Federal Court Cour fédérale

Date: 20150424

Docket: T-1971-98

Citation: 2015 FC 528

Ottawa, Ontario, April 24, 2015

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

FRANK FOWLIE

Applicant

and

HER MAJESTY THE QUEEN

Respondent

ORDER AND REASONS

[1] This is a motion for an order setting aside the order of Justice Scott (then a judge of this Court), dated June 18, 2012, in which he ordered that all material related to Court file T-1971-98 be kept confidential (the confidentiality order). For the reasons that follow the motion is granted, in part.

I. Events leading up to the motion before Justice Scott

[2] The events which underlie this motion lie in the distant past.

[3] In 1998, Dr. Fowlie, then an employee of the Government of Canada, sought judicial review of an administrative decision in respect of his entitlement to certain employment related disability benefits. In 2000, the judicial review was dismissed. In 2002, Dr. Fowlie noticed that the reasons for decision of Justice Gibson were posted on the Federal Court website.

[4] The reasons for decision, at paragraph 2, included reference to personal health information about Dr. Fowlie. Dr. Fowlie wanted to keep this information private. He contacted the Ottawa Registry of the Federal Court and requested an amendment to the internet version of the reasons to remove the personal health information from paragraph 2 of the reasons for decision. On March 4, 2002, Justice Gibson issued a direction acceding to the request that that paragraph be deleted from the Court's internet site.

[5] In 2004, Dr. Fowlie was appointed Ombudsman at the Internet Corporation for Assigned Names and Numbers (ICANN). He occupied this position from November 1, 2004 until February 1, 2011. ICANN is a non-profit society headquartered in California that administers domain names for the internet. Part of Dr. Fowlie's role as Ombudsman included conflict resolution.

[6] In 2004, Mr. George Kirikos lodged a complaint with ICANN respecting Universal Domain Name Resolution Policy (UDRP) adjudication. The UDRP is a tribunal process for

resolving or adjudicating disputes over ownership of a given domain name. Mr. Kirikos is a frequent commentator on the domain name industry and earns a living purchasing and monetizing domain names.

[7] Mr. Kirikos' complaint related to a decision that had been made through the UDRP process. It involved a UDRP panel decision ordering an individual who had registered a domain name relating to Hillary Clinton to transfer ownership to the real Hillary Clinton. After some communication with Mr. Kirikos, Dr. Fowlie determined he lacked jurisdiction to hear the complaint as Mr. Kirikos was not the person affected by the decision, and the only person with standing was the original domain name owner, Hillary Clinton.

[8] Six years later, in February, 2011, Mr. Kirikos found information on the internet concerning Dr. Fowlie's 1998 judicial review application. Mr. Kirikos posted about the judicial review application on his blog, and included a link to the Federal Court docket and reasons in two separate tweets on his Twitter account. Mr. Kirikos also posted a tweet which contained personal health information about Dr. Fowlie. After protest by Dr. Fowlie, this tweet was taken down.

[9] At this time, Dr. Fowlie realized that although a directive was issued by Justice Gibson to amend the internet version of the reasons to remove Dr. Fowlie's personal health information at paragraph 2, that had not happened. The personal health information at paragraph 2 had remained publicly available.

[10] In May, 2011, after Mr. Kirikos posted information online about Dr. Fowlie's judicial review application and personal health information, Dr. Fowlie initiated a complaint before the Ontario Human Rights Tribunal. In his complaint Dr. Fowlie asserted that Mr. Kirikos' tweets discriminated against him on the grounds of disability. Dr. Fowlie was self-represented at the time and thought the Ontario Human Rights Tribunal was the correct forum to seek relief in respect of Mr. Kirikos' alleged discriminatory tweets.

[11] Dr. Fowlie subsequently realized that the Human Rights Tribunal did not have jurisdiction and withdrew his complaint. On May 31, 2011, Mr. Kirikos posted on his blog that the application had been withdrawn. In his blog entry, Mr. Kirikos notes that he considered Dr. Fowlie's complaint to be "entirely frivolous and totally devoid of merit." Mr. Kirikos also provided links within the blog post to the reasons of Justice Gibson in the 1998 judicial review application, and a link to a 2010 decision of the Canadian Transportation Agency regarding a complaint filed by Dr. Fowlie. Mr. Kirikos also tweeted about the withdrawal of Dr. Fowlie's complaint, and included a link in his tweet to his blog post.

[12] Dr. Fowlie left ICANN on February 1, 2011, and took a position with the International Organization for Migration in Geneva in May 2012, where he is currently employed.

II. The motion for a confidentiality order

[13] In late May 2012, Dr. Fowlie filed a motion with the Court requesting a confidentiality order over the underlying file in this matter. The respondent on the motion was the Crown, as the Crown was the respondent on the 1998 judicial review. Although served, the Crown filed no

representations to oppose Dr. Fowlie's motion and did not appear. Dr. Fowlie did not serve the motion on Mr. Kirikos.

[14] In his written representations to the Court, Dr. Fowlie characterized Mr. Kirikos as an "internet stalker", who initiated a "campaign to widely spread [Dr. Fowlie's] medical diagnosis across the internet, and more specifically aimed to spread this information to [Dr. Fowlie's] workplace, colleagues, and the community he served as Ombudsman." Further, Dr. Fowlie alleged that Mr. Kirikos' motivations in disseminating this information were to "embarrass, humiliate, or [otherwise] harm" Dr. Fowlie, and by doing so, Mr. Kirikos was discriminating against Dr. Fowlie.

[15] On June 18, 2012, Justice Scott granted the confidentiality order:

ORDER

> CONSIDERING the motion brought forth by Mr. Frank Fowlie (the Applicant) for a confidentiality order pursuant to Rules 152 and 369 of the Federal Court Rules, SOR/98-106;
>
> AND CONSIDERING the grounds of the motion as set out in the Applicant's written submissions and the evidence filed in support thereof;
>
> AND UPON considering that the Respondent has not filed any representations to oppose the Applicant's motion;
>
> AND UPON considering that directives were issued on March 4th, 2002, by the Honourable Gibson ordering deletion of the file from the Court's internet site;
>
> AND UPON concluding that it is in the better interest of justice that a confidentiality order be granted to prevent the dissemination of personal confidential information;
>
> THIS COURT ORDERS that:

> 1. The Applicant's motion be allowed;
>
> 2. All material related to Court file T-1971-98 be kept confidential.

[16] Shortly thereafter, on June 26, 2012, and armed with Justice Scott's confidentiality order, Dr. Fowlie contacted Twitter and requested that Twitter remove Mr. Kirikos' tweets:

> The Federal Court of Canada this week issued a confidentiality order concerning the case which Mr. Kirikos is tweeting. Therefore, would you please ensure that these tweets are removed from Twitter, otherwisely, Twitter may be in violation of a Federal Court order.

[17] Twitter responded that it did not get involved in disputes between users. Mr. Fowlie again wrote to Twitter:

> I am sorry, this is not a matter of dispute between twitter members, there is an active court order in force, and I am asking Twitter to comply with it.

[18] On July 30, 2012 Twitter contacted Mr. Kirkios with respect to Dr. Fowlie's request that the tweets be deleted. Twitter also provided Mr. Kirikos with a copy of the email exchange between Dr. Fowlie and Twitter and a copy of the confidentiality order. This was when Mr. Kirikos first learned of the order.

[19] On November 1, 2012, Mr. Kirikos filed a notice of motion to set aside the confidentiality order.

III. Discussion

A. *Mr. Kirikos has private interest standing to bring this motion*

[20] Mr. Kirikos argues that Rule 399 of the *Federal Courts Rules*, SOR/98-106 permits this Court to set aside an order on motion. Rule 399 states:

399.(1) On motion, the Court may set aside or vary an order that was made	399. (1) La Cour peut, sur requête, annuler ou modifier l'une des ordonnances suivantes, si la partie contre laquelle elle a été rendue présente une preuve prima facie démontrant pourquoi elle n'aurait pas dû être rendue :
(a) *ex parte*; or	a) toute ordonnance rendue sur requête *ex parte*;
(b) in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding,	b) toute ordonnance rendue en l'absence d'une partie qui n'a pas comparu par suite d'un événement fortuit ou d'une erreur ou à cause d'un avis insuffisant de l'instance.
if the party against whom the order is made discloses a prima facie case why the order should not have been made.	
(2) On motion, the Court may set aside or vary an order	(2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :
(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or	a) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;
(b) where the order was obtained by fraud.	b) l'ordonnance a été obtenue par fraude.

[21] Mr. Kirikos submits that he has standing to bring a motion pursuant to Rule 399 because he is directly affected by the confidentiality order. Although Rule 399 does not specifically state

that a person whose interests are affected by an order can move to set it aside or vary it, the Court of Appeal in *Nu-Pharm Inc v Canada (Attorney General)*, [1999] FCJ No 1004 (CA), held that a person so affected can do so.

[22] In my view, in the circumstances of this case, Mr. Kirikos has standing to bring a motion pursuant to Rule 399. Dr. Fowlie obtained the confidentiality order to prevent Mr. Kirikos from publicly disseminating information relating to Dr. Fowlie's 1998 judicial review application. The target, so to speak, of the confidentiality order, was Mr. Kirikos.

[23] As Mr. Kirikos was directly affected by the order, he has a right to make submissions and move to set it aside. The fact that Mr. Kirikos was not a party to the underlying application is of no consequence. The right to be heard is integral to the Court's obligation to search for truth and to ensure fairness.

IV. The confidentiality order should be varied

A. *General principles*

[24] Court proceedings are presumptively "open" in Canada: *Toronto Star Newspapers Ltd. v Ontario*, 2005 SCC 41 at para 4. The open court principle is a hallmark of a democratic society and applies to all judicial proceedings: *Canada (Minister of Citizenship and Immigration) v Harkat*, 2014 SCC 37. The principle is "inextricably tied to freedom of expression": *A.B. v Bragg Communications Inc.*, 2012 SCC 46 at para 11. It ensures that citizens have access to the courts and can comment on how courts operate and on proceedings that take place within them: *CBC v Canada (Attorney General)*, 2011 SCC 2.

[25] In light of this principle, confidentiality orders are not routinely issued, save in matters of intellectual property and national security matters, each of which bring discrete evidentiary and policy considerations into the balance. In general, however, public access will only be restricted when the "appropriate court, in the exercise of its discretion, concludes that disclosure would subvert the ends of justice or unduly impair its proper administration": *Toronto Star* at para 4. Further, this Court has been reluctant to recognize humiliation, embarrassment or loss of reputation as justifying confidentiality orders: see *Monsieur X v Canada (Attorney General)*, 2008 FC 1115 (Proth); *John Doe v Canada (Minister of Justice)*, 2008 FC 916.

[26] These principles are reflected in the recent decision of the Ontario Court of Appeal in *MEH v Williams*, 2012 ONCA 35. In *Williams*, the respondent proposed to commence a proceeding in which she sought a divorce and corollary relief from her husband, David Williams, a former commander of CFB at Trenton, Ontario. Mr. Williams pled guilty to criminal charges in regards to a series of murders and sexual assaults. The respondent brought a motion seeking an order sealing the entire record in the divorce proceeding. Mr. Williams did not oppose the motion; however various media organizations were served with notice of the motion and several were granted intervener status to oppose the motion. Although the respondent put forward medical evidence that the publication of the details in her divorce would cause a real and substantial risk to her mental wellbeing, the Court of Appeal held that the order should not be granted.

[27] Unlike the respondent in *Williams*, in the present case, Dr. Fowlie did not supply any independent medical evidence as to harm. Instead, Dr. Fowlie argued that the confidentiality

order is warranted given his desire to preserve his privacy, reputational interest and avoid any social stigma associated with disclosure.

[28] Specifically, Dr. Fowlie states that Mr. Kirikos is intent on disseminating information about his private health information. Dr. Fowlie submits that he is concerned that if the confidentiality order is set aside, Mr. Kirikos will broadcast his health status over Twitter and blogs in order to humiliate Dr. Fowlie, harm his professional reputation, and hinder his ability to live a life free of discrimination.

[29] Mr. Kirikos, on the other hand, submits that he is a member of the media as he frequently writes on topics regarding the domain name industry, ICANN and internet governance on his own website, industry websites, and Twitter. He has authored several thousand tweets and posts relating to the domain name industry, and regularly refers and links to relevant legal proceedings. He says that this freedom of expression trumps the concerns of Dr. Fowlie.

V. Analysis

[30] After reviewing the submissions of both parties, the direction issued by Justice Gibson, the record before Justice Scott, and the confidentiality order, I am of the view that the present factual context justifies a variation of the confidentiality order.

[31] That is, I believe that the confidentiality order dated June 18, 2012 is unnecessarily broad. In order to ensure that court proceedings remain presumptively open and accessible to the

public and media, with the exception noted below, the reasons for decision shall be made public and the material related to Court file T-1971-98 shall no longer be kept confidential.

[32] However, the interests and administration of justice are better served if Dr. Fowlie's personal health information is kept confidential. Therefore, the last sentence in paragraph 2 of Justice Gibson's reasons for decision shall be redacted. Redacting the precise and limited information pertaining to Dr. Fowlie's health information found in the reasons for decision does not hinder the open court principle. I reach this conclusion based on the following four considerations.

[33] First, I am informed by the specific factual context of this dispute and the contentious relationship between Dr. Fowlie and Mr. Kirikos. The relationship, or lack thereof, is underscored by animosity, stemming from Dr. Fowlie's decision as ICANN Ombudsman in 2004 that determined he lacked jurisdiction to hear Mr. Kirikos' complaint with ICANN respecting a UDRP adjudication in respect of the Hillary Clinton domain name. Since that time, both Dr. Fowlie and Mr. Kirikos have acted, and re-acted, with hyper-sensitivity to the other.

[34] Second, in considering whether to vary the confidentiality order, it is necessary to balance the competing risks in this case: the harm inherent in revealing Dr. Fowlie's private health information versus the risk of harm to the open court principle in redacting that information from Justice Gibson's reasons; *A.B.* at para 10. In order for a confidentiality order to be justified, it must be necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk.

[35] Although direct evidence of harm is relevant in determining whether a confidentiality order is necessary to protect an important legal interest, courts may also act where the harm is objectively discernible. That is, absent empirical evidence of the necessity of restricting access, the court can find harm by applying reason and logic: *A.B.* at para 16 citing *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 72.

[36] In the present case, allowing Dr. Fowlie's health information to be publicly available would cause objectively discernible harm to Dr. Fowlie's privacy and professional reputational interests. Given the long and acrimonious history between Dr. Fowlie and Mr. Kirikos, and the demonstrated intention of Mr. Kirikos to widely disseminate Dr. Fowlie's health information, the potential deleterious effects that Dr. Fowlie alleges are a real possibility, more than just speculation.

[37] Third, in considering whether the public interest in confidentiality outweighs the public interest in openness, I remain unconvinced as to how, objectively viewed and in the specific factual context of this case, the health status of Dr. Fowlie in 1998 can be the subject of any public interest in 2015. It is also important to note that Mr. Kirikos has not articulated any public interest which would be served by the further dissemination of Dr. Fowlie's health information. It can have no relevance to the industry in which Mr. Kirikos is a member of the media. Dr. Fowlie left ICANN over three years ago in February, 2011. Mr. Kirikos contends, however, that his freedom of expression is, alone, sufficient rationale for the public interest at stake, and no further justification is required.

[38] Although Mr. Kirikos pits his right of freedom of expression against Dr. Fowlie's right to privacy, based on the arguments before the Court, the only conclusion that can be drawn is that Mr. Kirikos wishes, for reasons known only to him, to discredit and embarrass Dr. Fowlie by disclosing his prior medical history. This is a case of conflicting rights that must be weighed and thoughtfully considered. While the open court principle will rarely yield, it will in circumstances such as where there is limited public interest in disclosure of information which, if disclosed, will, objectively viewed, cause harm.

[39] Finally, the redaction of the reference to Dr. Fowlie's health information at paragraph 2 of Justice Gibson's reasons does not alter the decision in any way. This reference is not necessary for an understanding of the decision, or how Justice Gibson reached the decision that he did. That is, the redaction of this information has no effect on the public interests served by the open court principle. The reasons which underlie Justice Gibson's decision remain transparent and accessible.

[40] Further, any limits imposed on the open court principle and Mr. Kirikos' freedom of expression, are minimal. Analogy may be made to *Canadian Newspapers Co v Canada (Attorney General),* [1988] 2 SCR 122, where the Supreme Court of Canada upheld the constitutionality of the *Criminal Code* provision prohibiting disclosure of the identity of sexual assault complainants. The Court explained at paragraph 133 that "the limits imposed by [prohibiting identity disclosure] on the media's rights are minimal…Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial." The same is true for the present case. Nothing in the varied confidentiality order prevents Mr.

Kirikos from reporting on the 1998 judicial review application. Only the information relating to Dr. Fowlie's private health information is redacted. This amounts to one sentence.

[41] Under the circumstances of this specific case, given the history between the parties, the salutary effects for the applicant in varying the confidentiality order to redact private health information from the reasons outweigh the deleterious effects, specifically the public interest in open court proceedings.

[42] Therefore, I order that the motion to set aside the confidentiality order is granted, in part. The reasons for decision shall be made public and the material related to Court file T-1971-98 no longer be kept confidential; however the last three words in the last sentence in paragraph 2 of Justice Gibson's decision shall be redacted from any publicly available record.

[43] Any medical reports in Court file T-1971-98 referencing Dr. Fowlie's personal health information shall be sealed and kept confidential by the Registry.

ORDER

THIS COURT ORDERS that the motion to set aside the June 18, 2012 confidentiality order is granted, in part. The reasons for decision issued by Justice Gibson and the material related to Court file T-1971-98 shall be made public, but the last three words in the last sentence of paragraph 2 in the reasons for decision shall be redacted. Any medical reports in Court file T-1971-98 referencing Dr. Fowlie's personal health information shall be sealed and kept confidential by the Registry. There is no order as to costs.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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