

CANADA / JUDGMENT

Bélanger-Drapeau v. Canada (National Defence)

2023 FC 461

COURT

Federal Court

DECIDED

31 March 2023

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Bélanger-Drapeau v. Canada (National Defence)

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T-1211-21

Decision Content

Date: 20230331

Docket: T-1211-21

Citation: 2023 FC 461

Montréal, Quebec, March 31, 2023

PRESENT: Mr. Justice Gascon

BETWEEN:

NICOLE BÉLANGER-DRAPEAU

Applicant

and

CANADA (MINISTER OF NATIONAL DEFENCE)

Respondent

JUDGMENT AND REASONS

I. Overview [1] Ms. Nicole Bélanger-Drapeau applies to this Court, pursuant to section 41 of the Access to Information Act, RSC 1985, c A-1 [ATIA], for a review of a decision issued on July 6, 2021, by the Office of the Information Commissioner [OIC] upholding a refusal by the Department of National Defence [DND] to disclose one of several records based on solicitor-client privilege. The record at issue is an 11-page pre-charge screening document [Screening Document] that contains the legal advice of a military prosecutor on whether the Canadian Forces National Investigation Service [CFNIS] should lay charges for an alleged sexual assault. DND only agreed to disclose a heavily redacted version of the Screening Document.

[2] Ms. Bélanger-Drapeau submits that DND improperly applied the exemption from disclosure pursuant to section 23 of the ATIA. She argues that the regional military prosecutor who authored the legal advice and the CFNIS waived solicitor-client privilege regarding the impugned Screening Document. Ms. Bélanger-Drapeau is seeking a declaration that DND improperly withheld disclosure of information, an order directing that the requested record, or portions thereof, be disclosed to her, and costs for this application.

[3] For the reasons that follow, I will dismiss Ms. Bélanger-Drapeau's application. I am satisfied that the impugned Screening Document is exempted from disclosure under solicitor-client privilege and that the privilege was not waived by either the military prosecutor or the CFNIS. In addition, DND's exercise of its discretion not to disclose the exempt information was reasonable. There are no grounds to justify the Court's intervention.

II. Background A. The factual context [4] An investigator of the CFNIS, Sergeant Keven Léonard, was mandated to investigate an alleged sexual assault, which reportedly took place on May 8, 2018.

[5] At the end of its initial investigation, Sgt Léonard requested pre-charge screening legal advice. In the context of the Canadian military justice system, pre-charge screening legal advice is submitted by a military prosecutor when the CFNIS, at the end of its investigation, seeks legal advice on whether or not to lay charges. When providing pre-charge screening legal advice, military prosecutors must determine whether there is a reasonable prospect of conviction and whether a charge should be laid. The ultimate decision in this respect, however, remains within the discretion of the CFNIS, as the charge-laying authority. Requesting such pre-charge screening legal advice is a systematic and mandatory method of consultation between the CFNIS and the military prosecutor.

[6] In this case, Major Elisabeth Baby-Cormier, a regional military prosecutor with the Director of Military Prosecutions [DMP], issued the Screening Document on December 10, 2019.

- [7] On the same day, Sgt Léonard and Maj Baby-Cormier met with the victim to inform her of the CFNIS's decision not to lay charges against her alleged assailants.
- [8] Ms. Bélanger-Drapeau, in her position as Director of Access to Information and Privacy at the Michel Drapeau Law Office, filed access to information requests on behalf of the victim to obtain documents related to the investigation of the alleged sexual assault. On July 24, 2020, DND received Ms. Bélanger-Drapeau's five requests regarding this matter. One of those requests [Access Request] asked for "the contents of the file held by the Director of Military Prosecution concerning ... MP GO file EG-18-26313." This file is the Military Police General Occurrence file concerning the alleged sexual assault of the victim.

B. The DND ruling and OIC decision [9] On October 5, 2020, Ms. Bélanger-Drapeau received DND's response to her requests. The Access Request yielded a single record, namely, the Screening Document prepared by Maj Baby-Cormier. DND refused to disclose this record based on the exemption of solicitor-client privilege under section 23 of the ATIA. The only information on this 11-page Screening Document that DND agreed to disclose to Ms. Bélanger-Drapeau is the date of the document and the military prosecutor's signature block.

- [10] As she was not satisfied with DND's refusal to disclose the Screening Document, Ms. Bélanger-Drapeau filed a complaint with the OIC on October 15, 2020, pursuant to the ATIA.
- [11] On June 6, 2021, after investigation, the OIC concluded that Ms. Bélanger-Drapeau's complaint was not well founded and that the Screening Document met the requirements of the legal advice and litigation privilege exemption. In its decision, the OIC stated it was satisfied that the withheld information "is subject to legal advice privilege." More specifically, the OIC determined that the impugned record "consists of a communication between a lawyer [(i.e., the military prosecutor)] and his or her client [(i.e., the CFNIS)], which relates directly to the seeking and providing of legal advice, and that both parties intended for the communication and advice to remain confidential." The OIC also found that there had been no waiver of privilege over the exempted information and that the CFNIS confirmed its desire to maintain the privilege over the communication.
- [12] The OIC further determined that DND reasonably exercised its discretion when it chose not to release more information about the Screening Document, because DND "considered the application of section 25 when it performed severance and released a small portion of the general identifying information on page 11 of the responsive records."

C. The relevant provisions [13] The relevant provisions of the ATIA read as follows:

Responsibility of government institutions

Responsable de l'institution fédérale

4 (2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.

4 (2.1) Le responsable de l'institution fédérale fait tous les efforts raisonnables, sans égard à l'identité de la personne qui fait ou s'apprête à faire une demande, pour lui prêter toute l'assistance indiquée, donner suite à sa demande de façon précise et complète et, sous réserve des règlements, lui communiquer le document en temps utile sur le support demandé.

...

[...]

Protected information – solicitors, advocates, and notaries

Renseignements protégés : avocats et notaires

23 The head of a government institution may refuse to disclose any record requested under this Part that contains information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege.

23 Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements protégés par le secret professionnel de l'avocat ou du notaire ou par le privilège relatif au litige.

...

[...]

Severability

Prélèvements

25 Notwithstanding any other provision of this Part, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Part by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.

25 Le responsable d'une institution fédérale, dans les cas où il pourrait, vu la nature des renseignements contenus dans le document demandé, s'autoriser de la présente partie pour refuser la communication du document, est cependant tenu, nonobstant les autres dispositions de la présente partie, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.

...

[...]

Review by Federal Court – complainant

Révision par la Cour fédérale : plaignant

41 (1) A person who makes a complaint described in any of paragraphs 30(1)(a) to (e) and who receives a report under subsection 37(2) in respect of the complaint may, within 30 business days after the day on which the head of the government institution receives the report, apply to the Court for a review of the matter that is the subject of the complaint.

41 (1) Le plaignant dont la plainte est visée à l'un des alinéas 30(1)a) à e) et qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les trente jours ouvrables suivant la réception par le responsable de l'institution fédérale du compte rendu, exercer devant la Cour un recours en révision des questions qui font l'objet de sa plainte.

...

[...]

De novo review

Révision de novo

44.1 For greater certainty, an application under section 41 or 44 is to be heard and determined as a new proceeding.

44.1 Il est entendu que les recours prévus aux articles 41 et 44 sont entendus et jugés comme une nouvelle affaire.

D. The standard of review [14] Ms. Bélanger-Drapeau and the Respondent, the Minister of National Defence [Minister], both agree that the addition of section 44.1 to the ATIA in 2019 changed the applicable standard of review for applications under section 41 of the ATIA. All such applications must now undergo a de novo review rather than a judicial review of the decision maker's decision, as the Federal Court of Appeal [FCA] confirmed in *Canada (Health) v Elanco Canada Limited*, 2021 FCA 191 at paragraph 23:

The wording of section 44.1 makes it clear that when a party [...] makes an application under section [41 or] 44 of the Act for a review of a decision that certain information should be disclosed, the application is to be heard and determined as a new proceeding. This would mean that the Federal Court judge who is hearing the particular application is not reviewing a decision of the Minister per se but rather is making their own determination of whether the exemptions from disclosure [...] are applicable.

[15] Accordingly, this Court must make its own determination of the application of the exemption which, in the circumstances, has the same effect as a correctness review (*Savoie v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 333 [Savoie] at para 34). I point out that a review under section 41 of the ATIA is not a review of the report issued by the OIC, but a review of the federal institution's — in this case, DND — decision to withhold the records.

III. Analysis [16] Ms. Bélanger-Drapeau claims that DND erred in its interpretation and application of the solicitor-client privilege exemption under the ATIA. She submits that solicitor-client privilege does not extend to some factual elements of the Screening Document, and that the CFNIS waived the privilege when it met with the alleged victim. For the following reasons, I am not convinced by any of Ms. Bélanger-Drapeau's arguments.

A. Exempted disclosure under solicitor-client privilege (1) Solicitor-client privilege and the Screening Document [17] Section 23 of the ATIA is a discretionary exemption and protects from disclosure records that are subject to solicitor-client privilege. Solicitor-client privilege in section 23 of the ATIA refers to both the legal advice privilege and the litigation privilege (*Blank v Canada (Minister of Justice)*, 2006 SCC 39 at para 4). The latter is not in issue in this instance.

[18] It is not disputed that, for a communication to be protected under the legal advice privilege, three conditions must be met: (1) the communication must be between a solicitor and his/her client; (2) the communication must seek or give legal advice; and (3) the intent of the parties must be that the communication is to remain confidential (*Solosky v The Queen*, [1980] 1 SCR 821 at p 837; *Canada (Office of the Information Commissioner) v Canada (Prime Minister)*, 2019 FCA 95 [Canada (OIC)] at para 49).

[19] It is well recognized that solicitor-client privilege is a cornerstone of our judicial system (*R v McClure*, 2001 SCC 14 at para 61). In *Canada (OIC)*, the FCA held the following at paragraph 50:

The Supreme Court has often reiterated the critical importance of the solicitor-client privilege to the proper functioning of our legal system, and has gone as far as stating that it should only be set aside in the “most unusual circumstances” (*Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809 at para. 17; see also *Alberta (Information and Privacy Commissioner) v. University of Calgary*), 2016 SCC 53, [2016] 2 S.C.R. 555 at para. 34). That being said, a party asserting that a document is privileged bears the onus of establishing the privilege; this onus requires more than a bald assertion of privilege and will only be met if there is sufficient evidence to show that each of the three criteria of the Solosky test are met (see *Canada*

(Attorney General) v. Williamson, 2003 FCA 361 at paras. 11-13).

[20] Pursuant to section 25 of the ATIA, the institution to whom an access to information request is made has the duty to disclose any part of the record that does not contain any exempted information and that can be reasonably severed from the record. According to the FCA in *Canada v Blank*, 2007 FCA 87 [Blank 2007], this duty is altered when it comes to solicitor-client communications. The courts must be respectful of the client's confidence that communications with their lawyer would not be subject to disclosure without their consent (Blank 2007 at para 7). The FCA stated as follows at paragraph 13:

[S]ection 25 must be applied to solicitor-client communications in a manner that recognizes the full extent of the privilege. It is not Parliament's intention to require the severance of material that forms a part of the privileged communication by, for example, requiring the disclosure of material that would reveal the precise subject of the communication or the factual assumptions of the legal advice given or sought.

(See also *Canada (OIC)* at para 78).

[21] Ms. Bélanger-Drapeau acknowledges that the Screening Document is a record subject to solicitor-client privilege. It is a document exchanged between a client, the CFNIS, and its solicitor, the military prosecutor, relating directly to the seeking or giving of legal advice on the reasonable prospect of conviction in the alleged sexual assault, and which the parties intended to keep confidential. However, Ms. Bélanger-Drapeau submits that despite the record being covered by solicitor-client privilege, the general and factual information it contains (title, recipient of the document, facts relied on by the DMP's solicitor, etc.) should have been disclosed because it is not part of the privileged information. Relying on *Blank v Canada (Minister of Justice)*, 2004 FCA 287 [Blank 2004] at paragraph 66, she maintains that DND had to disclose, among other things, the title, description, and recipient of the document.

[22] The Minister responds that the Screening Document in its entirety is legal advice because (1) it is a communication between a lawyer and her client (2) that relates directly to the giving of a legal advice, and (3) which parties intended to keep confidential. The Minister maintains that disclosure of part of the document would jeopardize the privilege and that the factual information cannot be severed from the legal advice itself.

[23] I do not agree with Ms. Bélanger-Drapeau's submission that factual information forming part of the Screening Document is not protected under solicitor-client privilege and can be separated from the legal advice. In the circumstances of this case, and further to my review of the record, I am satisfied that the factual information contained in the Screening Document reveals the subject of the communication and the assumptions made by the military prosecutor. In my view, it represents "'factual statements' that are 'inextricably linked to the legal issue under discussion' and should thus be treated as part of the privileged communication" (*Canada (OIC)* at para 79, citing *Sheldon Blank & Gateway Industries Ltd v Canada (Minister of the Environment)*, 2001 FCA 374 [Sheldon Blank] at para

22). In other words, I am not persuaded that this is a situation where the factual components of the Screening Document could be carved out and disclosed without, at the same time, disclosing the legal advice.

- [24] I am mindful of the fact that, in Blank 2004, the FCA held that “this kind of [factual] information enables the requester ‘to know that a communication occurred between certain persons at a certain time on a certain subject, but no more’” (Blank 2004 at para 66, citing Sheldon Blank at para 23). The type of information identified by the FCA in that case is not an exhaustive list; it only illustrates that such general information can sometimes be severed for the above-mentioned purpose. However, in the case at bar, Ms. Bélanger-Drapeau already possesses this level of information. With the information already provided by DND, Ms. Bélanger-Drapeau knows that the record is a pre-charge screening document prepared by Maj Baby-Cormier on December 10, 2019, and she knows it was submitted to the CFNIS. In these circumstances, I determine that no further disclosure of factual information was required.
- [25] In sum, I am satisfied that the Screening Document is covered by solicitor-client privilege and exempt from disclosure, and that the privilege extends to the factual information contained in the document.
- (2) Waiver of solicitor-client privilege [26] Ms. Bélanger-Drapeau further argues that solicitor-client privilege on the Screening Document has been implicitly or expressly waived.
- [27] A waiver of solicitor-client privilege is expressly made when a party knows of the existence of the privilege and voluntarily and knowingly indicates an intention to waive it. A waiver is implied when fairness and consistency purposes require it (Canada (Citizenship and Immigration) v Mahjoub, 2011 FC 887 [Mahjoub] at para 9).
- [28] Mahjoub summarizes the legal framework applicable to implied waivers as follows, at paragraph 10:
- (a) waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. S. & K. Processors Ltd. v Campbell Ave. Herring Producers Ltd (1983), 1983 CanLII 407 (BC SC), 35 CPC 146, 45 BCLR 218 (SC) (S & K);
 - (b) where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost. (S & K);
 - (c) in cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived. (S & K);
 - (d) the privilege will deemed to have been waived where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action. Bank Leu Ag v Gaming Lottery Corp., [1999] OJ No 3949 (Lexis); (1999), 43 C.P.C. (4th) 73 (Ont. S.C.) at paragraph 5;

- (e) the onus of establishing the waiver rests on the party asserting waiver of the privilege. (S & K at paragraph 10).
- [29] Ms. Bélanger-Drapeau submits that the CFNIS and the military prosecutor waived solicitor-client privilege on the Screening Document by discussing the pre-charge screening results with the alleged victim at the December 10, 2019 meeting. Ms. Bélanger-Drapeau acknowledges that the meeting in itself is not a waiver, but claims that the discussion that took place at that meeting amounts to an implied waiver. According to Ms. Bélanger-Drapeau, because there is no legal requirement for the DMP to meet with the victim and discuss the result of its recommendation to the CFNIS, the fact that Maj Baby-Cormier participated in the meeting with the victim and discussed the outcome of the record at issue constitutes a waiver of solicitor-client privilege. Ms. Bélanger-Drapeau contends that solicitor-client privilege was waived when the CFNIS and the DMP met with the victim and “voluntarily injected [their] understanding of [their] legal position or relied on legal advice to justify [their] conduct, and acted in a manner inconsistent with maintaining the privilege” (*Soprema Inc v Wolrige Mahon LLP*, 2016 BCCA 471 at para 22).
- [30] The Minister responds that there is no factual and/or evidentiary basis to support a finding that the CFNIS or the military prosecutor waived solicitor-client privilege with respect to the Screening Document, either expressly or implicitly. The Minister argues that disclosure of the mere existence of such legal advice does not constitute a waiver of its contents. Moreover, the Minister points out that there is no evidence that Maj Baby-Cormier or Sgt Léonard discussed the content of the record itself with the victim at the December 10, 2019 meeting, as there is no evidence from any of the persons present at this meeting on the Court’s record.
- [31] I agree with the Minister. The onus was on Ms. Bélanger-Drapeau to establish the waiver. According to the evidence, Maj Baby-Cormier and Sergeant Léonard met with the victim to communicate the result of the investigation and the reasons why no charges were laid. Nothing in the evidence suggests that Maj Baby-Cormier or Sgt Léonard referred to any part of the legal advice itself during the meeting, openly discussed the DMP’s legal advice with the victim, or relied on the legal advice to justify the decision not to lay charges against the alleged assailants. Nothing from the factual evidence shows any implied intention from the DMP or the CFNIS to waive solicitor-client privilege. I can find no evidentiary basis in the record supporting the assertion that Maj Baby-Cormier’s legal advice was disclosed or discussed during the December 10, 2019 meeting.
- [32] At the hearing, Ms. Bélanger-Drapeau’s counsel referred to three specific entries from the administrative log of the Military Police General Occurrence file. According to Ms. Bélanger-Drapeau, these entries would purportedly demonstrate that the DMP’s solicitor and the CFNIS’s investigator waived the privilege because the outcome of the investigation, discussed with the victim, would rely on the legal advice itself to justify the decision not to lay charges.

- [33] I am not persuaded by Ms. Bélanger-Drapeau's submissions. Regarding two of these specific entries, the Minister correctly pointed out that the decision ultimately lies with the CFNIS and that nothing indicates that this decision was taken in accordance with the DMP's legal advice. Here, it is the client, namely the CFNIS, which decided not to lay charges because it concluded there was no reasonable prospect of conviction.
- [34] With respect to the third entry mentioned by Ms. Bélanger-Drapeau's counsel, located at page 22 of the Applicant's record, the Minister submitted that the sentence "aucune accusation n'a été recommandée par le PMR" ([translation] "no accusation was recommended by the RMP") was an inadvertent disclosure. The Minister argued that such disclosure does not constitute a waiver of solicitor-client privilege, and ultimately does not constitute proof of what was discussed during the meeting with the victim. I agree. In *Abi-Mansour v Canada (Human Rights Commission)*, 2014 FCA 74, the FCA stated at paragraph 4 that "[a] case-by-case assessment must be made to determine whether the inadvertent disclosure resulted in a loss of privilege." In the present case, according to Ms. Deirdra Finn's public affidavit relied upon by the Minister, DND contacted the CFNIS, which confirmed their intention to maintain solicitor-client privilege over the Screening Document. The factual evidence in this case does not support the assertion that the disclosure singled out by Ms. Bélanger-Drapeau intended to waive the privilege. The CFNIS's opposite intent is rather clear: it wanted to maintain the confidentiality of the Screening Document. As a result, the circumstances and evidence before the Court do not point to a waiver of solicitor-client privilege.
- [35] I further underline that the only evidence before the Court regarding the December 10, 2019 meeting is a paragraph in the affidavit of Ms. Bélanger-Drapeau herself, stating that Sgt Léonard and Maj Baby-Cormier explained the reasons underlying the CFNIS's decision not to advance the matter. However, I find no evidence supporting an allegation that such explanations were given at the meeting and that privilege was waived. The disclosure of the fact that legal advice was sought and obtained does not equate to a waiver of the privilege regarding the content of that advice. Seeking pre-charge screening legal advice is a routine step when the CFNIS considers laying charges. Moreover, I also underscore that Ms. Bélanger-Drapeau did not file any affidavit evidence from any of the three participants at the December 10, 2019 meeting — namely, Maj Baby-Cormier, Sgt Léonard or the victim — that could have supported her assertions regarding what was actually discussed at the meeting.
- [36] I pause to point out that finding that the meeting itself constituted a waiver of solicitor-client privilege would discourage meetings with alleged victims to inform them of the outcome of the investigations, because the DMP and the CFNIS would be at risk of losing solicitor-client privilege. It would not be a desirable result, especially considering the fact that the DMP's Policy Directive #002/00 encourages such meetings between the CFNIS investigators and the alleged victims.

[37] For all those reasons, I conclude that no waiver of solicitor-client privilege occurred in this case.

B. DND's discretionary ruling under section 23 of the ATIA [38] Even though Ms. Bélanger-Drapeau made no submissions on the reasonableness of DND's exercise of discretion, I take a moment to address the issue as the Minister discussed it in her submissions. For the reasons detailed below, I find that DND reasonably exercised its discretion when it decided not to disclose the entirety of the Screening Document.

[39] With respect to the review of the discretionary portion of the DND ruling, reasonableness remains the applicable standard of review (*Kimery v Canada (Justice)*, 2022 FC 829 at para 17; *Savoie* at para 36; *Suncor Energy Inc v Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2021 FC 138 at paras 68–69). Reasonableness focuses on the decision made by the administrative decision maker, which encompasses both the reasoning process and the outcome (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at paras 83, 87). Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and to determine whether the decision is based on “an internally coherent and rational chain of analysis” and is “justified in relation to the facts and law that constrain the decision maker” (Vavilov at para 85). The reviewing court must therefore consider whether the “decision bears the hallmarks of reasonableness — justification, transparency and intelligibility” (Vavilov at para 99), without “reweighing and reassessing the evidence” before it (Vavilov at para 125).

[40] Even where information falls under solicitor-client privilege, the government institution has discretion to disclose the totality or part of the exempted information pursuant to section 23 of the ATIA. The exercise of discretion requires the government institution to consider both the factors in favour of disclosure and the factors against it (*Canada (OIC)* at para 83).

[41] The FCA's comment in *Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227 [Leahy] is noteworthy. At paragraphs 133 to 136 and 141, it held as follows:

[133] Fourth, under the [Privacy] Act, the decision-maker must assess whether any of the exemptions to disclosure apply to the information sought. But that is not the end of the analysis. Even though an exemption applies, the decision-maker nevertheless can exercise his or her discretion to disclose the material: *Attaran v. Canada (Minister of Foreign Affairs)*, 2011 FCA 182, [2011] F.C.J. No. 750.

[134] At a minimum, the reasons or the record should show that the decision-maker was aware of this discretion to release exempted information and exercised that discretion one way or the other.

[135] In this case, there is nothing in the reasons or the record on this point.

[136] These deficiencies in the information provided to the Federal Court rendered it impossible for the Federal Court or this Court to carry out their respective roles.

[...]

[141] To reiterate, all that is needed is sufficient information for a reviewing court to discharge its role. In cases like this, this can be achieved by ensuring that there is information in the decision letter or the record that sets out the following: (1) who decided the matter; (2) their authority to decide the matter; (3) whether that person decided both the issue of the applicability of exemptions and the issue whether the information should, as a matter of discretion, nevertheless be released; (4) the criteria that were taken into account; and (5) whether those criteria were or were not met and why.

[Emphasis added.]

[42] The Minister submits that DND considered waiving privilege over the Screening Document, but because of the CFNIS's express desire to maintain privilege, it decided not to do so. DND's view would have been that disclosure of additional information on the Screening Document "would have constituted partial waiver and thereby breaking the relationship of privilege."

[43] Further to a careful review of the evidence, I find that while the reasons underlying the DND ruling do not provide a basis to suggest that DND was aware of its discretion, the record contains such indications. The exemption analysis worksheet [EAW] completed by DND during the OIC's investigation (at pages 79 to 82 of the Respondent's record) demonstrates that DND considered waiving solicitor-client privilege during the investigation. However, because the CFNIS expressly voiced its intent to maintain the privilege, it decided not to exercise its discretion. The excerpt from Leahy cited above states that at least some information on the exercise of discretion must appear in the decision or in the record, which is the case here.

[44] In a similar context, the FCA held that "a boiler-plate declaration that the discretion was exercised and that all relevant factors have been considered will obviously not be sufficient" (Canada (OIC) at para 83). Here, DND did not make such a broad declaration. Its decision is completely silent on the issue of discretion. However, the exercise of discretion is apparent from the record and the EAW. In light of the above, the real question is whether this is sufficient given the renewed importance of giving reasons, as the Supreme Court of Canada held in Vavilov.

[45] Reasonableness hinges on a decision being transparently and intelligibly justified (Vavilov at para 86). Administrative decisions must be justified with a minimum of reasons, with the exception of cases "where the decision-making process does not easily lend itself to producing a single set of reasons" (Vavilov at para 137). Here, I am satisfied that DND ruling constituted a reasonable outcome based on the law and the evidence, and it has the requisite attributes of transparency, justification and intelligibility. According to the reasonableness

standard, it is sufficient for a decision to be based on an inherently coherent and rational analysis, and to be justified having regard to the legal and factual constraints to which the decision maker is subject.

- [46] In the post-Vavilov case *Schoendorfer v Canada (Attorney General)*, 2021 FC 896 [Schoendorfer], Madam Justice Elliott held that the exercise of discretion to decide not to disclose information — under a different section of the ATIA — was reasonable even though it was only mentioned in the record and not in the decision itself (Schoendorfer at paras 80–81). Similarly, in the present matter, even if reasons were not given in the DND ruling itself, I find that the reasonable exercise of DND’s discretion flows from the record. In my view, that alone is sufficient under Vavilov, as it allows the Court to assess the intelligibility and transparency of DND’s reasoning.
- [47] I would also note that, in *Savoie* at paragraph 49, citing *Blank v Canada (Minister of Justice)*, 2005 FCA 405 at paragraph 12, this Court stated that even if it is not the OIC’s decision that is under review, its opinion and investigation deserve significant weight because of its expertise with respect to access to information. And on that front, the OIC observed in its Decision that DND reasonably exercised its discretion when it determined (1) not to release more information on the Screening Document, (2) that DND considered the application of section 25 of the ATIA when it performed severance, and (3) that it effectively divulged a small portion of the general identifying information on page 11 of the impugned record.

IV. Conclusion [48] For the reasons detailed above, Ms. Bélanger-Drapeau’s application is dismissed.

- [49] At the hearing before the Court, the parties agreed that costs in a lump sum, all-inclusive amount of \$1,500 shall be granted to the successful party. Accordingly, Ms. Bélanger-Drapeau will be ordered to pay costs in that amount to the Minister.

JUDGMENT in T-1211-21

THIS COURT’S JUDGMENT is that:

This application for judicial review is dismissed.

Costs in the all-inclusive, agreed upon lump-sum amount of \$1,500 are awarded to the Minister of National Defence.

“Denis Gascon”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

t-1211-21

STYLE OF CAUSE:

NICOLE BÉLANGER-DRAPEAU v CANADA (MINISTER OF NATIONAL DEFENCE)

PLACE OF HEARING:

HELD BY VIDEOCONFERENCE

DATE OF HEARING:

OCTOBER 18, 2022

JUDGMENT AND REASONS:

GASCON J.

DATED:

MARCH 31, 2023

APPEARANCES:

Stéfanie Bédard

For The Applicant

Stéphanie Dion

For The Respondent

SOLICITORS OF RECORD:

Michel Drapeau Law Office

Barristers and Solicitors

Ottawa, Ontario

For The Applicant

Attorney General of Canada

Ottawa, Ontario

For The Respondent

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