Indexed as:
Canada (Attorney General) v. Sander

Between
The Attorney General of Canada, James D. Bissell, Q.C. and Eugene Kucher, Petitioners, and Stephen Sander, Respondent

[1992] B.C.J. No. 1949

96 D.L.R. (4th) 85

[1992] 2 C.T.C. 290

35 A.C.W.S. (3d) 528

17 W.C.B. (2d) 195

Vancouver Registry No. CC920729

British Columbia Supreme Court
Vancouver, British Columbia

Collver J.

Heard: August 24 and 25, 1992
Judgment: filed September 18, 1992

(18 pp.)

Practice -- Discovery -- Privilege -- Disclosure of legal advice by Department of Justice to Department of National Revenue was sought -- Accused's right to make full answer and defence against public interest.

This was an application to determine whether it would be contrary to the public interest to require disclosure to the accused of particulars of legal advice given by the Department of Justice to the Department of National Revenue. After investigators seized the accused's business records the section under which the search warrants were issued was found to be of no force and effect and

therefore the documents were re-seized pursuant to another search warrant issued pursuant to the Criminal Code. The documents were ordered to be produced on the ground of the accused's right to make full answer and defence. The Crown claimed solicitor-client privilege.

HELD: The documents were not required to be produced. There were other means for the accused to obtain the information he sought, namely by cross-examining Revenue Canada Officials. The provision of legal advice to departments of government and their officials was one of the most important functions of the Attorney General. There was no compelling circumstances warranting that the privilege be successfully assailed. It would not have been in the public interest to order disclosure.

STATUTES, REGULATIONS AND RULES CITED:

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 37(1), 37(2). Canadian Charter of Rights and Freedoms, 1982, ss. 7, 8. Criminal Code, R.S.C. 1985, c. C-46, s. 487. Income Tax Act, S.C. 1970-71-72, c. 63, ss. 37(2), 231.3.

Counsel for the Petitioners: John R. Haig, Q.C.
Counsel for the Respondent: Thomas R. Berger, Q.C., David J. Martin and Erin F. Berger.

COLLVER J.:-- This is an application to determine whether it would be contrary to the public interest to require disclosure to the defence of particulars of legal advice given by the Department of Justice to the Department of National Revenue. Such disclosure was ordered by His Honour Judge Cronin, of the Provincial Court of British Columbia, pursuant to an application heard at the commencement of Stephen Sander's trial on tax evasion charges.

BACKGROUND OF THE APPLICATION

On June 21, 1990, Revenue Canada investigators seized business records at the home and at the business and accounting offices of Stephen Sander. The seizures were effected pursuant to search warrants authorized under Section 231.3 of the Income Tax Act.

However, on November 28, 1990, in the case of Baron v. A.G. Canada, [1991] 1 C.T.C. 125, the Federal Court of Appeal declared Section 231.3 of the Income Tax Act to be of no force and effect, after finding the section to be inconsistent with Sections 7 and 8 of the Canadian Charter of Rights and Freedoms. In Baron, the Court ordered that seized documents be returned forthwith.

In the present case, notwithstanding demands by Mr. Sander's counsel for return of the business records, Revenue Canada obtained another search warrant on March 21, 1991, this time

pursuant to Section 487 of the Criminal Code, and re-seized the documents already in its possession.

On June 14, 1991, Mr. Sander was charged with the present offences. The Crown elected to proceed by indictment.

In the mentioned pre-trial disclosure application, counsel for Stephen Sander sought production of Revenue Canada's audit and special investigation files. That material has apparently been supplied. But Mr. Sander also sought:

> Relevant notes, memoranda, reports, however described, documenting the deliberations of Revenue Canada officials with members of the Department of Justice, and or others, respecting whether to retain books and records seized pursuant to the warrants Exhibits 2 to 8 to the affidavit of Erin Berger, in light of the Federal Court of Appeal decision in Baron v. Canada [1991] 1 C.T.C. 125, and whether to and how to purport to reseize the said records.

On April 22, 1992, Judge Edmund Cronin ordered production of the above materials.

In his reasons, Judge Cronin assumed the existence of solicitor-client privilege between Justice Department lawyers and Revenue Canada investigators. However, in discussing the right to make full answer and defence, Judge Cronin emphasized Mr. Sander's right to explore the propriety of the detention and the re-seizure, including the nature of the advice received and, "whether the investigators complied with the advice and what considerations they gave to the decision of the Federal Court of Appeal and to the rights of Mr. Sander to have his property returned".

THE ORIGINAL DEMAND FOR DISCLOSURE

On March 30, 1992, counsel for Mr. Sander demanded disclosure of the following (summarized):

1. On what date was the Baron decision brought to the attention of the Department of National Revenue?
2. What legal advice was tendered regarding the course of action to be followed with respect to the Baron decision?
3. Does the Crown consider itself bound by the decision in Baron?
4. What was the response of Revenue Canada to the advice it received, and the policy it followed with respect thereto.
5. Did the Department consider returning the seized documents? If not, why not?
6. Was legal advice provided to the Department as to the retention of seized materials? What was that advice? What response did the Department make?
7. Was there a practice adopted, following Baron, of retaining documents seized

under warrants invalidated by the decision?

8. What legal advice did the Minister of National Revenue receive regarding the right to apply for a second warrant? What policy was adopted with respect thereto?
9. What consideration was given to returning requested documents?
10. Before either warrant was obtained, what other means of investigation were considered?

THE STATUTORY BASIS FOR THE OBJECTION TO PRODUCE

The application of the "Disclosure of Government Information" provisions of the Canada Evidence Act requires the balancing of public interests. The provisions under which the Minister of Justice seeks a review of Judge Cronin's order begin as follows:

> 37. (1) A minister of the Crown in right of Canada or other person interested may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

Section 37(2) provides that in the process of dealing with the objection the court may:

> ...examine or hear the information and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest.

THE SPECIFIED OBJECTIONS TO PRODUCTION IN THE PRESENT CASE

James D. Bissell, Q.C., Senior General Counsel and Director of the Vancouver Regional Office of the Department of Justice, as a "person interested" has objected to disclosure of the matters referred to in Judge Cronin's order. In certifying his objections, Mr. Bissell has specified the following "public interest" grounds (summarized):

1. Disclosure of this information would be injurious to the relationship between employees of Revenue Canada and legal counsel in the Department of Justice - resulting in reluctance to consult and discouraging full and frank discussion;
2. The application is premature, since no issue has yet arisen in the proceedings to which the requested information could be relevant;
3. Production of the information offends:

(i) legal professional privilege; (ii) Crown privilege; (iii) solicitor-client privilege.

4. Disclosure will "impair" the administration of justice since the Minister of Justice and her agents will, unlike other solicitors and counsel, become compellable

witnesses in prosecutions such as the present one, and will be required to disclose the advice they give, leading to the prospect of Justice Department testifying to the very issue of lawfulness the Court must ultimately decide;

5. The confidential exchange of information and advice between employees of the Department of National Revenue and counsel employed by the Minister of Justice is necessary for the enforcement of the Income Tax Act, and aside from the public protection so afforded, the advice also helps employees of Revenue Canada avoid violating citizens' Charter rights.
6. Exposure of such legal advice to public view would aid potential tax evaders in both conducting their affairs and avoiding detection and prosecution.

DISCUSSION

In my view, of the listed public interest grounds, only the issue of privilege justifies inhibiting the full disclosure now afforded to accused persons through reasonable application of Section 7 of the Charter. That is the only issue upon which I propose to concentrate in these reasons.

With respect to the other listed concerns, it seems highly unlikely that revelation of the information sought in the tax evasion trial of Stephen Sander will visit upon Revenue Canada or any other department or agency of the Government of Canada the ominous consequences predicted in the Bissell certificate.

Aside from my scepticism about the "floodgates" fears implicit in much of what Mr. Bissell has certified, the obvious observation to be made is that arguments in favour of disclosure will vary, from case to case, and will succeed only where non- disclosure will impair a citizen's right to make full answer and defence.

When the Crown raised the issue of privilege in the pretrial disclosure application before Judge Cronin, counsel for Mr. Sander submitted that support for overriding the claimed privilege is to be found in the reasons of Mr. Justice Oppal, in The Queen v. Gray, [1992] B.C.J. No. 1363 (No. CC910548, Vancouver Registry, February 18, 1992).

Gray was a drug conspiracy case in which defence counsel submitted that disclosure of advice and communications between Crown counsel and the R.C.M. Police was necessary, generally, "to make full answer and defence and more particularly on the issues of full disclosure, entrapment, abuse of process and breaches of the Charter".

In his reasons in Gray, Mr. Justice Oppal emphasized the extraordinary nature of the police investigation, the most controversial aspect of which involved police distribution of drugs to the accused as part of a "reverse sting" operation in which the police posed as sellers.

Because the police were concerned about the propriety of their plan in Gray, they sought legal advice throughout. Defence counsel submitted that particulars of the advice were relevant in order

to make full answer and defence, on the following grounds:

1. The advice of Crown counsel went to the issue of good faith, both on the part of the police and the Crown;
2. The advice went to the issue of whether the conduct of the police was illegal and, if it was, whether the Crown countenanced it;
3. The provisions of the Narcotic Control Act do not allow police authorities to provide samples of narcotics to suspects;
4. Discussion of (police) immunity from prosecution is a consciousness of illegality on the part of the police, and that granting immunity would be unlawful;
5. Since a part of the operational plan was to seize the funds of the accused, the police ought to have proceeded under Part XII of the Criminal Code (seizure of proceeds of crime).

In refusing to uphold the claim to privilege, Mr. Justice Oppal emphasized that the right to confidentiality or solicitor client privilege, initially a rule of evidence but now also a substantive rule of law, is not absolute.

Mr. Justice Oppal then cited several instances in which courts have declined to uphold the rule, and stated:

> A thread which is common to the authorities is that solicitor-client privilege will yield where it is necessary to obtain justice and where full disclosure is necessary to establish innocence, keeping in mind that it is for the Crown to prove the guilt of the accused.

Concluding that the legal advice upon which the police proceeded in Gray was relevant for a determination of the issues raised by the defence, Mr. Justice Oppal ruled:

> I appreciate that the advice which the RCMP sought was done so in confidence and that confidentiality is essential to ensure that police authorities seek the advice of officers of the Crown. I am also mindful of the fact that in an adversarial system the parties must be free to act in an unfettered manner as is reasonably possible. However, I am guided by the right of a person to make full answer and defence. That right must take precedence in a judicial system which has as its cornerstone the presumption of innocence. It is for these reasons that the application is allowed and the Crown's right to solicitor-client privilege is removed.

I have quoted at some length from the decision in Gray because in the present case, Judge Cronin indicated that the disclosure application would have presented him with greater difficulty had it not been for the Gray decision, emphasizing that "the principle is on all fours with the

situation that was before Mr. Justice Oppal".

In stressing the right of Mr. Sander to make full answer and defence Judge Cronin expressed concern for:

1. Mr. Sander's right to explore whether continued detention (of seized materials) was unconstitutional;
2. Considerations which the investigators brought to their decision to detain;
3. Advice investigators received from the Department of Justice, and whether they followed it;
4. Whether the advice was in conformity with the law.

With respect, the issues to be considered in addressing the above concerns hardly parallel those facing Mr. Justice Oppal when he ordered disclosure in the face of the plea for preserving privilege in Gray.

Pursuant to Section 37(2) of the Income Tax Act, I requested production of the documents which, on April 16, 1992, the special prosecutor listed and claimed privilege for. I have examined those and three others which have now been provided to me. All pertain to advice given by the Department of Justice to Revenue Canada following the decision in Baron.

Understandably, the decision in Baron posed serious legal problems for Revenue Canada not only as to future action, but also with respect to investigations, prosecutions, and trials already under way. A host of issues required immediate attention, and legal advice had to be sought.

The ensuing exchange of memoranda between Revenue Canada and the Department of Justice reveals not only the realization that every tactical choice made after Baron would be subjected to judicial scrutiny, but also that the consequences of any and all measures taken after Baron would be difficult to predict.

However, I now turn to the essential issue here - Mr. Sander's claim that he will not be afforded his right to full answer and defence unless details of the exchange of information between Revenue Canada and the Department of Justice are revealed to him, pursuant to the March 30, 1992, demand for disclosure.

I am not persuaded that advice given by the Department of Justice to the Department of Revenue with respect to either retention of items seized under the impugned provisions of the Income Tax Act or the availability of re-seizure under the provisions of the Criminal Code raises the spectre of unlawfulness.

In this regard, I question whether investigative moves dictated by decisions of the courts should attract critical scrutiny unless the questioned action is found to be a tactic aimed solely at circumventing a clear judicial direction or declaration. I also question whether revelation of the

communications over which privilege is claimed is necessary to determine the appropriateness of Revenue Canada's actions. Surely effective cross-examination of its investigators will see to that.

On May 27, 1992, in another application brought in the Gray case, Mr. Justice Oppal was called upon to review his ruling of February 18, 1992 (also by way of an objection raised pursuant to Section 37 of the Income Tax Act). In answer to one of the public policy objections set out in the certificate before him he observed:

> As I stated earlier, this is a most unusual case and each case must, of course, be decided on its own set of circumstances. In making the findings and decisions I did in February, I made no general statement which would be applicable to all criminal cases.

In the present case, had he had the benefit of the above comments of Mr. Justice Oppal, qualifying the earlier ruling in Gray, I question whether Judge Cronin would have concluded that Gray is a decision which necessarily provides guidance in this tax evasion prosecution.

Gray was a unique case where the unusual, perhaps questionable, nature of police activity was found to justify an examination of the advice given before an operational plan was put into effect. Good faith was an issue in light of the tactics of the undercover police officers.

Moreover, the questions posed in Stephen Sander's case (by the decision in Baron) were simple. What was to be done with material already seized? Was there another statutory means by which materials could be seized (or re-seized)?

Here, in considering Revenue Canada's resort to the search provisions of the Criminal Code, the most that can be said is that having had one investigatory door slammed shut, the taxing authority simply sought an alternative means of pursuing its probe of Stephen Sander's conduct.

In response to the submission that Mr. Sander's right to full answer and defence depends upon his receipt of particulars of the legal advice, which possibly prompted both retention of the seized business records and the Criminal Code search warrant application which followed, the Crown argues that in the absence of any evidence of a Charter breach, it is premature to order revelation of the privileged communications. Timing aside, I think there is a more important reason.

Although the Charter has substantially increased prospects for examining the manner in which the state intervenes in the affairs of its citizens, law enforcement officers and agencies have long been conditioned to the need to respond to developing case law. For example, one need only consider the many adjustments in policy and practice necessitated by the plethora of judicial decisions which followed introduction of the rather complex "blood-alcohol concentration" provisions in the 1969 amendments to the Criminal Code.

Inevitably, both the status of decisions already taken and guidelines for future action were the

expected subjects of discussion between law enforcement agencies and those to whom they turned for legal advice. Obviously, such discussions could only effectively take place in a privileged environment.

Here, counsel for Mr. Sander submits that having regard to the expanded bases for disclosure approved by the Supreme Court of Canada in R. v. Stinchcombe, (1992), 68 C.C.C.(3d) 1, the perceived breach of process issues cannot be properly determined without access to the discussions over which privilege is claimed - thus the March 30, 1992, demand for disclosure, which I summarized earlier in these reasons.

However, the question to be answered is whether there is a reasonable possibility that the withholding of the information listed in the demand for disclosure will impair Mr. Sander's right to make full answer and defence. In other words, does the common law principle of privilege constitute a reasonable limit on Mr. Sander's right to make full answer and defence?

Counsel for the petitioners submitted that the privilege which attaches to communications between solicitors and clients is a fundamental substantive right to be interfered with in only the most compelling of cases (Desoteaux v. Mierzwinski (1982), 70 C.C.C.(2d) 385, S.C.C.). Ordering access to legal advice which an accuser has received can only be justified if it can be said that without such revelation an accused citizen will be seriously handicapped in the advancement of his defence.

I have already suggested that cross-examination of Revenue Canada officials will determine the appropriateness of the action taken - a suggestion reflecting the receipt of advice in what counsel for the Crown calls "the most routine and ordinary context". Officials of Revenue Canada must answer for their decision to retain and then re-seize the mentioned business records, and in doing so I am satisfied that a determination as to presence or absence of good faith can be made without establishing the exact nature of the advice they either followed or rejected.

Although I concede that the perceived complicity of Department of Justice lawyers in the decision to retain and reseize Stephen Sander's business records might, if proven, assist in establishing a Charter breach (absence of good faith), I make two observations.

First, I am mindful of the fact that Stephen Sander's trial is being conducted by a very experienced trial judge who can be expected to respond incisively if counsel manages to ferret out a Charter breach in what will likely be penetrating cross- examination of Revenue Canada investigators. In my view, communications with Revenue Canada's legal advisors are not critical to that exercise.

Second, and more important, the provision of legal advice to departments of government and their officials is one of the most important functions of the Attorneys General of Canada and the provinces. Embellishment of that statement is hardly necessary.

Obviously, the significance of the advisory role is such that before the privileged environment in which advice is given can be successfully assailed, the circumstances giving rise to the request for disclosure must be compelling. Such circumstances are not to be found in the present case.

DECISION

On the ground of preserving privilege between solicitor and client, I find that in this prosecution of Stephen Sander under the provisions the Income Tax Act, it would not be in the public interest to require the Crown to disclose to the defence particulars of or documents pertaining to legal advice given by the Department of Justice to the Department of National Revenue.

COLLVER J.