Federal Court  Cour fédérale

Date: 20121015

Docket: T-1801-10

Citation: 2012 FC 1204

Toronto, Ontario, October 15, 2012

PRESENT: Madam Prothonotary Milczynski

BETWEEN:

BRITISH COLUMBIA LOTTERY CORPORATION

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

Issue and Summary

[1] The British Columbia Lottery Corporation ("BCLC") is a British Columbia Crown corporation responsible for conducting, managing and operating lottery, casino, community gaming and electronic gaming activities in the Province of British Columbia. BCLC is governed by the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000 c. 17 (the "Act"), that sets out certain requirements regarding record keeping, client identification, and reporting obligations with respect to financial transactions.

[2] The Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") is established under the Act as an independent agency that collects information from regulated entities to assist in the detection, prevention and deterrence of money laundering and the financing of terrorist activities. FINTRAC has the power to conduct compliance examinations and audits, in aid of which it can compel regulated entities to comply with production and disclosure requirements to assist FINTRAC in determining compliance with the Act, and to assist law enforcement.

[3] On or about October 30, 2009, FINTRAC commenced a compliance examination of BCLC, and required BCLC to produce certain documentation**…[Redacted]**

[4] On January 29, 2010, FINTRAC delivered an audit report to BCLC that advised it of what FINTRAC had identified as deficiencies in BCLC's reporting requirements. BCLC states that although it addressed each of the categories of violations, FINTRAC proceeded to issue a Notice of Violation on June 15, 2010, alleging that BCLC was non-compliant with the Act as a result of **[Redacted]** purported deficiencies. FINTRAC also imposed a monetary penalty against BCLC in the amount of $695,750.00.

[5] BCLC requested a reconsideration of the Notice of Violation, and made submissions in that regard to the Director of FINTRAC on June 30, 2010, and made further supplementary submissions on August 3, 2010.

[6] In a notice of decision dated October 1, 2010, the Director of FINTRAC affirmed the Notice of Violation that found BCLC to be non-compliant with the Act and regulations, and also affirmed

the monetary penalty payable by BCLC. The underlying proceeding is the appeal by BCLC from the decision of the Director of FINTRAC.

[7] The within motion brought by BCLC is for a confidentiality order pursuant to section 73.21(4) of the Act, and Rule 151 of the *Federal Courts Rules*, as well as an order maintaining the confidentiality of the hearing. Reference is made also to Rule 152 of the *Federal Courts Rules*.

[8] Although quite broad in its scope and application and contrary to the principles of an open court process, I am satisfied that the order regarding the sealing of documents and information as referred to and identified in the Act must be granted. The Act is clear as to what information must be kept confidential and sealed from public access, both by FINTRAC in the fulfillment of its mandate under the Act, and by the Court in the course of any appeal from the Director. It is not a matter of the exercise of the Court's discretion or the application of the test in *Sierra Club of Canada*, [2002] 2 S.C.R. 522, or reading down legislation so as to make the restriction conform as much as possible with the public interest in open court proceedings and/or the *Canadian Charter of Rights and Freedoms*. It is a matter of the application of the Act, which in the absence of any constitutional challenge, must be applied, even though as acknowledged by the parties, some of the information falling within ss.55(1) of the Act might not meet the test for confidentiality under the Rule 151 of the *Federal Courts Rules*.

[9] I note, however, that the scope of the sealing order requested by BCLC is overly broad. BCLC seeks to maintain the confidentiality of every document and piece of information, citing the practical difficulties or effort required to remove or redact that information which falls under the Act

from that which does not. Such considerations cannot, and do not displace the public interest in an open court process. Only in exceptional circumstances, such as where legislation requires it, or upon application of Rule 151 (balancing considerations of the public interest, as contemplated by *Sierra Club*) should the Court grant a confidentiality order. Accordingly, with respect to the order that will issue, only the information referred to in the Act shall be the subject of the sealing motion. Those were was the parameters of the motion, with particular focus on the four documents sought by the CBC. To the extent there may be additional documents (falling outside ss.55(1)) sought to be protected as this appeal proceeds, the party seeking the protection will need to bring a further motion, specifically identifying the document(s) and satisfy the requirements of Rule 151 of the *Federal Courts Rules*, including the test set out by the Supreme Court of Canada in *Sierra Club*.

[10] With respect to the conduct of the hearing of the appeal, and the attendance of members of the public and/or media, this is a matter best left to the judge hearing the merits to determine whether the hearing in its entirety, or in part should be conducted *in camera*. The same consideration applies in respect of any further interlocutory proceedings (e.g. motions or case conferences) that may be conducted, leading up to the hearing of the appeal, which will be dealt with by the Case Management Judge, or otherwise by the Court.

[11] In that regard, as a preliminary matter on this motion, the parties did not object, and the Court did grant leave for the Canadian Broadcasting Corporation/Radio Canada (the "CBC") to appear on this motion. The CBC's participation was limited to making written and oral submissions on BCLC's motion for confidentiality, with no rights of appeal and further direction that the CBC be neither liable to pay or receive costs of this motion. The CBC confirmed that of primary interest

for disclosure were four documents: (1) the audit report, created following examination of the information provided by BCLC in response to the October 30, 2009 commencement of the compliance audit; (2) the Notice of Violation; (3) BCLC's Request for Reconsideration; and (4) the Notice of Decision – which documents are Exhibits A, C, D, and E to the affidavit of Terry Towns sworn May 2, 2012.

Applicable Legislation

[12] **(i)** ***Proceeds of Crime (Money Laundering) and Terrorist Financing Act***

The relevant provisions of the Act for the purposes of this motion are as follows

> **ss. 73.21 (1)** A person or entity on which a notice of a decision made under subsection 73.15(2) or 73(19) is served, in respect of a serious violation or very serious violation, may, within 30 days after the day on which the notice is served, or within any longer period that the Court allows, appeal the decision to the Federal Court.
>
> **ss. 73.21 (4)** In an appeal, the Court shall take every reasonable precaution, including, when appropriate, conducting hearings in private, to avoid the disclosure by the Court or any person or entity of information referred to in subsection 55(1).
>
> **ss. 73.22** When proceedings in respect of a violation are ended, the Centre may make public the nature of the violation, the name of the person or entity that committed it, and the amount of the penalty imposed.
>
> **ss. 55(1)** Subject to subsection (3), sections 52, 55.1, 56.1 and 56(2), subsection 58(1) and sections 65 and 65.1 of this Act and to subsection 12(1) of the *Privacy Act*, the Centre shall not disclose the following:
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> (a) information set out in a report made under section 7;
>
> (a.1) information set out in a report made under section 7.1;
>
> (b) information set out in a report made under section 9;

> (b.1) information set out in a report referred to in section 9.1;
>
> (b.2) information provided under sections 11.12 to 11.3 except for identifying information referred to in subsection 54.1(3);
>
> (c) information set out in a report made under subsection 12(1), whether or not it is completed, or section 20;
>
> (d) information voluntarily provided to the Centre about suspicions of money laundering or of the financing of terrorist activities;
>
> (e) information prepared by the Centre from information referred to in paragraphs (a) to (d); or
>
> (f) any other information, other than publicly available information, obtained in the administration or enforcement of this Part.

[13] The reference to "this Part" in ss. 55(1)(f) relates to Part 3 of the Act: "Financial Transactions and Reports Analysis Centre of Canada", which establishes FINTRAC, whose objects include operating as an independent agency that:

> **ss.40(b)** collects, analyses, assesses and discloses information in order to assist in the detection, prevention and deterrence of money laundering and of the financing of terrorist activities; [and]
>
> ****
>
> **ss.40(e)** ensures compliance with Part 1.

[14] Part 1 of the Act concerns "Record Keeping, Verifying Identity, Reporting of Suspicious Transactions and Registration", and defines in section 5, the entities such as BCLC that are subject to the registration and reporting requirements under Part 1 of the Act.

[15] Section 3 of the Act sets out the object of the Act:

> **ss. 3** The object of this Act is

> (a) to implement specific measures to detect and deter money laundering and the financing of terrorist activities and to facilitate the investigation and prosecution of money laundering offences and terrorist activity financing offences, including:
>
> (i) establishing record keeping and client identification requirements for financial services providers and other persons or entities that engage in business, professions or activities that are susceptible to being used for money laundering or the financing of terrorist activities,
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> (ii) requiring the reporting of suspicious financial transactions of cross-border movements of currency and monetary instruments, and
>
> (iii) establishing an agency that is responsible for dealing with reported and other information;
>
> (b) to respond to the threat posed by organized crime by providing law enforcement official with the information they need to deprive criminals of the proceeds of their criminal activities, while ensuring that appropriate safeguards are put in place to protect the privacy of persons with respect to personal information about themselves; and
>
> (c) to assist in fulfilling Canada's international commitments to participate in the fight against transnational crime, particularly money laundering, and the fight against terrorist activity.

[16] **(ii)** ***Federal Courts Rules***

The *Federal Courts Rules* provide as follows for the maintenance of confidentiality of documents and information filed with the Court:

> 151(1) On motion, the Court may order that material to be filed shall be treated as confidential.
>
> 151(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.

> 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 legislative provision or the Court order under which it is required to be treated as confidential.

Discussion

[17] The information that falls within ss.55(1) of the Act, requires some navigation around various provisions of the statute, but is clearly defined, and is extensive with respect to the information that passes from and between BCLC and FINTRAC. To the extent that any such information is filed with the Court on the appeal from the Director's decision, BCLC submits that subsection 73.21(4) of the Act expressly prohibits its disclosure, by either FINTRAC or by the Court – without consideration or further review of the nature of the information and the consequences of it being made public. Alternatively, BCLC argues that the Court should have regard to the purposes of the Act, the manner in which the information in issue was obtained, and the purposes for its use, together with policy considerations regarding security and enforcement, such that if there is any discretion to be exercised by the Court, the Court should conclude that there is a public interest and need to keep the information confidential.

[18] The CBC submits that disclosure is not clearly or unambiguously prohibited by the Act, and that it would be inappropriate for the Court to impose a confidentiality order over all of the records with just reference to and mechanical application of sections 55 and 73.21 of the Act. The CBC states that not all of the information sought to be protected should be lumped together, but rather that each document should be reviewed on a principled basis to determine whether it should be kept from public access. Such review would be consistent with the public interest in open court

proceedings, and ensure that only that information that should be kept confidential (namely that which would satisfy application of the test under *Sierra Club*), is kept confidential. There is a concern with the comprehensive and all encompassing nature of the order sought by BCLC, without review to determine whether the information truly warrants being sealed. The CBC also notes that the open court principle and the right to freedom of expression of the media are fundamental aspects of the rights guaranteed by the *Canadian Charter of Rights and Freedoms*, and that any decision that would prevent public access to the justice system cannot be taken lightly.

[19] CBC submits that the Court must first look to the language of the statute to determine whether there is a clear intention on the part of Parliament to ban access to the proceeding and to the material filed. As noted in *Morguard Properties Ltd. v. City of* Winnipeg, [1983] 2 S.C.R. 493 at 509:

> In more modern terminology the courts require that, in order to adversely affect a citizen's right, whether as a taxpayer or otherwise, the Legislature must do so expressly. Truncation of such rights may be legislatively unintended or even accidental, but the courts must look for express language in the statute before concluding that these rights have been reduced. This principle of construction becomes even more important and more generally operative in modern times because the Legislature is guided and assisted by a well-staffed and ordinarily very articulate Executive. The resources at hand in the preparation and enactment of legislation are such that a court must be slow to presume oversight or inarticulate intentions when the rights of the citizen are involved.

[20] CBC submits that FINTRAC's obligation of non-disclosure contained in section 55(1)(f) of the Act refers only to Part 3 of the Act, and that because the documents sought by CBC for disclosure relate to the enforcement of Part 1, the non-disclosure provisions of section 55(1) do not

apply to the records being sought by CBC (which records or documents such as the Notice of Violation, are identified and defined in parts of the Act other than Part 3).

[21] However, these submissions fail, to take into account the clear and unambiguous language in section 55(1) of the Act that does not refer to the non-disclosure of any particular report or document, but the information that may be contained in one of a number of documents or reports, or that relates to the enforcement of FINTRAC's objects, which necessarily includes ensuring compliance with Part 1 (ss.40(e)). Section 55(1)(e) also makes clear and unambiguous reference to information prepared by FINTRAC from information referred to in paragraphs (a) to (d) of ss.55(1) – which is information submitted by BCLC in compliance with BCLC's reporting requirements under Part 1 of the Act.

[22] The information that is submitted and sought to be protected in this proceeding is the prescribed financial transaction information provided by BCLC to FINTRAC pursuant to ss. 9 of the Act and also relates to the information obtained in the administration and enforcement of Part 3 of the Act, and what was prepared by FINTRAC from information referred to in ss. 55(1)(b) of the Act. It is information relating to the manner in which BCLC records, monitors or otherwise deals with financial transactions in which money laundering and terrorist financing activities may be detected and reported. Parliament has intended that the Act protect findings made by FINTRAC as well as the information regarding how FINTRAC administers compliance – the Act requires that the integrity of FINTRAC's compliance and enforcement policies and procedures be protected.

[23] Moreover, the intention of Parliament is further made clear by ss. 73.22 of the Act that provides that only after proceedings in respect of a violation have concluded, can FINTRAC make public the nature of the violation, the name of the person or entity that committed it, and the amount of the penalty imposed. It would make little sense for this provision to be included in the Act, if through the proceedings in this Court, all of the information relating to the violation was already disclosed.

[24] With respect to the Respondent, Attorney General of Canada (the "AG"), the AG also submits that the blanket order sought by BCLC is overbroad and inconsistent with the principles of an open court process and that ss.55(1) neither imposes an automatic ban on all information or justifies the requested "sweeping confidentiality order". The AG submits that ss.73.21(4) does not impose a specific obligation on the Court to seal information, and at paragraph 22 of the written representations, further submits:

> Section 55(1) was never intended to shield an appellant under Part IV from the normal obligations of any litigant before the Court. Had Parliament intended to enact a "broad prohibition against disclosure" of the categories of information listed in s.55(1), as BCLC urges, it would have made that subsection applicable to everyone, not just the Centre.

[25] The AG states that it remains in the Court's discretion how to avoid disclosure of information, and that the Court should engage in a further analysis to determine if confidentiality is warranted under the *Sierra Club* test, to determine:

(i) whether a confidentiality 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

(ii) 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.

[26] In oral submissions, the AG submitted that the Court could, where it determined it to be reasonable, permit disclosure of some documents that were captured by ss.55(1) of the Act, following a review and analysis of those documents, applying the *Sierra Club* test and a finding that such documents did not warrant protection. Such determination and subsequent disclosure would result because for those documents the public interest in open courts or the freedom of expression outweighs the interest or need for the information to be kept confidential.

[27] As noted above, however, in the absence of a constitutional challenge to the non-disclosure provisions of the Act, there is no basis for the Court to engage in this analysis or balancing exercise. It can only be conducted for those documents or other information which fall outside ss.55(1) of the Act, but in respect of which a confidentiality order is sought. That analysis may be required on a further motion, but with respect to the four documents identified by CBC for release (having regard to the table of concordance referencing the information contained therein to the Act), and with respect to all other documents falling within ss.73.21(4) of the Act, the requirement of non-disclosure is clear and unambiguous. The Court cannot apply Rule 151 considerations to "less important" documents captured in ss. 55(1) by operation of the Act, and to the extent either the CBC or AG are inviting the Court to apply *Charter* considerations in the interpretation of the non-disclosure provisions, this would constitute a veiled constitutional challenge, without the

requirements for such challenge being satisfied. As noted by BCLC, the decision of *Canada (Information Commissioner) v. Canada (Prime Minister)*, [1993] 1 F.C. 427 is directly on point, where similarly, there was an express derogation of a protected right:

> Para. 89 Counsel for Ms. Calamai says that he does not challenge the constitutionality of s.14. Indeed he says it is valid and there are occasions when a refusal to disclose would be justified. However, if s.14 expressly confers the power on the government to limit an assumed protected right (access to government information), the attack must be on the constitutional validity, applicability or operability of s. 14. This requires compliance with s. 57 of the Federal Court Act.
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> 90 In effort to get around s. 57, counsel argues that s. 14 must only be "construed" with a view to para. 2(b) of the *Charter* and that this is different than questioning the validity, applicability or operability of the section.
>
> 91 While there may be circumstances where an argument relating to the construction of a statue does not involve the question of its validity, applicability or operability, I cannot appreciate such a distinction in this case based upon the arguments made. Counsel argues that the information in question here contributes to "core values" thereby creating a prima facie right of access and that in these circumstances the exemption in s. 14 is narrowed by para. 2(b) of the *Charter*. This argument if accepted would, to my mind, result in the inapplicability or inoperability of the exemption under s. 14 or at least the limiting or narrowing of the applicability or operability of the exemption when documents relating to core values are at issue. If it does not result in the limiting or narrowing of the applicability or operability of the exemption then "construing" s.14 in light of the Charter serves no useful purpose.
>
> 92 With respect to the *Charter* arguments…..
>
> ****
>
> ….in the absence of required notice, which may possibly lead to the hearing of additional submissions, I will not adjudicate the *Charter* challenge….

[28] In *Bell Express Vu Limited Partnership v. Rex* [2002] 2 S.C.R. 559, at para.66, the Supreme Court stated that "where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result", and at para.62, noted:

> Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [Charter] principles and values over interpretations that do not"…it must be stressed that, to the extent this Court has recognized a "Charter values" interpretative principle, such principle can only receive application in circumstances of genuine ambiguity, i.e. where a statutory provision is subject to differing, but equally plausible, interpretations. [emphasis added]

[29] Similarly, in the within proceeding, and as noted above, I find that the express non-disclosure provisions of the Act governing the treatment of designated information in an appeal in this Court constitute an unambiguous derogation from protected rights (freedom of expression, open courts), in respect of which any challenge requires a notice of constitutional question as required by section 75 of the *Federal Courts Act*. The confidentiality order must be granted for information falling within ss.55(1) of the Act, even for that designated information that might not otherwise have been so protected on application of Rule 151 of the *Federal Courts Rules* and *Sierra Club*.

ORDER

THIS COURT ORDERS that:

1. The Canadian Broadcasting Corporation/Radio Canada is granted leave to make oral and written submissions on this motion, without rights of appeal, and without being subject to any order on costs.

2. The motion for a confidentiality order is granted in part:

   a. Information and documents falling within subsection 55(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("designated confidential information") shall be filed and maintained in accordance with Rule 152 of the *Federal Courts Rules*;

   b. The confidentiality of the hearing of any motion, case management conference or appeal, in whole or in part, shall remain in the discretion of the judge or prothonotary;

   c. This order is without prejudice to either party filing a motion under Rule 151 of the *Federal Courts Rules* in respect of documents or information that do not fall within subsection 55(1) of *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*; and

   d. Where it is not reasonably practical to segregate designated confidential information from non-confidential information, the parties may file an entire document or volume thereof in a sealed envelope, provided that a public version of the document or

volume, from which confidential information has been redacted or removed, is also filed on the public record.

3. In the event the parties cannot agree on the costs of this motion, each may file written submissions no longer than 3 pages in length, within 10 days of the date of this Order.

"Martha Milczynski"
Prothonotary

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1801-10
STYLE OF CAUSE:	BRITISH COLUMBIA LOTTERY CORPORATION v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 10, 2012
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