Federal Court Cour fédérale

Date: 20240924

Docket: T-1580-09

Ottawa, Ontario, September 24, 2024

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ABOUSFIAN ABDELRAZIK

Plaintiff

and

HIS MAJESTY THE KING IN RIGHT OF CANADA AND LAWRENCE CANNON

Defendant

CANADIAN BROADCASTING CORPORATION/ SOCIÉTÉ RADIO-CANADA

Intervener

ORDER

UPON Notice of Motion filed by the Defendant Crown, His Majesty the King, dated July 2, 2024, for:

1. An Order pursuant to Rule 29(2) of the *Federal Courts Rules*, SOR/98-106 [Rules], that the testimony of witnesses who are current or former employees of the

Canadian Security Intelligence Service; Scott Heatherington; Philippe Lapierre; and any other witness who may testify about matters that may be subject to further notice under s. 38.01 of the *Canada Evidence Act* RSC 1985, c C-5 [CEA] will be heard *in camera* and will not be open to the public.

2. An Order that transcripts of these witnesses' testimony shall be made available to the public forthwith after having been reviewed and redacted by the Defendant Crown to ensure that they comply with this Court's Order dated August 11, 2023 (2023 FC 1100, per St-Louis J.) prohibiting disclosure of certain information pursuant to s. 38.06(3) of the CEA, and that no additional sensitive or potentially injurious information that has not yet been subject to a determination by the Federal Court is made public.

3. An Order granting the Defendant Crown costs on this motion.

4. Such further and other relief as counsel may advise and this Honourable Court may permit.

AND UPON noting the Court's September 4, 2024 Order granting the Canadian Broadcasting Corporation/Société Radio-Canada [CBC/Radio-Canada] leave to intervene on the Defendant Crown's motion;

AND UPON considering the written and oral submissions from the parties;

AND UPON considering *Canada (Attorney General) v Abdelrazik*, 2023 FC 1100, the decision of Justice Martine St-Louis responding to the Attorney General of Canada's application

under subsection 38.04(1) of the CEA for an order with respect to disclosure of information about which notices were given to the AGC under subsections 38.01(1) and 38.01(3) of the CEA [Section 38 Judgment];

AND UPON considering the Defendant Crown's September 13, 2024 letter advising that the Defendant Crown learned, on September 12, 2024, that the testimony of defence fact witness James Wright also gives rise to a serious risk of inadvertent disclosure of information protected by the Section 38 Judgment and that the Defendant Crown requests Mr. Wright's testimony be heard *in camera*;

AND UPON considering the Plaintiff's September 16, 2024 letter objecting to the admission of the Defendant Crown's September 13, 2024 letter on the basis that it amounts to further additional submissions without consent or leave of the Court on a motion that has been argued, and also disputes certain of the factual information as set out by the Defendant Crown;

AND UPON concluding that the motion will be dismissed for the following reasons:

[1] The Defendant Crown notes that its documentary production includes approximately 6000 documents. In excess of 1400 of those documents contain redactions that have been ordered pursuant to s. 38 of the CEA, which establishes a scheme "to protect from disclosure information that would, if disclosed, pose a threat to national security, national defence or international relations, while at the same time permitting conditional, partial and restricted disclosure in appropriate circumstances."

[2] The Defendant Crown anticipates that approximately six of its estimated 15 fact witnesses – current or former employees of the Canadian Security Intelligence Service [CSIS], the Foreign Intelligence Division of Global Affairs Canada [GAC], and the Royal Canadian Mounted Police [RCMP] – will testify about matters closely linked to information protected by the Section 38 Judgment. Citing the risk of inadvertent disclosure, the Defendant Crown brings this motion seeking an Order allowing these witnesses to testify *in camera*, but in the presence of the Plaintiff and his counsel. The Defendant Crown would prepare vetted transcripts of the *in camera* testimony on an expedited basis and those transcripts would be released to the public.

[3] Courts are presumptively open to the public thereby providing the transparency required to maintain the integrity of judicial processes, and demonstrating that justice is rendered in accordance with the rule of law (*Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2 at para 1). Despite this strong and constitutionally protected presumption in favour of open courts, discretionary authority exists to limit the open court principle (Rule 29(2) of the Rules).

[4] A party seeking to restrict that principle is required to demonstrate that openness presents a serious risk to a competing interest of public importance. That party must satisfy a high threshold in meeting the burden of demonstrating a serious risk (*Sherman Estate v Donovan*, 2021 SCC 25 at para 3 [*Sherman Estate*]).

[5] The test to be considered where a party seeks a discretionary limit on the open court principle is set out by the Supreme Court of Canada in *Sherman Estate*:

> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
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> (1) court openness poses a serious risk to an important public interest;
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> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
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> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
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> Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).
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> [Emphasis added.]

[6] The Defendant Crown argues this discretionary test does not apply in this instance; the Order it seeks on this motion is non-discretionary. This is because the Section 38 Judgment constrains the disclosure of certain information in the Defendant Crown's production. This in turn requires the testimony of certain witnesses to be heard *in camera* to maintain the integrity of the prior judicial order. I disagree.

[7] In arguing that the Order sought is non-discretionary the Defendant Crown relies upon the decision in *R v Cameron Ortis*, 2023 ONSC 6829 [*Ortis*], a criminal proceeding where an order similar to that being sought here was granted.

[8] I note that in *Ortis* there was also an underlying section 38 decision that protected certain information from disclosure. Despite this, the Court in *Ortis* did not consider the motion for *in camera* testimony on the basis that a non-discretionary order was being sought. Instead, the Court considered and applied the test for imposing a discretionary limit upon the open court principle as set out in *Sherman Estate* (*Ortis* at para 9).

[9] The Section 38 Judgment binds the Parties in this trial. None of the fact witnesses are authorized to disclose any information protected pursuant to that Judgment in the course of the trial. The Defendant Crown seeks to have witnesses examined *in camera* not because they will be required to disclose protected information – they simply have no authority to do so – but because the Defendant Crown is of the view that a risk of inadvertent disclosure arises.

[10] Both the circumstances of this proceeding and the Defendant Crown's framing of the risk demonstrate that issuance of the Order is not required to maintain the integrity of the prior judicial order. The Order being sought is discretionary and this motion is properly being determined by applying the three-part test set out in *Sherman Estate*. The Defendant Crown argues that the three-part test is satisfied.

[11] The first prong of the *Sherman Estate* test requires the Defendant Crown to establish that the examination of certain witnesses poses a serious risk to an important public interest – the protection of Canada's national security.

[12] The Defendant Crown relies on the section 38 Judge's findings to support their view that an important competing public interest is engaged. Justice St Louis found that: (1) the protected information is relevant to this proceeding, (2) disclosure of certain relevant information was injurious; and (3) after weighing the interest in disclosure against the interest in non-disclosure, public interest in non-disclosure outweighed the public interest in disclosure. Thus, the Section 38 Judgment concluded the information must be protected. The Defendant Crown argues this fully satisfies the first branch of the *Sherman Estate* test. Again, I disagree.

[13] In the section 38 proceeding, having concluded the information was of relevance and that disclosure of the information was injurious, the Section 38 judge then weighed the competing public interests and concluded certain relevant information was not to be disclosed. This Court is not engaging in that analysis on this motion.

[14] On this motion, the Court is assessing whether there is a serious risk to the protection of Canada's national security arising from the possibility of the inadvertent disclosure of that protected information in the course of the testimony of certain witnesses during the trial. This risk assessment is fact based and requires consideration of both the risk that inadvertent disclosure will actually occur, and the consequences should that risk materialize (*Sherman Estate* at para 42). A serious risk is described as follows in *R v Mentuck*, 2001 SCC 76:

> [34] I would add some general comments that should be kept in mind in applying the test. The first branch of the test contains several important elements that can be collapsed in the concept of "necessity", but that are worth pausing to enumerate. One required element is that the risk in question be a serious one, or, as Lamer C.J. put it at p. 878 in *Dagenais*, a "real and substantial" risk. That is, it must be a risk the reality of which is well-grounded in the evidence. It must also be a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained.
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> [Emphasis added.]

[15] I accept that harm will result in the event information subject to the Section 38 Judgment is inadvertently disclosed in the course of the trial, and that the consequences of such disclosure are significant. However, that harm must be assessed and weighed against the evidence relating to the likelihood of inadvertent disclosure occurring.

[16] Given the fact-based nature of this assessment, *Ortis* is of limited assistance.

[17] The Defendant Crown has advanced little evidence to establish the likelihood of the risk of inadvertent disclosure. They instead rely on the fluid and unpredictable nature of trial proceedings and the volume of information subject to protection to argue a serious risk of inadvertent disclosure.

[18] Trial unpredictability does create a possibility of inadvertent disclosure and the volume of information subject to the Section 38 Judgment might somewhat exacerbate that risk. However, this possibility arises in any proceeding where witnesses have knowledge of information that is

subject to protection or non-disclosure. This alone does not identify a risk that is well grounded in the evidence.

[19] Nor does the context support a limit on the open court principle. Should the risk, inadvertent disclosure materialize the consequences would be significant, a conclusion that flows from the Section 38 Judgment. However, the witnesses are experienced individuals who have spent much of their professional lives protecting sensitive information in a variety of circumstances. The Defendant Crown is in a position to prepare their witnesses, and the witnesses are in a position to review and understand the information subject to the Section 38 Judgment. In addition, counsel for Defendant Crown is in a position to identify any area of concern or particular risk in the course of the witness testimony. These circumstances all mitigate the risk of inadvertent disclosure and there is no evidence before me that identifies circumstances that exacerbate the risk.

[20] The Defendant Crown's proposed measures to moderate the impact of *in camera* testimony on the open court principal by producing vetted transcripts does not address the initial point in issue; has a serious risk of inadvertent disclosure been established? In my view the evidence fails to meet the high bar that a party seeking to limit the open court principle must satisfy (*Sherman Estate* at para 3). The Defendant Crown fails on the first prong of the *Sherman Estate* test.

[21] Recognizing that there is some risk of inadvertent disclosure, the Plaintiff is willing to consent to an in-court protocol aimed at further reducing any risk of inadvertent disclosure. I

encourage the parties to pursue such measures and provide the Court a protocol for consideration.

[22] Having dismissed the motion, I need not address the Plaintiff's issues with the request that Mr. Wright's testimony be included as part of any Order granting the relief sought.

[23] For reasons of clarity, I also note that dismissal of this motion does not prevent the Defendant Crown from seeking to proceed *in camera* at any point in the course of the trial – a request that, if made, will be considered by the Court at that time.

THIS COURT ORDERS that:

1. The Defendant Crown's motion pursuant to Rule 29(2) of the *Federal Court Rules* requesting the testimony of six witnesses to be held *in camera* is dismissed;

2. Costs in the cause.

"Patrick Gleeson"
Judge