduct investigations on its own.

VI. Conclusion

[24] For these reasons, I will dismiss this application for judicial review.

[25] In my discretion and having heard submissions from the parties, I will award costs to the Respondent, at the usual level of the middle of Column 3 of Tariff B.

[26] With respect to the legal opinion, which I found to be subject to solicitor-client privilege, I note that counsel for Mr. Scarcella undertook to return all copies to the Respondent. In addition, I will order that any copies contained in the Court's Registry be returned to the Respondent.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. the application for judicial review is dismissed;

2. costs are awarded to the Respondent at the usual level of the middle of Column 3 of Tariff B; and

3. all copies of the legal opinion that was included at Tab F of the Applicant's Affidavit and that was ordered sealed by the Order of Madam Prothonotary Tabib on August 5, 2009, shall be returned forthwith by the Registry or counsel for Mr. Scarcella (as applicable) to the Respondent.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-802-09
STYLE OF CAUSE:	Peter Scarcella v. The Attorney General of Canada et al
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 3, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	SNIDER J.
DATED:	December 11, 2009

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