Federal Court  Cour fédérale

Date: 20190722

Docket: T-279-19

Citation: 2019 FC 963

Ottawa, Ontario, July 22, 2019

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Applicant

and

GIBRALTAR MINES LTD.

Respondent

ORDER AND REASONS

[1] Canadian National Railway Company [CN] has brought a motion in writing pursuant to Rules 369(1) and 151 of the *Federal Courts Rules*, SOR/98-106 [*Rules*] to maintain the confidentiality of certain information and documents contained in its application record. Gibraltar Mines Ltd [Gibraltar] opposes the motion in part.

[2] For the reasons that follow, the motion is granted in part.

I. Background

[3] CN seeks judicial review of the Decision of the Arbitrator dated December 13, 2018 in the matter of a Final Offer Arbitration [FOA] under Part IV of the *Canada Transportation Act*, SC 1996, c 10 [CTA]. The dispute relates to the freight rates that Gibraltar pays to CN.

[4] When the matter was before the Arbitrator, Gibraltar advised the Canadian Transportation Agency pursuant to s 167 of the CTA that it wished to keep all matters relating to the FOA confidential. CN's preference is that documents which were treated as confidential during the FOA remain confidential in the application for judicial review.

[5] CN initially filed a motion for a confidentiality order on January 15, 2019. Justice George Locke dismissed the motion on February 25, 2019, holding that Parliament did not intend s 167 of the CTA to have effect in subsequent court proceedings that may arise from the 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" (*Canadian National Railway Company v Gibraltar Mines Ltd*, 2019 FC 225 at para 10 [*CN v Gibraltar*]).

[6] The applicable law was summarized by Justice Locke in *CN v Gibraltar* at paragraphs 12 to 15, and is reproduced here for ease of reference.

[7] 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.

[8] The Supreme Court of Canada stated in *Atomic Energy of Canada Limited v Sierra Club of Canada*, 2002 SCC 41 [*Sierra Club*] at paragraph 53 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.

[9] 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 (*Sierra Club* at 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 (*Sierra Club* at 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 (*Sierra Club* at para 57).

[10] CN says the information it seeks to protect is commercially-sensitive, and its public disclosure could harm both CN and Gibraltar. It notes that the Supreme Court of Canada held in *Sierra Club* that "the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met" (at para 59). CN also argues that materials submitted in the course of arbitration should be treated as confidential in order to maintain the integrity of the process, and

that the parties' expectations of confidentiality should be respected in subsequent court proceedings.

[11] CN asserts that there are no reasonable alternatives to prevent the risks associated with public disclosure of the information and documents in question. CN says the confidential information is highly relevant, and cannot be adequately conveyed by means of public summaries. CN therefore argues that the salutary benefits of the order requested outweigh any potential deleterious effects: the order will only maintain pre-existing confidentiality arrangements, and refusing the order will hinder CN's ability to properly present its case.

[12] In *CN v Gibraltar*, Justice Locke found that CN's motion for a confidentiality order was premature and that CN had offered no evidence to satisfy the *Sierra Club* criteria. Gibraltar initially took the position that the present motion suffered from similar defects, and CN had provided no evidence of "real and substantial" harms arising from disclosure of the information and documents it sought to keep confidential. Gibraltar noted that much of the information CN wished to keep confidential was already in the public domain.

[13] Gibraltar nevertheless agreed that the following information and documents should be kept confidential in this application for judicial review:

(a) CN Confidential Transportation Agreement 538745-AA;

(b) Memorandum of Understanding dated June 15, 2016; and

(c) References to the freight rates that Gibraltar pays to CN.

[14] Pursuant to a direction issued by this Court on May 31, 2019, CN filed a confidential application record together with a public record that omits several documents CN says should be treated as confidential. The number of documents withheld from the public has been significantly reduced.

[15] CN says the remaining documents it wishes to keep confidential are not in the public domain, and contain commercially-sensitive information, including freight rates, negotiations and contract details. CN argues that the risks presented by the disclosure of commercially-sensitive information are especially real and substantial in small, highly competitive marketplaces, such as the rail freight industry (citing *Arkipelago Architecture Inc v Enghouse Systems Ltd*, 2018 FCA 192 at paras 11, 16). CN notes that this Court has previously held that settlement agreements and offers to settle may be subject to confidentiality orders (citing *Lavigne v Canada (Human Rights Commission)*, 2010 FC 1038 at paras 29, 31-32).

II. Analysis

[16] The information and documents in issue may be divided into three categories: (A) information that both parties agree should be kept confidential and which meets the *Sierra Club* test; (B) information that only CN wishes to keep confidential and which meets the *Sierra Club* test; and (C) information that only CN wishes to keep confidential and which may meet the

Sierra Club test, but whose confidentiality should be revisited after the hearing of the application for judicial review. I will address each of these categories in turn.

A. *Information agreed upon*

[17] The parties agree that the following information should be kept confidential in the application for judicial review:

(a) CN Confidential Transportation Agreement 538745-AA;

(b) Memorandum of Understanding dated June 15, 2016; and

(c) References to the freight rates that Gibraltar pays to CN.

[18] I am satisfied that these documents contain commercially-sensitive information that meets the *Sierra Club* test.

B. *CN's information that meets the Sierra Club test*

[19] I am satisfied that the following documents contain commercially-sensitive information that meets the *Sierra Club* test and cannot readily be redacted:

(a) CN Express Contract;

(b) Gibraltar's "Negotiations" Document; and

(c) CN's Performance Incentive/Penalties Charts regarding Gibraltar's Final Offer.

C. *Information that may meet the Sierra Club test but whose confidentiality should be revisited after the hearing of the application for judicial review*

[20] The following documents may contain commercially sensitive information that meets the *Sierra Club* test. However, they also contain factual information and arguments that will inevitably become public in the course of the application for judicial review. It is difficult to predict in advance precisely how much of this information will be disclosed in the course of the application for judicial review, and how much will ultimately be irrelevant to the proceedings. For this reason, the confidentiality of these documents should be maintained for the time being, but should be revisited by the parties and the presiding judge at the conclusion of the hearing of the application for judicial review:

(a) Hearing Transcript;

(b) CN's Summary of Information and Argument;

(c) Gibraltar's Summary of Information and Argument;

(d) CN's Final Argument;

(e) CN's Application to Strike;

(f) Gibraltar's Answer to Application to Strike;

(g) CN's Reply to Gibraltar's Answer to Application to Strike;

(h) CN's Memorandum of Fact and Law Re: Judicial Review; and

(i) All remaining documents withheld from CN's public application record that are not specifically listed in these reasons.

[21] Finally, the Decision of the Arbitrator which is the subject of the application for judicial review contains no confidential information by operation of statute. Pursuant to s 167(b) of the CTA, "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." A cursory review of the Arbitrator's decision confirms that it contains no information that may be considered commercially-sensitive.

ORDER

THIS COURT ORDERS that:

1. The motion by Canadian National Railway Company [CN] to maintain the confidentiality of certain information and documents contained in its application record is allowed in part.

2. The following documents shall be kept confidential:

   (a) CN Express Contract;

   (b) Gibraltar's "Negotiations" Document; and

   (c) CN's Performance Incentive/Penalties Charts regarding Gibraltar's Final Offer.

3. Unless the Court orders otherwise, the following documents shall be kept confidential until the conclusion of the hearing of the application for judicial review, at which time their ongoing confidentiality shall be revisited by the parties and the presiding judge:

   (a) Hearing Transcript;

(b) CN's Summary of Information and Argument;

(c) Gibraltar's Summary of Information and Argument;

(d) CN's Final Argument;

(e) CN's Application to Strike;

(f) Gibraltar's Answer to Application to Strike;

(g) CN's Reply to Gibraltar's Answer to Application to Strike;

(h) CN's Memorandum of Fact and Law Re: Judicial Review; and

(i) All remaining documents withheld from CN's public application record that are not specifically listed in this Order.

4. The Decision of the Arbitrator shall be disclosed as part of CN's public application record.

"Simon Fothergill"

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:	FOTHERGILL J.
DATED:	JULY 22, 2019

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