Federal Court of Appeal | Cour d'appel fédérale

Date: 20240229

Docket: A-297-23

Citation: 2024 FCA 38

CORAM: **STRATAS J.A.**
MONAGHAN J.A.
BIRINGER J.A.

BETWEEN:

9219-1568 QUEBEC INC. and MG FREESITES LTD.

Appellants

and

PRIVACY COMMISSIONER OF CANADA

Respondent

Heard at Toronto, Ontario, on February 29, 2024.

Judgment delivered from the Bench at Toronto, Ontario, on February 29, 2024.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on February 29, 2024).

STRATAS J.A.

[1] The appellants appeal from an order of the Federal Court: 2023 FC 1428 (*per* McDonald J.). The Federal Court dismissed the appellants' motion for injunctive relief and for an order extending earlier orders of the Federal Court that imposed confidentiality and a publication ban.

[2] These matters stem from preliminary findings and recommendations made by the Privacy Commissioner of Canada under the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 concerning the appellants' handling of personal information. These preliminary findings and recommendations were expressed in the Commissioner's preliminary report and a later letter revising some aspects of the report and advising of his decision to publish the final report.

[3] The appellants have applied for judicial review of the Commissioner's decision. The appellants brought the motion, now before us, within that judicial review. The appellants argued that the Commissioner needed to be enjoined from publishing his findings and recommendations. They argued that without injunctive relief, their reputation would be irreparably harmed and their judicial review would be rendered moot.

[4] Applying the classic test for injunctive relief in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the Federal Court found that the appellants had failed to establish irreparable harm with the evidence they adduced. The evidence was general, broad, unparticularized, unspecific, and relatively sparse—in short, insufficient and inadequate and, thus, well short of the mark. The Federal Court added that the appellants "did not offer any evidence to establish that such public exposure [as a result of the disclosure of the Commissioner's final report would have]… an impact on their business in a manner that would take it outside the normal impact of the Commissioner's proceedings" (at para. 48). In other words, there was evidence of harm but the evidence was of such generality and non-specificity that it was not possible to infer or conclude that the harm would be irreparable.

[5] From that, the Federal Court concluded that the appellants failed to establish harm of sufficient quality or weight to show that the balance of convenience was in their favour. The Federal Court added that the pursuit of the Commissioner's mandate was very much in the public interest and that weighed heavily against the appellants in any assessment of the balance of convenience.

[6] Applying the standards governing court openness in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 and *Sherman Estate v. Donovan*, 2021 SCC 25, the Federal Court issued a restricted confidentiality order largely to protect the strong privacy interests of the complainant before the Privacy Commissioner. It also discontinued an earlier publication ban.

[7] In this Court, the appellants successfully obtained a stay of the Federal Court's order pending this appeal. As will be discussed, portions of this file and the hearing of this appeal have been subject to confidentiality and publication orders and other orders and directions, largely to ensure that the appellants' appeal, aimed at preventing disclosure, did not become moot through disclosure.

[8] We will dismiss this appeal.

[9] The Federal Court did not err in law in making the order it did. It properly identified and applied the applicable law.

[10] The appellants have failed to show that the Federal Court's application of the law to the evidence was tainted by a reviewable error within the meaning of *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Under *Housen*, the Federal Court's assessment of the weight of evidence is reviewable only for palpable and overriding error. The appellants have demonstrated no such error. This Court does not reweigh the evidence before the Federal Court, nor does it substitute its view of the facts for that of the Federal Court.

[11] We do not accept the appellant's submission that the Federal Court's evidentiary findings were affected by a misunderstanding and misapplication of *Newbould v. Canada (Attorney General)*, 2017 FCA 106, [2018] 1 F.C.R. 590 and *Glooscap Heritage Society v. Canada (National Revenue)*, 2012 FCA 255.

[12] We add that even if the standard of review on evidentiary findings were more favourable to the appellants and we could reweigh and reassess the evidence, in our view, substantially for the reasons given by the Federal Court, the evidence was indeed deficient, insufficient, and inadequate to establish irreparable harm. From evidence of this quality, it was not possible for the Federal Court nor would it be possible for us to infer that the harm would be irreparable. To attempt to do so would put the courts in the realm of speculation, assumption or guesswork about the quality of the harm the appellants would suffer and, thus, whether it is irreparable. Whether the Commissioner could redact portions of any report to eliminate irreparable harm pending legal challenge could affect the assessment of irreparable harm. As well, further affecting that assessment is the fact that some of the information the appellants seek to keep confidential is already public in media reports. The overall result is evidentiary uncertainty.

[13] We are also not persuaded that if this appeal is dismissed the judicial review pending in the Federal Court would become moot.

[14] Both the appellants and the respondent filed motions to admit fresh evidence in the appeal. The appellants' motion was said to be dependent on the respondent's motion. As we are dismissing this appeal, both motions are now moot.

[15] This is sufficient to determine this appeal and the motions. However, a few words need to be said about the challenges posed by the open court principle in appeals such as this. Our words are not specifically directed to the counsel in this case but rather to courts and the legal profession at large.

[16] The open court principle is of constitutional force, essential in a democratic state, and has been described as the "very soul of justice": *Sierra Club* at paras. 36, 52 and 86; *Sherman Estate* at para. 1; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at para. 22. The guidance in these cases is firm, binding and clear, a prescription for all participants in the justice system to follow.

[17] This appeal presented an unusual challenge. Before us was a difficult chicken-and-egg situation: under appeal was an order denying parties' request for confidentiality based on evidence that itself was said to be confidential. But undue openness and disclosure in the appeal would render moot the appellants' appeal seeking confidentiality. Despite this, in the end, after

eight directions and orders issued by this Court in the last month, much openness was achieved, making it possible for public observers to appreciate the nature of what was taking place.

[18] As for the hearing in this case, we emphasized the need to keep it as open as possible and the closed session as short as possible. To this end, only a five-minute portion was held in closed session.

[19] In cases like this, all in the justice system must keep the open court principle front of mind. For example, counsel must remember that they are officers of the court, ethically bound to further the administration of justice and the public's confidence in it. Counsel must work with the Court to ensure that the Court's proceedings are as open as possible.

[20] In particular, all must follow strictly the guidelines—open to interpretation and occasional difficulties of application—as they are set out in *Sierra Club* and *Sherman Estate*. Among other things, in exceptional cases—and truly exceptional they must be—where the need for confidentiality has an important public dimension as explained in these cases, confidentiality must nevertheless be minimized. In this regard, where possible—and it almost always is—public versions of confidential material must be filed alongside confidential material and the redactions in the confidential material must be minimized in accordance with a strict reading of the governing confidentiality order.

[21] This Court regularly reviews its practices in cases involving confidential evidence—especially in particularly challenging cases such as this—to ensure that our proceedings are as

open as possible, in accordance with *Sierra Club*, *Sherman Estate* and the fundamental constitutional imperatives that underlie them.

[22] For the foregoing reasons, we will dismiss the motions and the appeal, all with costs to the respondent, fixed by agreement at $10,000 all inclusive.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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