Federal Court of Appeal

Cour d'appel fédérale

Date: 20200217

Docket: A-92-19

Citation: 2020 FCA 45

CORAM: **BOIVIN J.A.**
GLEASON J.A.
RIVOALEN J.A.

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

BNSF RAILWAY COMPANY

Respondent

and

INTELLECTUAL PROPERTY INSTITUTE OF CANADA

Intervener

Heard at Montréal, Quebec, on December 16, 2019.

Judgment delivered at Ottawa, Ontario, on February 17, 2020.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: GLEASON J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. Introduction

[1] The Canadian National Railway Company (CN) appeals an Order of the Federal Court *per* Locke J., as he then was, rendered on February 13, 2019 (the Order), pursuant to which a

motion brought jointly by CN and BNSF Railway Company (BNSF) seeking a protective order was dismissed. Reasons for the Order were subsequently issued on March 7, 2019.

[2] The parties' underlying dispute concerns intellectual property matters. As is often the case in litigating such disputes, parties are required to disclose commercially sensitive and confidential information. Influenced in part by the practice in the United States and the *Patented Medicines (Notice of Compliance) Regulations*, S.O.R./93-133, protective orders are typically sought for the pre-trial exchange of information between parties involved in an intellectual property dispute. For the past few decades, such orders were part of an entrenched practice in the Federal Court and have routinely been granted on an uncontentious basis. More recently, however, the availability of such orders has been put into question in various instances before the Federal Court. The present appeal is an example of such an instance.

[3] This appeal accordingly concerns the test applicable in determining the availability of protective orders—i.e., under what criteria such an order should be granted. Federal Court jurisprudence is inconsistent in this regard and the present appeal offers an opportunity to provide some much-needed guidance.

[4] For the reasons that follow, I would allow the appeal without costs.

II. Background

[5] The appellant CN and the respondent BNSF are two major corporations that compete in the freight transportation business in North America. Their underlying dispute is related to

patented technology that allows customers to arrange rail shipments online. Given the nature of the patent invalidity allegations raised by BNSF, the parties knew that they would be required to disclose confidential material and highly sensitive information during the discovery process. They accordingly prepared a joint draft protective order based on a Federal Court template developed over the years by the Federal Court IP Users' Committee. This is common practice in intellectual property disputes before the Federal Court, particularly patent disputes between direct competitors. Historically, such motions on consent were consistently granted by the Federal Court but, more recently, there have been instances where such motions have been denied.

[6] In the present case, given the growing inconsistency of the Federal Court's jurisprudence regarding protective orders, the parties were invited by a prothonotary to file a formal motion that would be heard directly by a Federal Court judge (as opposed to a prothonotary) so as to avoid one level of appeal. The parties' formal motion for a protective order was heard by Locke J. (the Motions Judge) on February 11, 2019 at the direction of the Chief Justice of the Federal Court.

III. The Order of the Motions Judge

[7] As previously indicated, the Motions Judge issued his Order without reasons dismissing the parties' joint motion on February 13, 2019. The Motions Judge subsequently issued reasons on March 7, 2019.

[8] In his reasons, the Motions Judge acknowledged that "[m]otions on consent to issue protective orders have traditionally been granted by this Court, especially in patent actions". However, he questioned the established practice in view of recent Federal Court decisions (*Live Face on Web, LCC v. Soldan Fence and Metals (2009) Ltd.*, 2017 FC 858, 283 A.C.W.S. (3d) 821 (Prothonotary Tabib); *Seedlings Life Science Ventures LLC v. Pfizer Canada Inc.*, 2018 FC 443, 292 A.C.W.S. (3d) 391 (Prothonotary Tabib), reversed in *Seedlings Life Science Ventures, LLC v. Pfizer Canada Inc*., 2018 FC 956, 159 C.P.R. (4th) 51 (Ahmed J.) [*Seedlings Life #2*]). The Motions Judge further recalled the distinction between protective orders, confidentiality orders, and hybrid orders. He explained that protective orders prescribe "the treatment of confidential information" but do not address filing confidential information with the Court, while confidentiality orders do cover the filing of confidential information with the Court, pursuant to Rule 151 of the *Federal Courts Rules*, S.O.R./198-106 (Motions Judge Reasons for Order at para. 10). He also noted that hybrid orders contain provisions that govern both confidential information exchanged between parties during the discovery process and confidential information filed with the Court (Motions Judge Reasons for Order at para. 10).

[9] Against this background, the Motions Judge considered the decisions in *Seedlings Life #2* and, particularly, *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 [*Sierra Club*] and concluded that the test for confidentiality orders, which incorporates a necessity requirement, also applied to determining the availability of protective orders (Motions Judge Reasons for Order at paras. 12-19). On this basis, he found that, in the present case, a protective order was not necessary because "reasonably alternative measures" were available to the parties. He was of the view that an implied undertaking, supplemented by a

"protective agreement" between the parties, was a "reasonable alternative measure" to the protective order jointly sought by the parties (Motions Judge Reasons for Order at para. 53). He accordingly dismissed their joint motion.

IV. The Appeal

[10] This appeal is brought by CN. BNSF did not participate. By order dated December 9, 2019, the Intellectual Property Institute of Canada (IPIC) was granted leave to intervene given the nature of the issue at the heart of the appeal, i.e., the test applicable in determining the availability of protective orders, which is an issue of importance in the area of intellectual property.

V. Issue

[11] As indicated, this appeal concerns the test applicable to determining whether a protective order should be granted. In this case, this Court must assess whether the Motions Judge erred in denying the protective order jointly sought by CN and BNSF.

VI. Relevant Statutory Provisions

[12] The relevant provisions of the *Federal Courts Rules* are reproduced in the Appendix to these Reasons.

VII. Standard of Review

[13] The applicable standard of review in this case is the one stated by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]. Applying *Housen*, for questions of law and questions of mixed fact and law, where there is an extricable legal principle at issue, the applicable standard is that of correctness. Questions of fact and mixed fact and law are reviewable on the standard of palpable and overriding error.

VIII. Analysis

A. *The Parties' Submissions*

[14] As submitted by CN and IPIC, the test regarding the availability of protective orders referred to as the *AB Hassle* test is well established. IPIC's summary is reproduced as a helpful reminder (IPIC memorandum of fact and law at para. 30):

> […] Before issuing a protective order relating to information to be produced, the Court must be satisfied that "the moving party believes that its proprietary, commercial and scientific interests would be seriously harmed by producing information upon which those interests are based" [citing *AB Hassle v. Canada (Minister of National Health and Welfare*) (1998), 161 F.T.R. 15, 83 C.P.R. (3d) 428 at paras. 15, 20-30, affirmed in *AB Hassle v. Canada (Minister of National Health and Welfare*), [2000] 3 F.C. 360, 5 C.P.R. (4th) 149 (Fed. C.A.); See also *Sierra Club* at para. 14]. In the event a party challenges a confidential designation made by the other party, in determining whether information is confidential, the Court must be satisfied that it "has been treated by the party at all relevant times as confidential," and that "on a balance of probabilities, [the disclosing party's] proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of information" (the "*AB Hassle* test"). (Footnotes omitted.)

[15] In this particular case, CN and IPIC submit that the Motions Judge's decision fails to follow binding precedent established by the Supreme Court of Canada in *Sierra Club*. They

further contend that the Motions Judge misinterpreted *Sierra Club* and erred when he found that the test regarding the availability of confidentiality orders as set out in *Sierra Club* is also applicable to protective orders. CN and IPIC maintain that there are well-founded justifications for the long-standing practice of granting protective orders. They emphasize that Federal Court cases departing from this practice are concerning for a number of reasons:

- The nature of intellectual property litigation—where parties are often direct competitors—is such that the need to protect the disclosure of confidential and sensitive information not only to third parties, but to the other party to the litigation as well, is much greater than in other types of disputes;

- Intellectual property litigants are often involved in cross-border litigation, particularly in the United States where courts have rejected the implied undertaking rule of confidentiality and hence typically issue protective orders;

- Reciprocity of the issuance of protective orders is key in cross-border disputes involving the United States;

- The issuance of protective orders provides legal certainty as there is no issue regarding their enforceability when granted by the Federal Court.

[16] As can be gleaned from CN and IPIC's submissions, the applicability of the test set out in *Sierra Club* in the context of protective orders is central to the issue at hand. The proceedings in *Sierra Club* were in fact initiated in Federal Court with an application for a confidentiality order that would restrict the public's access to the Court's information *(Sierra Club of Canada v. Canada (Minister of Finance)*, [2000] 2 F.C. 400, 179 F.T.R. 283 (Fed. T.D.) [*Sierra Club FC*]). Significantly, *Sierra Club FC* was not about protective orders.

[17] In balancing the need for confidentiality against "the public interest in open and accessible court proceedings", the Federal Court dismissed the application for a confidentiality order (*Sierra Club FC* at paras. 17 and 31). In order to understand whether there was a need for

confidentiality, the Federal Court turned to the *AB Hassle* test for protective orders because it reasoned that the two types of orders were essentially the same (*Sierra Club FC* at para. 21). However, the Federal Court noted that, "information voluntarily tendered stands on a different footing than information disclosed under compulsion." (*Sierra Club FC* at paras. 24-26).That is, the Federal Court recognized that different considerations bear on matters that involve evidence parties choose to tender, to which confidentiality orders apply, and those that involve potential evidence parties are required to disclose, such as information shared during the discovery process, to which protective orders apply.

[18] A majority of the Federal Court of Appeal upheld the Federal Court's decision to deny the confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance)*, [2000] 4 F.C. 426, 187 D.L.R. (4th) 231 (Fed. C.A.)). The Supreme Court of Canada allowed the appeal, finding that the confidentiality order should have been granted.

B. *The Proper Application of Sierra Club*

[19] In *Sierra Club*, the Supreme Court established a new test for confidentiality orders by reference to the principles applicable in the context of publication bans. It explained at paragraph 37 that:

> […] In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

[20] The Supreme Court in *Sierra Club* also referred to its earlier decision in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 175 N.R. 1 [*Dagenais*], which addresses publication bans in the criminal law context. The Court noted that *Dagenais* sets forth a framework "[that] utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests" such that it could "be adapted and applied to various circumstances" (*Sierra Club* at para. 38). It went on to adapt the *Dagenais* model to the matter before it and articulated the new test for confidentiality orders in the following manner (*Sierra Club* at para. 53):

> […] A confidentiality order under Rule 151 [of the *Federal Courts Rules*] 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.

[21] Applying the test for a confidentiality order to the facts of the case, the Supreme Court explained that the determination of whether a confidentiality order is required by the first prong of the test is made as follows (*Sierra Club* at para. 58):

> At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself, or to its terms. [Emphasis added.]

[22] The Supreme Court went on to address the *AB Hassle* test, which, as indicated earlier, concerns protective orders (*Sierra Club* at paras. 60-61). The Supreme Court expressly referred to the Federal Court's reasoning in the matter before it and the similarity between protective orders and confidentiality orders:

> Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. 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 and 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).
>
> Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

[23] It can be seen from the above that, while the Supreme Court relied on the *AB Hassle* test regarding protective orders, it did so solely in the context of assessing whether the disclosure of confidential documents would impose a serious risk on an important commercial interest in the first prong of the test regarding confidentiality orders. The Supreme Court's reliance on the *AB Hassle* test ends there, and does not in any way extend the *AB Hassle* test, applicable to protective orders, to include a consideration of necessity, alternative measures, or the scope of the order to ensure that it is not overly broad (*Sierra Club* at para. 62). It follows that the necessity element of the *Sierra Club* test cannot be said to apply in the context of protective

orders, notwithstanding the reference to the *AB Hassle* test and the Supreme Court's comment recognizing a similarity between protective orders and confidentiality orders earlier in the decision (*Sierra Club* at para. 14). Indeed, as observed by the appellant, "[n]owhere does the [Supreme] Court say that the test for confidentiality orders set out earlier in the decision at paragraph 53 is also applicable to protective orders, and the [Supreme] Court does not alter the law by implication."

[24] It bears emphasis that the underlying interests in seeking protective orders and confidentiality orders are significantly different. This was acknowledged by the Motions Judge in the present instance when he observed that "a protective order has no deleterious effects on the principle of open and public courts", unlike confidentiality orders. Yet, the Motions Judge deemed that "a request for a protective order should be considered using the same criteria as set out in paragraphs 53 and following of *Sierra Club* for a confidentiality order" (Motions Judge Reasons for Order at para. 19). This is inconsistent given that the criteria in *Sierra Club* are meant to address interests, in particular the open court principle, which are simply not in play in the context of protective orders at the pre-trial discovery stage. This was made clear by the Supreme Court in *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157, where the Court stated (at para. 21):

> […] Pre-trial discovery does not take place in open court. The vast majority of civil cases never go to trial. Documents are inspected or exchanged by counsel at a place of their own choosing. In general, oral discovery is not conducted in front of a judge. The only point at which the "open court" principle is engaged is when, if at all, the case goes to trial and the discovered party's documents or answers from the discovery transcripts are introduced as part of the case at trial.

[25] In short, there is no justification for applying the same onerous *Sierra Club* test that is applied to confidentiality orders to protective orders. Confidentiality orders are squarely meant to circumvent the open court principle, while protective orders are instead used in instances where the open court principle is not engaged.

[26] In the present case, the Motions Judge accepted that confidential information would be exchanged during the discovery stage. However, he questioned whether a protective order was necessary on the basis that "reasonably alternative measures will not prevent the risk to the parties' interest in that confidential information" (Motions Judge Reasons for Order at para. 22) [emphasis omitted]. In doing so, he extended the necessity element of the test for confidentiality orders to motions for protective orders. Indeed, he rejected the *AB Hassle* test for protective orders cited with approval at paragraph 60 in *Sierra Club* because "it fails to consider whether the requested order is necessary because reasonably alternative measures will not prevent the risk to that interest" (Motions Judge Reasons for Order at paras. 18-19). This is tantamount to applying confidentiality order criteria without distinction to a protective order. Conflating the *AB Hassle* test for protective orders with the more onerous test for a confidentiality order discussed in *Sierra Club*, as did the Motions Judge, is an error in law. It follows that the Order dismissing the joint motion for a protective order should be set aside.

C. *Hybrid Orders*

[27] Although the present case was argued principally with respect to protective orders, a few observations regarding hybrid orders are warranted.

[28] It is recalled that a hybrid order encompasses provisions governing both confidential information exchanged between parties and confidential information filed with the Court. The protective order sought in the present instance can be characterized as a hybrid order (Motions Judge Reasons for Order at para. 11; Appellant's memorandum of fact and law at paras. 25-27).

[29] CN and IPIC both contend that hybrid orders are proposed for practical reasons: to avoid the parties having to seek confidentiality orders every time an interlocutory motion is brought with respect to the discovery of a matter. The question however, is whether this has implications for the applicable test.

[30] The test for granting a hybrid order, in the form I endorse below, remains the same as the test for granting a protective order. As noted, hybrid orders also address materials that might be filed with the Court with a confidential designation. As such, a party who wishes to have the Court treat documents subject to the hybrid order as confidential must bring a motion pursuant to Rule 151 of the *Federal Courts Rules* forthwith after filing the documents. It is at this juncture, when the Court is being asked to seal documents, that the *Sierra Club* test set out at paragraph 20, above, is engaged. The motion for a confidentiality order should not automatically be left for the trial judge to determine, but should be filed at the first opportunity. This approach not only respects the practical reasons for requesting a hybrid order but also the fundamental open court principle. Indeed, filing a motion for a confidentiality order as soon as the documents identified as confidential are filed with the Court ensures that a ruling can be issued promptly, while avoiding the possibility that sealed material forming part of the public record remains sealed any longer than necessary.

D. *A Few Practical Observations*

[31] The Federal Court's authority to issue protective orders is derived from Rules 3, 4 and 385(1)(a) with respect to specially managed proceedings, as well as the Federal Court's inherent jurisdiction. Although the Federal Court is in no way obliged to grant a protective order, I am of the view that there has been no significant and compelling changes to the law that justify the refusal to grant a protective order on consent (or not) if (i) the *AB Hassle* test is met and (ii) the protective order submitted to the Federal Court is in accordance with the protective order template jointly developed over the years between the Intellectual Property Bar and the Federal Court. It is true that reviewing draft protective orders may be time-consuming for the Federal Court, but such reviews remain necessary nonetheless. For more certainty, and to facilitate the Court's review, the parties should provide sufficient evidence in support of their motion for a protective order. The parties should also adopt the practice of identifying the portions of their draft protective order that have been added to the template or removed from it.

[32] Protective orders undoubtedly remain pertinent and useful for intellectual property litigants and there is no justification, legal or otherwise, for stifling this long-standing practice. Not only do protective orders provide "structure and enforceability in ways the implied undertaking", or private agreements, for that matter, cannot, but they are also consistent with "modern, efficient, effective and proportional litigation" (*Paid Search Engine Tools, LLC v. Google Canada Corporation*, 2019 FC 559, 306 A.C.W.S. (3d) 831 at paras. 53 and 58 (Phelan J.); See also *dTechs EPM Ltd. v. British Columbia Hydro & Power Authority*, 2019 FC 539, 305 A.C.W.S. (3d) 161 at paras. 47-49 and 53-60 (Lafrenière J.)). They further add support to the

Federal Court’s efforts over the past decades to streamline complex intellectual property litigation and ensure that the system remains efficient.

IX. Conclusion

[33] For the foregoing reasons, I would allow the appeal, set aside the Motions Judge’s Order dated February 13, 2019 (T-913-17), and render the order that should have been rendered. I would grant the protective order in the form attached as Schedule A to BNSF’s Notice of Motion in the Court below (Tab 19 of the Appeal Book), subject to an amendment that would require a party who wishes to have documents treated confidentially by the Court in the context of an interlocutory proceeding to bring a motion under Rule 151 for a confidentiality order forthwith after the documents are filed.

[34] As the respondent did not appear in this appeal, I would not grant costs.

“Richard Boivin”
J.A.

“I agree.
Mary J.L. Gleason J.A.”

“I agree.
Marianne Rivoalen J.A.”

APPENDIX

***Federal Courts Rules* (S.O.R./98-106)**	***Règles des Cours fédérales* (D.O.R.S./98-106)**
General principle	**Principe général**
3 These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.	3 Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.
Matters not provided for	**Cas non prévus**
4 On motion, the Court may provide for any procedural matter not provided for in these Rules or in an Act of Parliament by analogy to these Rules or by reference to the practice of the superior court of the province to which the subject-matter of the proceeding most closely relates.	4 En cas de silence des présentes règles ou des lois fédérales, la Cour peut, sur requête, déterminer la procédure applicable par analogie avec les présentes règles ou par renvoi à la pratique de la cour supérieure de la province qui est la plus pertinente en l'espèce.
[…]	[…]
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.
[…]	[…]
Powers of case management judge or prothonotary	**Pouvoirs du juge ou du protonotaire responsable de la gestion de l'instance**
385 (1) Unless the Court directs otherwise, a case management judge or a prothonotary assigned under paragraph 383(c) shall deal with all matters that arise prior to the trial or hearing of a specially managed proceeding and may	385 (1) Sauf directives contraires de la Cour, le juge responsable de la gestion de l'instance ou le protonotaire visé à l'alinéa 383c) tranche toutes les questions qui sont soulevées avant l'instruction de l'instance à gestion spéciale et peut :
(a) give any directions or make any orders that are necessary for the just, most expeditious and least expensive determination of the	a) donner toute directive ou rendre toute ordonnance nécessaires pour permettre d'apporter une solution au litige qui soit juste et la plus

proceeding on its merits;

expéditive et économique possible;

(b) notwithstanding any period provided for in these Rules, fix the period for completion of subsequent steps in the proceeding;

b) sans égard aux délais prévus par les présentes règles, fixer les délais applicables aux mesures à entreprendre subséquemment dans l'instance;

(c) fix and conduct any dispute resolution or pre-trial conferences that he or she considers necessary; and

c) organiser et tenir les conférences de règlement des litiges et les conférences préparatoires à l'instruction qu'il estime nécessaires;

(d) subject to subsection 50(1), hear and determine all motions arising prior to the assignment of a hearing date.

d) sous réserve du paragraphe 50(1), entendre les requêtes présentées avant que la date d'instruction soit fixée et statuer sur celles-ci.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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