Federal Court  Cour fédérale

Date: 20190225

Docket: T-279-19

Citation: 2019 FC 225

Montreal, Québec, February 25, 2019

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Applicant

and

GIBRALTAR MINES LTD.

Respondent

ORDER AND REASONS

[1] The applicant, Canadian National Railway Company (CN), seeks an Order that all information and documents filed in the within judicial review proceedings be filed and maintained as confidential. The respondent, Gibraltar Mines Ltd. (Gibraltar), opposes the motion.

[2] For the reasons set out below, the motion will be dismissed.

I. BACKGROUND

[3] CN has filed an application for judicial review (the Application) of an arbitrator's decision (the Decision) made pursuant to Part IV of the *Canada Transportation Act*, SC 1996, c 10 [the *Act*].

[4] In its letter dated October 10, 2018, to the Canada Transportation Agency (the Agency) requesting the final offer arbitration that led to the Decision, Gibraltar advised, pursuant to section 167 of the *Act*, that it wished to keep matters relating to the arbitration confidential.

[5] CN cites that request as the basis for its motion. Specifically, CN argues that:

i. The material in question is required by law to be treated as confidential, and therefore satisfies the requirements of Rule 152 of the *Federal Courts Rules*, SOR/98-106 [the *Rules*] ; and

ii. Even if Rule 152 does not apply, a confidentiality order is justified under Rule 151 of the *Rules*.

II. RULE 152

[6] Subsection 1 of Rule 152 provides as follows:

Marking of confidential material	**Identification des documents confidentiels**
152 (1) Where the material is required by law to be treated confidentially or where the Court orders that material be treated confidentially, a party who files the material shall separate and clearly mark it as confidential, identifying the	**152 (1)** Dans le cas où un document ou un élément matériel doit, en vertu d'une règle de droit, être considéré comme confidentiel ou dans le cas où la Cour ordonne de le considérer ainsi, la personne qui dépose le document ou

legislative provision or the Court order under which it is required to be treated as confidential.	l'élément matériel le fait séparément et désigne celui-ci clairement comme document ou élément matériel confidentiel, avec mention de la règle de droit ou de l'ordonnance pertinente.

[7] Section 167 of the *Act*, which CN cites to support the requirement that the material in question be treated confidentially, reads as follows:

Confidentiality of information	**Caractère confidentiel**
167 Where the Agency is advised that a party to a final offer arbitration wishes to keep matters relating to the arbitration confidential,	**167** La partie à un arbitrage qui désire que des renseignements relatifs à celui-ci demeurent confidentiels en avise l'Office et :
(a) the Agency and the arbitrator shall take all reasonably necessary measures to ensure that the matters are not disclosed by the Agency or the arbitrator or during the arbitration proceedings to any person other than the parties; and	**a)** l'Office et l'arbitre prennent toutes mesures justifiables pour éviter que les renseignements soient divulgués soit de leur fait, soit au cours des procédures d'arbitrage à quiconque autre que les parties;
(b) no reasons for the decision given pursuant to subsection 165(5) shall contain those matters or any information included in a contract that the parties agreed to keep confidential.	**b)** les motifs des décisions donnés en application du paragraphe 165(5) ne peuvent faire état des renseignements que les parties à un contrat sont convenues de garder confidentiels.

[8] CN asserts that Parliament used broad language to define the information that must be kept confidential on the request of a party pursuant to this provision. CN argues that this requirement of confidentiality in relation to final offer arbitration extends to an application for judicial review of an arbitrator's decision thereon. CN cites the Order of Prothonotary Roger R.

Lafrenière (as he then was) dated September 17, 2013, in *National Gypsum (Canada) Ltd v Canadian National Railway Company*, Federal Court File No. T-1323-13 [*National Gypsum*], as a precedent for granting a confidentiality order of the kind sought in the present motion.

[9] Gibraltar argues that the effect of section 167 of the *Act* is limited to the final offer arbitration referred to therein, and it is not intended to extend to proceedings in court in judicial review of an arbitrator's decision. Apart from the fact that section 167 does not state that it has effect beyond the arbitration itself, Gibraltar notes the well-known principle that courts should be open and public. Gibraltar cites the decision of the British Columbia Supreme Court in *McHenry Software Inc v ARAS 360 Inc*, 2014 BCSC 1485, in which the Court stated at para 35 that "there is no general principle that the confidentiality of arbitration proceedings carries over to court proceedings when the arbitration is appealed. On the contrary, such court proceedings are generally public." Gibraltar also distinguishes the decision in *National Gypsum* on the basis that it relied on the consent of the respondent, which is not the case here.

[10] I agree with Gibraltar. I do not accept that Parliament intended section 167 of the *Act* to have effect in court proceedings that may follow related to an arbitration. Nothing in the wording of the provision indicates such extended effect, and the general principle of open and public court proceedings should apply unless there is some indication to the contrary.

[11] It may be appropriate in certain circumstances to put in place a confidentiality order in the context of a judicial review of an arbitration, but those circumstances would have to satisfy the requirements set out in Rule 151 of the *Rules* and in the decision of the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*], as discussed in the next section.

III. RULE 151

[12] Rule 151 of the *Rules* provides as follows:

Motion for order of confidentiality	**Requête en confidentialité**
151 (1) On motion, the Court may order that material to be filed shall be treated as confidential.	**151 (1)** La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.
Demonstrated need for confidentiality	**Circonstances justifiant la confidentialité**
(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.	**(2)** Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

[13] The *Sierra Club* decision, at paragraph 53, provides that:

> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order 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
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[14] The Supreme Court of Canada added that "three important elements" are subsumed in the first branch of this test:

(a) 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 (para 54);

(b) The "important commercial 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 (para 55); and

(c) 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 (para 57).

[15] CN argues that the material it seeks to shield includes commercially-sensitive information whose public disclosure could harm CN. It also argues that the integrity of the arbitration process requires respect for parties' expectations of confidentiality in the material that is submitted in the context of arbitration. CN further argues that the salutary effects of the requested Order outweigh any potential deleterious effects since the Order would simply maintain pre-existing confidential treatment protecting the parties' interests, and the public interest would not be harmed. Finally, CN asserts that refusing the requested Order could force it to withhold the entire arbitration record in order to protect its interests, thus hindering its ability to present its case.

[16] Gibraltar argues that much of the information which would be the subject of the requested Order is already in the public domain, and therefore should not be shielded from view by the Court. Gibraltar notes the lack of evidence that the material in question satisfies the requirements set out in *Sierra Club*. Gibraltar acknowledges that some of the information

submitted in the context of the arbitration may meet the *Sierra Club* test, but argues that there is insufficient information available to issue the requested Order at this time. Gibraltar proposes that any decision on confidentiality be left for the judge hearing the application.

[17] I agree with Gibraltar for the most part. There is no evidence that the material in question meets the requirements of Rule 151 and *Sierra Club* other than the fact that Gibraltar requested that matters relating to the arbitration be kept confidential. Based on the evidence before me, it appears that at least some of the information in question is already in the public domain, and hence not confidential. If, as Gibraltar acknowledges, some of the information in question is indeed confidential, then any confidentiality order must be limited in scope to what is necessary to protect that confidential information.

IV. CONCLUSION

[18] I will dismiss CN's motion. It would be inappropriate to issue the requested Confidentiality Order based on the evidence currently available. However, I accept that one or both of the parties may eventually wish to file material which is confidential. Once either or both of the parties are in a position to establish that such material satisfies the requirements for a confidentiality order, they may make a new motion therefor.

ORDER in T-279-19

THIS COURT ORDERS that the motion is dismissed with costs.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-279-19
STYLE OF CAUSE:	CANADIAN NATIONAL RAILWAY COMPANY v GIBRALTAR MINES LTD.

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	LOCKE J.
DATED:	FEBRUARY 25, 2019

APPEARANCES:

Douglas C. Hodson, Q.C.	FOR THE APPLICANT
Louis J. Zivot	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MLT Aikins Barristers and Solicitors Saskatoon, Saskatchewan	FOR THE APPLICANT
McMillan LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE RESPONDENT