Federal Court Cour fédérale

Date: 20201130

Docket: T-1951-19

Citation: 2020 FC 1100

Ottawa, Ontario, November 30, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

KENNETH MCCARTHY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] This application for judicial review sought to quash a Notice of Pre-Disciplinary Hearing [Notice] issued by the President of the Canada Border Services Agency (CBSA), in which the President accepted findings of an investigation into allegations of wrongdoing in the workplace. The investigation was triggered by disclosures made under the *Public Servants Disclosure Protection Act*, SC 2005, c 46 [*PSDPA*]. On September 24, 2020, I granted the Attorney

General's motion to strike the application, and dismissed the Attorney General's motion for certain procedural relief as moot: *McCarthy v Canada (Attorney General)*, 2020 FC 930. As indicated at paragraphs 1 and 2 of that decision, a third motion remained outstanding, namely the Attorney General's motion for an order sealing an exhibit that Mr. McCarthy filed in response to the first motion.

[2] By order of the same date, I gave the parties an opportunity to file supplementary submissions on the Federal Court of Appeal's recent decision in *Desjardins v Canada (Attorney General)*, 2020 FCA 123, since the Attorney General had relied on the decision of the Federal Court in that case, which was overturned by the Court of Appeal. The parties each filed supplementary submissions on *Desjardins* and maintained their respective positions on the requested confidentiality order.

[3] For the reasons that follow, I conclude that the requested confidentiality order should not be granted.

II. Issue

[4] In response to the Attorney General's motion to strike the application, Mr. McCarthy filed an affidavit that attached numerous documents I concluded were improper on a motion to strike: *McCarthy* at paras 14–17. One of these documents, Exhibit Z to the affidavit, was an email Mr. McCarthy sent to the President of the CBSA prior to the Notice, which purported to compare Mr. McCarthy's case to that of another CBSA employee, and sought an explanation for

a perceived difference in handling. The other CBSA employee is named, and the file number and certain information regarding the allegations against the other employee are included.

[5] The only issue on this motion is whether the Court should issue a confidentiality order pursuant to Rule 151 of the *Federal Courts Rules*, SOR/98-106, sealing Exhibit Z so as to keep confidential the identity of the other CBSA employee.

III. Analysis

A. *General Principles on Confidentiality Orders*

[6] Rule 151 permits the Court on motion to order that material to be filed shall be treated as confidential. Before doing so, the Court "must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings": Rule 151(2).

[7] In *Desjardins*, the Federal Court of Appeal recently considered the principles applicable to confidentiality orders in a case that, like this one, was brought against the background of disclosures made under the *PSDPA* of alleged wrongdoing. The information at issue in that case was the names of witnesses and disclosing parties, and witness interviews and notes arising from the investigation.

[8] Justice Nadon for the Court in *Desjardins* discussed two leading cases from the Supreme Court of Canada on the issue of confidentiality orders, *Sierra Club of Canada v Canada*

(Minister of Finance), 2002 SCC 41 and *AB v Bragg Communications Inc*, 2012 SCC 46. At paragraph 55 of his decision, Justice Nadon cited and reaffirmed the test for a confidentiality order established by Justice Iacobucci in *Sierra Club* at paragraph 53:

> 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 parties agree this is the test I ought to apply.

[10] Justice Nadon went on to review Justice Abella's decision in *Bragg*, and in particular her statements regarding the evidence that might establish a need to restrict access, and the ability to apply "reason and logic" in that exercise: *Bragg* at paras 16, 20; *Desjardins* at paras 66–70. Justice Nadon emphasized that nothing in *Bragg* could be taken to undermine the principle that the existence of a "serious risk" (or "serious risk of harm") arising from disclosure must be "well grounded in the evidence": *Desjardins* at paras 82–84; *Sierra Club* at para 46. At paragraph 85 of his decision, Justice Nadon provided the following summary of what must be considered in assessing a request for a confidentiality order:

> I am of the opinion that the exercise of discretion under Rule 151 requires that a judge analyze all of the relevant facts and all of the circumstances that may show whether or not there is harm to the important interest sought to be protected and thus make the appropriate order. In particular, the exercise of discretion under

> Rule 151 requires that a court hearing a motion for an order of confidentiality weigh all of the relevant factors, including the objectives and particular provisions of the legislative or regulatory scheme, the public interest at stake in the case, the constitutional rights at issue (privacy, freedom of expression, the open court principle) as well as the information that is already public.

[11] Justice Nadon continued in the same paragraph to address how these principles could apply in respect of an issue related to disclosures under the *PSDPA*:

> In this case, the current situation and current places of employment of the witnesses and the persons who made the disclosure, whether or not they have a relationship with the appellant, any other risk factors, the filing of affidavits stating concerns and, conversely, any evidence which tends to show the absence of risk (*i.e.*, if the names of the persons who made the disclosure and the witnesses have already been widely known for a long time and they have not suffered any reprisals to date, etc.) are all elements that the Judge had to analyze before finding that there was a serious risk of harm.

[12] Justice Nadon was clear that the generalized allegations proffered by the Attorney General in that case, including statements that revealing the names and testimony of those involved in the investigation would discourage others to come forward, were insufficient to demonstrate a risk of harm "well grounded" in the evidence: *Desjardins* at paras 86–87. He was also clear that simply being a disclosing party or a witness was insufficient to create a presumption that disclosure would create a serious risk to an important interest, and that neither the existence of an important interest nor the provisions of the *PSDPA* could dictate the outcome of a Rule 151 motion: *Desjardins* at paras 88, 90.

B. *Application to the Present Case*

(1) Parties' positions

[13] As Mr. McCarthy points out, the information at issue in this case is not the identity or evidence of a person making a disclosure or a witness, as was the case in *Desjardins*. Rather, it is the identity of and allegations made against someone who was not involved in Mr. McCarthy's case at all, but who was simply used as a comparator by Mr. McCarthy in an argument he presented to the President of the CBSA. The Attorney General's request for a confidentiality order is therefore not founded on the need for protection of disclosing parties and witnesses, as was the request in *Desjardins*.

[14] Rather, the Attorney General contends that the information in question is "personal information" as defined in the *Privacy Act*, RSC 1985, c P-21. They argue that disclosure would undermine the legislative intent of the *Privacy Act*, whereas a confidentiality order would be consistent with the *Privacy Act* regime. The Attorney General contends that the improper, unnecessary, and involuntary disclosure of personal information constitutes a serious risk to an important public interest. They further argue that the requested order would have minimal impact on the open court principle, since the information in question is that of a non-party whose identity is neither relevant to the proceeding, nor necessary for the public to have to ensure an open and accessible proceeding. They therefore argue that the second part of the *Sierra Club* test is met as the salutary effects of preventing harm to the public interest outweigh any deleterious effects of the minimal impact on the open court principle.

[15] Before turning to the substance of Mr. McCarthy's response to the Attorney General's motion, I must address a troublesome aspect of his submissions. The Attorney General raised this confidentiality issue at the outset of their motion. It should therefore have been clear to Mr. McCarthy and his then counsel that the employee's information should have been treated with discretion until the issue was decided by the Court. Instead, Mr. McCarthy's response appears to have been designed to compound the issue raised on the motion. His responding submissions unnecessarily repeat the name of the individual frequently, no fewer than nine times over the course of a six-page written submission, in an apparent attempt to deliberately identify the individual as often as possible in submissions filed in the Court record. Such an approach is inappropriate and is particular disappointing given that Mr. McCarthy was represented by counsel at the time. Mr. McCarthy also filed an affidavit in support of his response, in which he attached an exhibit that lists 35 individuals he had named during the course of his earlier affidavits, including the CBSA employee at issue. Although this ultimately does not matter in light of my conclusions herein, had I found that the information should be kept confidential, it would have been necessary to extend the order to further materials in the Court file. The Court takes a dim view of such tactics in response to a motion for a confidentiality order. I note that as a result of the foregoing, my order inviting further submissions on *Desjardins* had to specify that the further submissions should not again repeat or disclose the information at issue, which Mr. McCarthy respected in his responding submissions filed on his own behalf.

[16] In terms of substance, Mr. McCarthy responds that the *Privacy Act* does not apply to him, since he is not a government institution but an individual, and in particular one who retired from the federal public service subsequent to the filing of the affidavit in question. He notes that the

Attorney General did not seek to seal or redact the personal information of the 34 other individuals he had identified in his affidavit, and that the CBSA employee in issue ought to be treated in the same manner as the others. He also argues that the Attorney General has not adequately identified the important interest that would be harmed, or filed sufficient evidence of the harm to that interest that would arise from the disclosure, citing paragraphs 88 and 94 of *Desjardins*. He also maintains, despite my finding to the contrary in my decision of September 24, 2020, that the email in Exhibit Z is relevant, since it was sent to the CBSA President prior to the decision at issue.

(2) The *Sierra Club* test is not met on the evidence filed

[17] In keeping with the Court of Appeal's instructions in *Desjardins*, I must consider the relevant facts and circumstances, the objectives and provisions of any relevant legislative scheme, and the public interest. I must also consider the relevant constitutional rights, which in this case are the right to privacy, the right to freedom of expression, and the open court principle.

[18] I am satisfied that the information relating to the CBSA employee, which identifies them by name and which includes details relating to allegations of workplace wrongdoing made against them, falls within the definition of "personal information" in section 3 of the *Privacy Act*. To the extent it is necessary to specify, subsection (*b*) of the definition expressly refers to "information relating to the […] employment history of the individual," while subsection (*g*) refers to "the views or opinions of another individual about the individual," which in my view could include allegations that the individual had conducted themselves improperly in the workplace. Subsection (*i*) of the definition refers to the "name of the individual where it appears

with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual."

[19] Subsection 8(1) of the *Privacy Act* prohibits disclosure by a government institution of personal information under its control, except in accordance with the section. Subsection 8(2) then sets out a series of exceptions in which personal information may be disclosed. These include two exceptions that relate expressly to legal proceedings:

Where personal information may be disclosed	**Cas d'autorisation**
8 (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed	**8 (2)** Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :
[…]	[…]
(c) for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information;	**c)** communication exigée par *subpœna*, mandat ou ordonnance d'un tribunal, d'une personne ou d'un organisme ayant le pouvoir de contraindre à la production de renseignements ou exigée par des règles de procédure se rapportant à la production de renseignements;
(d) to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada;	**d)** communication au procureur général du Canada pour usage dans des poursuites judiciaires intéressant la Couronne du chef du Canada ou le gouvernement fédéral;

[20] Paragraph 8(2)(*d*) clearly contemplates the potential use of personal information in the context of litigation, and does not limit such use to cases where the production of information is compelled by order, subpoena, or the rules of court, as is the case with paragraph 8(2)(*c*). Evidently, the context contemplated is that the information is in the control of a government institution, and that the use would be by the Attorney General, who would typically represent the Crown or the Government of Canada in such legal proceedings. Justice Mandamin of this Court helpfully discussed the balancing reflected in these provisions between the privacy interest and the need to advance the positions in legal proceedings in *Alderville First Nation v Canada*, 2017 FC 631 at paras 47–48.

[21] This leads to the argument raised by Mr. McCarthy, namely that the *Privacy Act* has no application since he is not a "government institution." I have some difficulty with this assertion given that the information in question clearly came into Mr. McCarthy's possession while he was a federal government employee, and in his capacity as an employee. Indeed, Mr. McCarthy asserts within the email that is Exhibit Z that his facts are accurate with respect to the other employee's case since "I was the Director overseeing the investigation to identify the whistle blowers." In other words, the email in question (a) was sent by Mr. McCarthy as a CBSA employee, from his CBSA email account; (b) included information that came into his possession because he was a government investigator on the other employee's file; and (c) was filed with the Court by Mr. McCarthy while he was an employee of the CBSA. In such circumstances, I do not believe that the application of the *Privacy Act* can be avoided simply through the assertion that Mr. McCarthy is not himself a government institution, or that he subsequently retired from the federal public service.

[22] Nevertheless, the issue is not whether Mr. McCarthy breached the *Privacy Act* or not by filing the email in question, a matter on which I need not and do not make a determination. Rather, the issue is whether, now that the email has been filed, a confidentiality order ought to issue to seal that document. As the Federal Court of Appeal noted in *Desjardins* with respect to the *PSDPA*, Parliament's creation of schemes for protection of information does not automatically answer the questions that must be addressed under Rule 151. Rather, the *Sierra Club* test must be met, with consideration given to all relevant circumstances.

[23] With respect to the first step of the *Sierra Club* test, I am satisfied that the protection of privacy can constitute an "important interest" for the purposes of the *Sierra Club* test: *Alderville First Nation* at paras 43, 71. This view is supported by the fact that the information falls within the definition of "personal information" in the *Privacy Act*, although the broader recognition of privacy interests in Canadian law, including constitutionally, similarly informs the conclusion. As the Federal Court of Appeal noted in other circumstances, "[p]rivacy rights are significant and they must be protected": *BMG Canada Inc v Doe*, 2005 FCA 193 at para 38.

[24] One can reasonably assume that the disclosure of personal information presents at least some degree of harm or risk to the important right to privacy. However, *Desjardins* teaches that the Court cannot simply rely on such generalized assumptions for the purposes of the *Sierra Club* test. *Sierra Club* requires that a confidentiality order be necessary to prevent a "serious risk" to the interest, and that the salutary effects of preventing such risk outweigh the deleterious effects on the open court principle. These conclusions must be grounded in the evidence.

[25] No restriction on the open court principle should be taken lightly, given its fundamental role in the Canadian judicial system. Nor should the restriction on the right to freedom of expression that arises any time the sealing of Court records may impact the ability to report on a matter. However, in the present case, I agree with the Attorney General that the deleterious effects on the open court principle and freedom of expression that would result from either sealing or redacting the single exhibit at issue, which should not have been filed in the first place and which had no bearing on the Court's decision to strike the application, are fairly modest.

[26] Nevertheless, I conclude that the Attorney General has not demonstrated, through the evidence filed on the motion, that maintaining the open court principle, and thereby permitting the disclosure of the information in question through access to the Court file, would cause a "serious risk" to the relevant privacy rights, or that the salutary effects of preventing that risk would outweigh the deleterious effects of any restriction on the open Court principle.

[27] The evidence filed by the Attorney General on their motion consists solely of a paralegal's affidavit attaching the relevant portions of the record. No evidence was filed with respect to issues such as the particular impact of the disclosure on the identified individual, their current situation (although their current employment position is known), or other risk factors that would establish the existence of a "serious risk" to the privacy interest arising from the disclosure of their information. These are matters that the Federal Court of Appeal has emphasized are relevant to the assessment and must be established through convincing evidence: *Desjardins* at paras 82, 85, 87. Indeed, the Attorney General's arguments appear primarily directed at the general "public interest" in personal information not being made public without

consent. Such general information does not in this case satisfy the *Sierra Club* requirements: *Desjardins* at paras 86–87.

[28] In this regard, I do not consider that the cases the Attorney General put forward as exemplary are of assistance. In *AB v Canada (Attorney General)*, 2016 ONSC 1571, the applicant sought physician-assisted death, and filed evidence from himself and his daughter regarding his health status and the request to prevent disclosure of his identity and those of his health care providers: *AB* at paras 1, 18. In such a context, and with time being of the essence, the Ontario Superior Court of Justice was satisfied that the evidence was sufficient to satisfy the *Sierra Club* test: *AB* at paras 24–28. While the Ontario Superior Court commented on the reasonable position taken by the applicant, seeking to redact only certain identifying information, even a narrow request for sealing must meet the *Sierra Club* principles based on a sound evidentiary record.

[29] Similarly, the issues in *AC v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1452 related to the risk that parties and witnesses in a refugee proceeding might be exposed to danger or reprisal in their country of origin: *AC* at para 11. Even in this very different context, the Court must be satisfied on the evidence that the principles of the *Sierra Club* test are met: *AC* at paras 6, 13, 18. The Court's approach in that case, of maintaining an open record while anonymizing the record of proceeding on the Court's website, has no application in this case: *AC* at para 19.

IV. Conclusion

[30] I am certainly sympathetic to the Attorney General's concerns regarding the exposure of personal employment details of an individual with no direct relationship with this application through the filing of a document that need not and should not have been filed. This is even more so given the sense that this individual has been unwillingly dragged into Mr. McCarthy's employment file through Mr. McCarthy's own use of his personal information, of which he came into possession through his own role as an investigator. However, the open court principle is a fundamental one, and while it recognizes exceptions, the grounds for those exceptions must be established on a convincing evidentiary record. I do not have such a record before me on this motion, and the motion will therefore be dismissed.

[31] Mr. McCarthy did not seek his costs of the motion. Even if he had, I would not have been inclined to award them, given that the confidentiality issue arose due to the filing of an exhibit that should not have been filed on a motion to strike, and given the approach taken in response to the motion, as described in paragraph [15] above.

JUDGMENT IN T-1951-19

THIS COURT'S JUDGMENT is that

1. The Attorney General's motion to seal or redact Exhibit Z to the affidavit of Kenneth McCarthy sworn February 12, 2020 is dismissed.
2. Paragraph 4 of the Court's Order dated September 24, 2020 is vacated.
3. There is no order as to costs.

"Nicholas McHaffie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1951-19
STYLE OF CAUSE:	KENNETH MCCARTHY v ATTORNEY GENERAL OF CANADA

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

JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	NOVEMBER 30, 2020

WRITTEN REPRESENTATIONS BY:

Kenneth McCarthy	ON HIS OWN BEHALF
Caroline Engmann	FOR THE RESPONDENT

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