Federal Court  Cour fédérale

Date: 20240328

Docket: T-2382-23

Ottawa, Ontario, March 28, 2024

PRESENT: Case Management Judge Benoit M. Duchesne

BETWEEN:

IGOR VIKTOROVICH MAKAROV

Applicant

and

CANADA (MINISTER OF FOREIGN AFFAIRS) and THE ATTORNEY GENERAL OF CANADA

Respondents

ORDER

[1] The Applicant has brought a motion in writing pursuant to Rule 369 of the *Federal Courts Rules* (the "*Rules"*), for a confidentiality order pursuant to Rule 151 of the *Rules.* The order sought would be limited, however, in that it seeks to have only paragraphs 4 to 12, 14 and 15 of the document titled "Confidential Solemn Affirmation of Mr. Igor Makarov" affirmed on December 8, 2022, kept confidential. Mr. Makarov argues there is a real risk of harm to himself and to his mother who continues to reside in Russia should the sought confidentiality order not be granted.

[2] While the Respondents accept that the protection from physical harm is an important public interest for the purposes of a confidentiality order, it contests the Applicant's motion on several grounds, including that the affidavit evidence led by the Applicant is inadmissible with the inevitable result that the Application has no evidence before the Court and cannot meet its burden of proof.

[3] The Applicant argues in reply that the evidence it has led on this motion is admissible and satisfies the requirement for the issue of a confidentiality order as sought.

[4] The Applicant's motion is dismissed for the reasons that follow. The fact affidavit led on this motion is inadmissible as it does not speak to the deponent's personal knowledge and runs afoul of Rule 81(1) of the *Rules.* The only other affidavit for the Applicant is an expert affidavit regarding changes in the laws of the Russian Federation since about 2022 that is neither relevant nor probative regarding the issues on this motion.

[5] This motion would be dismissed even if the inadmissible affidavit evidence was admitted. The salient part of the subjects and statements sought to be made confidential are pleaded in the Applicant's Notice of Application at paragraphs 13, 27, 28, 29, 30, 36, and already form part of the public record. The Court cannot make confidential that which the Applicant has already made public.

I. DISCUSSION

[6] A confidentiality order may be made pursuant to Rule 151 of *Rules* when the moving party meets the required test fixed by law for such an order to be made.

[7] The test for a confidentiality order was recently addressed by the Supreme Court of Canada in *Sherman Estate v. Donovan*, 2021 SCC 25 (CanLII) at paras 37 and 38 ("*Sherman Estate"*) as follows:

> [37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).
>
> [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:
>
> > (1) court openness poses a serious risk to an important public interest;
> >
> > (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,
> >
> > (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> 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).

[8] The Supreme Court of Canada elaborated on what may constitute an "important public interest" and when fact evidence is required in the confidentiality analysis at paragraphs 42 and 43 of the *Sherman Estate* decision as follows:

[42] While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

[43] The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of "important interest" transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, The Law of Civil Procedure in Ontario (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 Ottawa L. Rev. 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

(the emphasis is mine)

[9] What is clear from the foregoing is that while the Court may agree with the parties that the protection from physical harm is an important public interest, it remains that the Applicant must establish as a matter of fact whether his or his family's physical safety is at a serious risk should this motion be dismissed.

[10] Establishing the serious risk requires that the Applicant lead admissible, compelling evidence on this motion. The Applicant has not done so.

[11] The first affidavit filed by the Applicant is sworn by an articling student at the Applicant's solicitor of record's law firm. The articling student does not swear that he has personal knowledge of the facts included in his affidavit. The affidavit does not comply with Rule 81(1) of the *Rules* and its content is inadmissible as a result (*Duyvenbode v Canada (Attorney General)*, 2009 FCA 120 at para 2; *White Burgess Langille Inman v Abbott and Haliburton Co,* 2015 SCC 23 at para 14; *Akme Poultry Butter & Eggs Distributors Inc. v. Canada (Public Safety and Emergency Preparedness)*, 2024 CanLII 24409 (FC), at paras 16 and 17; Rule 81(1), *Federal Courts Rules*).

[12] Even if the affidavit had been considered admissible as evidence, it seeks to lead documents into the record for the truth of their content and not simply for the fact that they exist. The content of the documents attached to the affidavit cannot be accepted for the truth of their contents on the basis of the affidavit filed. Moreover, some of their content is with respect to contentious matters that the deponent has no personal knowledge of.

[13] The Applicant also seeks to have the Court accept news reports and publications from Human Rights Watch as compelling evidence on the contentious issue that lay at the heart of this

motion, specifically, whether the Applicant's or his family's physical safety is at serious risk if the content of certain paragraphs of his December 8, 2022, "Confidential Solemn Affirmation of Mr. Igor Makarov" might form part of the public record. News articles and reports ought not to be considered as evidence of specific facts about specific events (*Pascal v. Canada (Citizenship and Immigration)*, 2020 FC 751 (CanLII), at para 56, citing Justice De Montigny, as he then was, in *Bruzzese v. Canada (Public Safety and Emergency Preparedness)*, 2014 FC 230, at paras 57-58). If they are admitted into evidence in court due to the particular context in which they are presented, the weight to be given to them depends very much upon the context itself and the articles' general indicia of reliability although they are often given very little evidentiary weight (*Demaria v. Canada (Citizenship and Immigration)*, 2019 FC 489 (CanLII), at para 143 citing *Thuraisingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 607, at para 39).

[14] In essence, what the affidavit does is to offer evidence from an uninformed witness that they believe an assertion made by someone else. Such evidence is evidence of little or no weight at all, and of little or no probative value (*Glassjam Investments Ltd. v. Freedman*, 2014 ONSC 3878 at para. 33; *Walsh Construction Company Canada v. Toronto Transit Commission*, 2020 ONSC 3688 (CanLII), at para 24).

[15] The expert affidavit tendered in evidence on this motion outlines recent administrative offence and legislative changes within the Russian Federation with respect to public actions aimed at discrediting the use of the Armed Forces of the Russian Federation and the punishments that may be imposed as a result of them. It also outlines relatively recent legislative changes regarding crimes against the security of the Russian Federation. The opinion does not opine at all on how these changes have been or may be implemented other than that "law enforcement

practice is being actively formed with respect to them". The opinion does not provide any opinion as to how those provisions might be applied with respect to the Applicant or to his family members that continue to reside in the Russian Federation. It also does not provide an opinion on whether anything contained in the paragraphs of the document that are sought to be kept confidential would fall within the scope of any of the identified administrative offence and legislative changes. The opinion evidence is therefore of no probative value on this motion.

II. CONCLUSION AND DIRECTIONS ON COSTS

[16] It follows from the foregoing that the Applicant's motion is dismissed as he has not met his burden of proof for the order sought to be granted.

[17] The Respondents have sought their costs of this motion but have yet to make submissions on the issue.

[18] The Court strongly encourages the parties to this motion to confer and attempt to agree on the costs of this motion prior **to April 11, 2024**. If the parties agree on costs by then, they may deliver a letter on consent to the case management office in Ottawa to my attention that sets out their agreement as to costs and, if the Court considers such costs appropriate, a subsequent Order as to costs consistent with the agreement as to costs will issue.

[19] In the event that the parties do not agree on the costs of this motion, then the Plaintiff and responding party shall have **until April 15, 2024**, to serve and file its costs submissions that do not exceed three pages, double-spaced, exclusive of schedules, appendices and authorities. The Defendant and moving party will then have until **May 3, 2024**, to serve and file its costs

submissions, also limited to three pages, double-spaced, exclusive of schedules, appendices, and authorities.

[20] If no agreement as to costs is filed by **April 11, 2024**, and no costs submissions are served and filed by **April 15, 2024**, then no costs will be awarded on this motion.

THIS COURT ORDERS that:

1. The Applicant and moving party's motion is dismissed.

2. Costs of this motion are reserved to be determined in accordance with the directions given above.

"Benoit M. Duchesne"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2382-23
STYLE OF CAUSE:	IGOR VIKTOROVICH MAKAROV v CANADA (MINISTER OF FOREIGN AFFAIRS) and THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO (IN WRITING)
DATE OF HEARING:	MARCH 28, 2024
REASONS FOR ORDER:	ASSOCIATE JUDGE B.M. DUCHESNE
DATED:	MARCH 28, 2024

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