Federal Court of Appeal  Cour d'appel fédérale

Date: 20160311

Docket: A-227-15

Citation: 2016 FCA 80

CORAM: **DAWSON J.A.**
NEAR J.A.
BOIVIN J.A.

BETWEEN:

GEORGE KIRIKOS

Appellant

and

FRANK FOWLIE and HER MAJESTY THE QUEEN

Respondents

Heard at Toronto, Ontario, on February 16, 2016.

Judgment delivered at Ottawa, Ontario, on March 11, 2016.

REASONS FOR JUDGMENT BY: THE COURT

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REASONS FOR JUDGMENT BY THE COURT

THE COURT

[1] Mr. George Kirikos appeals an order rendered by Justice Rennie, then at the Federal Court, (the Judge) dated April 24, 2015 (2015 FC 528) allowing in part Mr. Kirikos' motion to set aside an order rendered by Justice Scott (then at the Federal Court) on June 18, 2012 that all

material related to Court File T-1971-98, including the reasons of Justice Gibson issued on July 19, 2000, be kept confidential.

[2] In granting in part the motion of Mr. Kirikos to set aside the confidentiality order of Justice Scott, the Judge made public the reasons for judgment of Justice Gibson with the exception of three redacted words. The Judge also ordered that any medical reports in the said Court File referencing Dr. Frank Fowlie's personal medical information be sealed and kept confidential by the Registry. The Judge made no order as to costs.

I. **Factual Background and Procedural Context**

[3] The genesis of the current dispute can be traced back to nearly twenty years ago.

[4] In 1998, Dr. Frank Fowlie filed a judicial review application in the Federal Court challenging an administrative decision regarding employment disability benefits. On July 19, 2000, Justice Gibson dismissed the application for judicial review in *Fowlie v. Canada*, [2000] F.C.J. No. 1145, 187 F.T.R. 255 (QL) [*Fowlie v. Canada*]. In 2002, Dr. Fowlie noticed that the reasons for judgment in *Fowlie v. Canada* were posted on the Federal Court website. In the second paragraph of these reasons, there was a reference to Dr. Fowlie's medical condition. Dr. Fowlie thus contacted the Ottawa Registry of the Federal Court on February 22, 2002 and requested that the internet version of Justice Gibson's decision on the Federal Court's website be amended so as to remove his personal medical information.

[5] On March 4, 2002, in an era when the internet was still nascent, Justice Gibson issued a direction and acceded to Dr. Fowlie's request (Compendium of the appellant at tab 3). In doing so, Justice Gibson did not issue a confidentiality order pursuant to Rule 151 of the *Federal Courts Rules*, SOR/98-106 nor did he amend his reasons by order. Rather, he directed that personal medical information found in paragraph 2 of his reasons be deleted from the Federal Court's website. As a result, although Dr. Fowlie's personal medical information was deleted from Justice Gibson's reasons posted on the Federal Court's website, it remained accessible through the Registry Office and, more importantly, in other public sources such as CanLII.

[6] In 2004, Mr. Kirikos, the appellant in the present matter, lodged a complaint with the Internet Corporation for Assigned Names and Numbers (ICANN) regarding a determination made pursuant to the Universal Domain Name Resolution Policy (UDRP). At that time, Dr. Fowlie was the Ombudsman of ICANN. After some communication with Mr. Kirikos, Dr. Fowlie determined that he lacked jurisdiction to hear Mr. Kirikos' complaint.

[7] A number of years later, in February 2011, Mr. Kirikos published two tweets on his Twitter account about *Fowlie v. Canada*, which included a link to the decision available on the CanLII website. He also posted a tweet that revealed Dr. Fowlie's medical condition. At that point, Dr. Fowlie realized that, notwithstanding the direction issued by Justice Gibson in 2002, his medical condition was in fact public and accessible via public databases other than the Federal Court's website, namely CanLII.

[8] In May 2011, Dr. Fowlie filed a complaint before the Human Rights Tribunal of Ontario on the basis that Mr. Kirikos' tweets constituted discrimination on disability grounds. Realizing subsequently that the Human Rights Tribunal of Ontario lacked jurisdiction, Dr. Fowlie then withdrew his complaint. On May 31, 2011, Mr. Kirikos posted on his blog that Dr. Fowlie's complaint had been "entirely frivolous and totally devoid of merit" and further included a link to the *Fowlie v. Canada* decision. He also wrote a tweet about the blog post in which he included a link to the same.

[9] A year later, in May 2012, Dr. Fowlie filed a motion requesting a confidentiality order on the entire underlying file related to his 1998 judicial review application and Justice Gibson's resulting reasons for judgment (Court File T-1971-98). It is worthy of note that in making this motion, Dr. Fowlie named the Crown, not Mr. Kirikos, as the respondent. The Crown was served with the motion but declined to make any written submissions and did not appear. Mr. Kirikos was not served with Dr. Fowlie's motion for a confidentiality order and the proceeding therefore unfolded without him having knowledge of it.

[10] On June 18, 2012, Justice Scott acquiesced to Dr. Fowlie's request and granted a "wall-to-wall" confidentiality order for all materials related to Court file T-1971-98.

[11] On June 26, 2012, Dr. Fowlie used Justice Scott's confidentiality order to approach Twitter and request that Mr. Kirikos' tweets be removed. Twitter initially responded to Dr. Fowlie that it did not get involved in disputes between users. However, Twitter eventually contacted Mr. Kirikos requesting that he delete the tweets. In doing so, Twitter included a copy

of its communication with Dr. Fowlie as well as a copy of Justice Scott's confidentiality order. Prior to Twitter's request, Mr. Kirikos had no knowledge of the confidentiality order rendered by Justice Scott.

[12] On November 1, 2012, Mr. Kirikos filed a notice of motion to set aside the confidentiality order of Justice Scott. The Judge granted the motion in part and ordered that the reasons for judgment of Justice Gibson dated July 19, 2000 be made public, with the exception of the three redacted words and that medical information related to Dr. Fowlie be sealed and kept confidential. It is that decision which is under appeal.

II. **Statutory provision**

[13] Rule 151 of the *Federal Courts Rules*:

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.

III. **Standard of Review**

[14] The standard of review for questions of law is correctness. Questions of fact and mixed fact and law in respect of which there is no extricable question of law are reviewed on the standard of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

IV. **Issues**

[15] This appeal raises the following issues:

- Did the Judge err in fact or in law in applying the test for granting a confidentiality order?
- Did the Judge err in fact or in law by ordering that a portion of references to Dr. Fowlie's medical information in the Court File T-1971-98 be redacted?
- Did the Judge err in declining to order costs in favour of Dr. Fowlie?

V. **Analysis**

[16] Before this Court, Mr. Kirikos essentially argues that the Judge failed to identify and apply the appropriate legal principles in assessing whether to issue a confidentiality order. Specifically, Mr. Kirikos alleges that the Judge erred in allowing a portion of the reasons for judgment of Justice Gibson (three words) be redacted.

[17] Dr. Fowlie cross-appeals and submits that he should have been awarded costs and that the Judge further erred in failing to redact all references to his medical information in the Court file T-1971-98.

[18] At the outset, this Court observes that this case serves as a telling illustration of the challenges posed by the publication of decisions in the internet era. The starting point in addressing such challenges is the long-standing open court principle, a corollary to the fundamental right of freedom of expression as guaranteed in 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* (U.K.), 1982, c. 11. In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 [*Sierra Club*], the Supreme Court of Canada observed the following at paragraph 36:

> The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23, La Forest J. expressed the relationship as follows:
>
> > The principle of open courts is inextricably tied to the rights guaranteed by s. 2*(b)*. Openness permits public access to information about courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2*(b)*, so too is the right of members of the public to obtain information about the courts in the first place.
>
> Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

[19] What is meant by the "open court principle"? In a nutshell, it signifies that in Canada, unless otherwise stated, all court proceedings, including all material forming part of a court's records, remain publicly available. As such, confidentiality orders are the exception. Orders such as the one requested in this case are granted only in exceptional circumstances to avoid deleterious effects on the principle of open courts and freedom of expression (*Sierra Club* and *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36 (QL)).

[20] In order to obtain a confidentiality order, an applicant must meet the test set out by the Supreme Court in both *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104 and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442. The test is known as the *Dagenais/Mentuck* test and was reformulated in *Sierra Club* to include protection for commercial interest.

[21] Specifically, under the *Dagenais/Mentuck* test, a party seeking a confidentiality order must demonstrate that:

1. the order is necessary to prevent a serious risk to the proper administration of justice, because reasonably alternative measures will not prevent the risk, and;
2. the salutary effects of the order outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[22] In *Sierra Club*, which concerned technical information regarding an ongoing environmental assessment for the construction of nuclear reactors, the Supreme Court stated the following at paragraph 60 with regard to confidential orders:

> Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (F.C. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).
>
> [Emphasis added]

[23] In *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253 [*Named Person*], the Supreme Court ruled that in the context of informer privilege in criminal cases, prior publication defeats the privilege (at para. 116; see also the decision from this Court in *Leahy v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227, [2012] F.C.J. No. 1158).

[24] Although the contexts in *Sierra Club* and *Named Person* are somewhat different from the one at issue, they are not sufficiently different to distance this case from the principles that have emerged in the jurisprudence and the unequivocal language of the Supreme Court with respect to the extreme caution that must be exercised in granting confidentiality orders given their effect on the entrenched and guaranteed right to freedom of expression.

[25] Applying these principles to the present case, we note that Dr. Fowlie's medical information has been available and in the public realm for over a decade. In fact, the information was first adduced by Mr. Fowlie in a public Federal Court file in 1998. The information was further used in an application by Dr. Fowlie before the Human Rights Tribunal of Ontario and later before the British Columbia Small Claims Court, and in these instances, Dr. Fowlie did not seek a confidentiality order, therefore allowing the information to remain public.

[26] As a result, the Court does not accept that the information related to Dr. Fowlie's medical condition has been "treated at all times as confidential" nor does it accept that it has been "accumulated with a reasonable expectation of it being confidential" (*Sierra Club*, at para. 60). Moreover, the language of Rule 151 is prospective in nature: it confines the Court's ability to make confidentiality orders in connection to materials "to be filed" as opposed to materials that

have already been filed. In the present circumstances, the fact that the information in question has been public for more than a decade weighs heavily against granting the confidentiality order sought by Dr. Fowlie.

[27] It follows that, to the extent that the Judge proceeded with his analysis without addressing the issue as to whether Dr. Fowlie's medical information was treated at all relevant time as confidential, this was an error.

[28] As this is dispositive of the appeal, it is not necessary to address the additional alleged errors with respect to the Judge's application of the *Dagenais/Mentuck* and *Sierra Club* framework, more particularly in relation to the "necessity" and "balancing" factors.

[29] On the cross-appeal, in his memorandum of fact and law at paragraph 47, Dr. Fowlie requests that this Court "order a publication ban forbidding the publishing of his medical diagnosis". However, since Dr. Fowlie did not request a publication ban in his notice of cross-appeal, this Court shall not make a ruling in this regard. Moreover, Dr. Fowlie has failed to persuade the Court that any confidential order is justified at law.

[30] Dr. Fowlie also asserts that he was entitled to costs in the Federal Court. We are of the view that the Judge exercised his discretion appropriately in refusing to award costs to Dr. Fowlie. There is no reason that would warrant the intervention of this Court on that issue.

[31] Consequently, we will allow the appeal without costs and dismiss the cross-appeal without costs. Rendering the order that the Judge should have rendered, the confidentiality order in respect of Court File T-1971-98 will be set aside in its entirety.

[32] The outcome of this appeal is obviously not the one sought by Dr. Fowlie. The price to pay for freedom of expression is that it will sometimes protect hurtful comments such as the ones at issue made by Mr. Kirikos on social media. However, despite the protracted relationship between Dr. Fowlie and Mr. Kirikos and the fact that Mr. Kirikos obtained the information from publicly available sources, we fail to understand what purpose, if any, Mr. Kirikos had in retrieving and disseminating medical information regarding Dr. Fowlie filed nearly twenty years ago.

"Eleanor R. Dawson"

J.A.

"D.G. Near"

J.A.

"Richard Boivin"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-227-15
STYLE OF CAUSE:	GEORGE KIRIKOS v. FRANK FOWLIE and HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 16, 2016
REASONS FOR JUDGMENT BY THE COURT:	DAWSON J.A. NEAR J.A. BOIVIN J.A.
DATED:	MARCH 11, 2016

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