Federal Court  Cour fédérale

Date: 20181031

Docket: T-1492-17

Citation: 2018 FC 1094

Ottawa, Ontario, October 31, 2018

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] In this proceeding, the British Columbia Civil Liberties Association [BCCLA] seeks an Order setting aside a decision of the Security Intelligence Review Committee [SIRC] rendered on May 30, 2017 dismissing BCCLA's complaint against the Canadian Security Intelligence Service [CSIS]. At the heart of the BCCLA's complaint is an allegation that CSIS acted unlawfully by investigating Canadians engaged in lawful protest against the Northern Gateway Project and by sharing the fruits of its investigations with the National Energy Board [NEB] and

with private-sector businesses engaged in the petroleum industry. The decision is also challenged insofar as it purports to curtail the BCCLA's ability to comment publicly on matters it raised in the course of SIRC's hearing of the complaint. This aspect of the SIRC decision, it says, constitutes an infringement of its right to free expression protected by subsection 2(b) of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11, and is an unreasonable extension of section 48 of the *Canadian Security Intelligence Service Act*, RSC, 1985, c C-23 [*CSIS Act*] permitting SIRC to conduct its hearings in private.

[2] At this stage of the proceeding, the Attorney General is reviewing the SIRC certified tribunal record [CTR] to remove all classified material. I am advised that the CTR contains approximately 8,245 pages of which 3,359 pages are unclassified. The balance of the CTR includes classified material that must be redacted. The process of review, redaction and delivery is expected to be completed by May 2019.

[3] The matter presently before me concerns the filing of the redacted, unclassified CTR in this Court. In most instances that material, once filed, would be publicly available. In this case, the Attorney General seeks an Order under Rule 151 of the *Federal Courts Rules*, SOR/98-106 authorizing the confidential filing of the CTR (and other filings referring to the content of the CTR) pending the disposition of the underlying application. The Attorney General also seeks relief under Rule 29(2) such that the hearing of the application be conducted *in camera* – at least to the extent that any reference is to be made to the contents of the redacted CTR. The stated rationale for the requested relief is that public access to the contents of the CTR in this Court

would wholly undermine SIRC's confidentiality order before the lawfulness of the order can be tested on the merits.

[4] The Attorney General's position is succinctly set out in the Notice of Motion in the following way:

> A confidentiality Order is necessary in this case to prevent a serious risk to an important interest, namely, the proper interpretation to be given to subsection 48(1). Were any material from the unclassified CTR to be made public, the subsection 48(1) interpretation issue would be rendered moot by effectively granting the Applicant the remedy it is seeking before the hearing of the merits of the application. There is no reasonable alternative to the proposed confidentiality Order that would protect the information that SIRC deemed confidential until the Court has had an opportunity to review SIRC's interpretation on its merits.

[5] There are, of course, two aspects to the BCCLA's challenge to SIRC's confidentiality order, only one of which will be rendered moot by refusing this motion. The first concerns the legality of the order itself. The question of whether SIRC's interpretation of section 48 of the *CSIS Act* was lawful will not be rendered moot by the public disclosure of the CTR. That issue will remain to be determined on the merits whether or not a confidentiality order is granted in this proceeding.

[6] I accept that the public exposure of the non-classified CTR will, in practical terms, undermine the effect of the SIRC order. The issue is whether that fact is sufficient to displace the principle of open and accessible court proceedings recognized by Rule 151(2). The Attorney General bears the onus of satisfying me that the interest in maintaining the integrity of SIRC's confidentiality order outweighs the value of protecting the open court principle.

[7] The parties agree that in balancing these competing interests, the Court must apply the considerations identified in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522. There the court was dealing with commercially sensitive information over which expectations of confidentiality had been created. A confidentiality order was said to be justified where two fundamental conditions were met:

1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and,

2) the salutary effect of the confidentiality order, including the effect on the right of civil litigants to a fair trial, outweighs its deleterious effects on the right to free expression and on the public interest in open courts.

[8] In the following passage, the Court went on to discuss additional elements applying to the above conditions:

> 54 As in *Mentuck*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.
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> 55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if

> there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" (emphasis added).
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> 56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.
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> 57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

[9] Counsel for the Attorney General candidly acknowledged that there is nothing in the unclassified CTR that is inherently worthy of protection. For instance, no commercial or privacy concerns will arise if the redacted CTR is made available to the public. Indeed, what the BCCLA says should be exposed to public view is evidence from its witnesses which, at least prior to the SIRC hearing, was already publicly available, along with the redacted SIRC decision which has been disclosed to the BCCLA and which SIRC summarized in its annual report published in May of this year. I am also told that CSIS did not ask SIRC to protect any non-classified information from public disclosure.

[10] As the BCCLA points out, Parliament has the right to put reasonable limits on public access to court records and processes. An example of this can be found in subsection 11.4 of the

Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000, c 17. In contrast, Parliament has imposed no limitations with respect to this Court's supervision of SIRC's decision-making. The SIRC is authorized by section 48 of the *CSIS Act* to conduct its hearings in private but this limitation is not carried forward into the exercise of this Court's right of review under subsection 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[11] In the absence of controlling legislation, this Court is not governed by the procedures that apply to an administrative decision-maker whose decision is the subject of judicial review. This point was made in *Goodis v Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 SCR 32 in the following way:

> 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.
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> (1) Textual Analysis
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> 27 The provisions of the *Access Act* which the Ministry cites are specifically referable to the Commissioner: 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.
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> …
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> 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 Procedure 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.
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> (2) Jurisdiction on Judicial Review
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> 31 In support of its position that the court is bound by the provisions of the *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.

Also see *Blank v Canada*, 2005 FCA 405, [2005] FCJ No 2040 at paras 16-17.

[12] In the result, this Court's discretion to make a confidentiality order and to hear this case *in camera* is governed by its own procedural rules, specifically Rules 29 and 151.

[13] In *Canada (Attorney General) v Almalki*, 2010 FC 733, [2010] FCJ No 886, Justice Richard Mosley held that a party seeking confidentiality over court records bears a heavy onus to demonstrate the need for such an order. This was so, he said, because the open court principle is a core democratic interest inextricably linked to the fundamental freedoms of expression and of the media [see paras 17 and 22]. Even where warranted, the order must be carefully tailored to protect only the information for which there was a valid confidentiality concern.

[14] In *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41, [2005] 2 SCR 188, the Court discussed the rationale for maintaining openness in judicial proceedings in the following way:

> 1 In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.
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> 2 That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(*b*) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.
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> 3 The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.
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> 4 Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure *would subvert the ends of justice or unduly impair its proper administration*. [Emphasis in original]

[15] In many situations involving a specific, identifiable risk of harm, a confidentiality order can be crafted in a way that is least injurious to the open court principle. A good example of this can be seen in *Singer v Canada*, 2011 FCA 3, 196 ACWS (3d) 717 at paras 8-9. Here the only option that would serve the Attorney General's interests is a complete bar to public access to the entire CTR.

[16] What the Attorney General is seeking is protection for the sake of protection. That type of concern does not constitute “a serious risk to an important interest”. In a case like this, involving matters of public importance, and where Parliament has not imposed any limitations on the process of judicial review, the need to preserve access to court records and proceedings outweighs the generalized concern advanced by the Attorney General. To find otherwise would be to routinely subordinate the open court principle to the practices of any tribunal authorized to conduct its hearings in private.

[17] For the foregoing reason, this motion is dismissed with costs payable to the Applicant in the amount of $1,750.00.

ORDER in T-1492-17

THIS COURT ORDERS that the motion is dismissed with costs payable to the Applicant in the amount of $1,750.00.

THIS COURT FURTHER ORDERS that this Order will take effect thirty (30) days from the date of issuance.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1492-17
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