NOVA SCOTIA COURT OF APPEAL

Citation: ***Resolve Business Outsourcing Income Fund v. Canadian Financial Wellness Group Inc.***, 2014 NSCA 98

Date: 20141028
Docket: CA 423907
Registry: Halifax

Between:

Resolve Business Outsourcing Income Fund,
Resolve Corporation and D+H Limited

Appellants

v.

The Canadian Financial Wellness Group Limited

Respondent

Judges:	Saunders, Fichaud and Bryson, JJ.A.
Appeal Heard:	September 16, 2014
Held:	Appeal allowed with costs, per reasons for judgment of Fichaud, J.A.; Saunders and Bryson, JJ.A. concurring
Counsel:	Scott R. Campbell and Christopher W. Madill for the appellants Peter Coulthard, Q.C. and Alexander C. Grant for the respondent

Reasons for Judgment:

[1] The defendants sought a confidentiality order. The proposed order would prevent the public disclosure of documents to be produced by the defendants to the plaintiff in the discovery stage of the lawsuit. The defendants were concerned that the documents might become exhibits to an affidavit for a chambers motion. The motions judge denied the order. He held that the defendants had not established a public interest in confidentiality, beyond their own commercial interest, and had not satisfied the first branch of the *Sierra Club* test.

[2] The defendants appeal. They say that the documents disclose intellectual property that is integral to servicing a government-sponsored project for which a competitive bidding call is imminent. Disclosure of the documents in court, assert the defendants, would open its information to other bidders and undermine the public interest in a fair and competitive bidding process.

Background

[3] The Appellant D+H Limited Partnership (D+H) administers $20 billion in student loans. Its portfolio includes student loans provided by the Government of Canada's Student Loan Program (CSLP) and those provided by most provincial governments. D+H provides loan-related services to 1.7 million students in Canada.

[4] D+H manages the CSLP loans further to a contract with the Government of Canada (Government). The contract had an operational start date of March 17, 2008 (CSLP Contract). The Government awarded the CSLP Contract to the Appellant Resolve Corporation (Resolve) after a public and competitive tendering process initiated by the Government in the spring of 2006. In 2010, D+H acquired Resolve and, with it, the CSLP Contract.

[5] The Government's 2006 request for proposals for the CSLP Contract asked for "end to end" servicing of the student loans, from the initial disbursement of funds to the post-study repayment of loans. The Affidavit of Mr. Bob Zebeski, D+H's Director of Operations, summarizes the bidding process:

> 6. Resolve's bid for the CSLP Contract in response to the RFP in the spring of 2006 included lengthy and detailed technical submissions on the process proposed

> by Resolve to manage and administer the CSLP loan portfolio on an end-to-end basis. These bid submissions required a significant amount of work and included confidential process-related information that was (and is) highly commercially and competitively valuable and sensitive to Resolve (now D+H).
>
> 7. In addition to Resolve's detailed technical submissions on the proposed processes for providing end-to-end servicing of CSLP loans, the RFP for the CSLP Contract required bidders to submit a separate financial proposal outlining the costs to the Government of Canada associated with providing those services. Bids for the CSLP Contract were evaluated using a "price per point" model developed by the Government of Canada, whereby the technical process and service-related (among other) elements of the bids were assigned points. The total points awarded to the bid were divided by the total cost of the bidder's proposal, to arrive at a "price per point" score. Resolve was awarded the CSLP Contract on the basis of having the best (lowest) price-per-point score.
>
> 8. Although certain aspects of the tender and bidding process run by the Government of Canada for the CSLP Contract are in the public domain, such as the RFP and the identity of the bidders, Resolve's technical bid documents were submitted on a confidential basis.

[6] The CSLP Contract had a five-year term, with an additional two-year option followed by three one-year options, all exercisable by the Government. The Government exercised the two-year option, which runs until March 2015.

[7] The CSLP Contract is financially significant to the Government and the operator. The revenue from the initial five-year term approximated $380 million.

[8] In 2012, the Government began the re-procurement process for the next contract to service the CSLP. On November 28, 2012, the Government held an "Industry Day" meeting to provide potential bidders with an overview of the bidding timetable and objectives for the next CSLP contract. The document distributed by the Government on Industry Day itemized the consultative steps leading to the draft RFP. According to Mr. Zebeski's Affidavit, dated September 23, 2013, the steps scheduled by the Government included "issuance of the RFP in late 2013", "evaluation of bids in response to the RFP in spring of 2014" and "awarding contract for CSLP in fall of 2014".

[9] To jump ahead briefly - at the hearing in the Court of Appeal on September 16, 2014, counsel informed the Court that the Government had issued the RFP the previous week. Of course, that fact was not before the motions judge whose decision was dated December 4, 2013.

[10] In late 2012, the Government issued "Rules of Engagement" for the Re-procurement process. The Rules of Engagement included:

> An overriding principle of the industry consultation is that it be conducted with the utmost of fairness and equity between all parties. No one person or organization shall receive nor be perceived to have received any unusual or unfair advantage over the others.
>
> These Rules of Engagement will apply beginning with the signing of this document and concluding with the release of the Final Request for Proposal (RFP) on MERX.
>
> …
>
> Canada will not disclose proprietary or commercially-sensitive information concerning a Participant to other Participants or third parties, except and only to the extent required by law.
>
> **TERMS AND CONDITIONS:**
>
> …
>
> 2. Participants will NOT reveal or discuss any information to the MEDIA/NEWSPAPER regarding the CSLP Re-procurement during this consultative process. …

[11] D+H views its systems documents as containing proprietary or confidential and commercially sensitive information that would benefit other bidders in the competitive bidding process for the new CSLP contract. Mr. Zebeski's Affidavit explains:

> 23. … D+H's competitive advantage in this area of borrower communications will be lost if the confidential documents which are the subject of this motion become publicly available to competitive bidders as a result of this litigation.
>
> …
>
> 29. In addition, D+H maintains an internal Knowledge Base system, which stores and organizes documents for a variety of users within D+H, including CSRs [customer service representatives]. These Knowledge Base documents are strictly confidential and only for use within D+H. Within D+H, access to the Knowledge Base documents is restricted to employees with a "need-to-know" based on user access profiles which are created and monitored by D+H's system access group, which is independent of any D+H business or operational group. Furthermore, all D+H employees, including the CSRs, are bound by confidentiality agreements with D+H which they entered into as a condition of their employment with D+H. These employee confidentiality agreements prohibit the dissemination of Knowledge Base documents outside of D+H.

…

> 33. D+H's Knowledge Base documents reflect and represent a significant expenditure of time and resources dedicated by D+H to its student loan servicing business, are central to D+H's performance of that business, and constitute highly confidential and commercially sensitive work product of D+H.

[12] In August 2011, the Respondent The Canadian Financial Wellness Group Incorporated (CFW) sued D+H, Resolve Corporation and the Resolve Business Outsourcing Income Fund. CFW's Statement of Claim says that, before 2008, CFW had developed a program of confidential and proprietary material that was designed to address the relationship between student loan borrowers and service providers. CFW alleges that Resolve and D+H became privy to CFW's information, wrongly used that information for profit, and are liable to CFW for *quantum meruit*. By a Defence filed in October 2011, D+H and Resolve denied liability.

[13] The parties exchanged notices of documentary disclosure. CFW provided its list and documents in late September 2012. D+H and Resolve provided their list on December 10, 2012. The D+H/Resolve notice listed almost 600 documents. D+H/Resolve's list included training and systems manuals for their customer service representatives and scripts for use by their representatives in communications with student borrowers.

[14] D+H and Resolve agree that these documents pertain to the litigious issues, and should be disclosed to CFW for the purposes of the lawsuit. But D+H and Resolve wish to avoid the public disclosure of their training and systems manuals and scripts (which D+H terms "Confidential Documents"). D+H's factum says these "have been developed and refined over time, with the knowledge and experience gained through interaction, research and analysis. In the public domain, the Confidential Documents would provide a competitor with the Appellants' 'recipe for success'…."

[15] D+H and Resolve state that public disclosure would make the information available to their competitors for use in the impending bidding process for the renewed CSLP Contract. D+H and Resolve are concerned that CFW may attach the information to affidavits for an upcoming chambers motion, meaning the information would be on the public court record and accessible to its competitors.

[16] On June 26, 2013, D+H/Resolve moved in the Supreme Court of Nova Scotia for a confidentiality order under Civil Procedure Rule 85.04 to seal the

documents that they considered to be confidential – approximately 35% of the their productions. Justice Scaravelli heard the motion on November 7, 2013, and issued a ruling on December 4, 2013 (2013 NSSC 394), dismissing the motion. Later I will discuss his reasons. The Order was issued on January 28, 2014.

[17] On February 3, 2014, D+H and Resolve applied for leave to appeal to the Court of Appeal.

Issues

[18] The issues are whether leave should be granted and, if so, whether the motions judge committed an appealable error, under the standard of review, by denying the confidentiality order.

Standard of Review

[19] Rules 85.04(1) and (2)(a) say:

> **85.04 Order for confidentiality**
>
> (1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the *Canadian Charter of Rights and Freedoms* and the open courts principle.
>
> (2) An order that provides for any of the following is an example of an order for confidentiality:
>
> (a) sealing a court document or an exhibit in a proceeding; …

[20] The judge "may" issue the order. A discretionary order is reviewed by this Court for error of legal principle or patent injustice. *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, paras 26-29. The question here is whether the motions judge erred in legal principle in the application of the open courts principle.

Analysis

[21] D+H/Resolve agree that CFW is entitled to production of the documents for the purpose of the lawsuit. The pre-trial disclosure of documents carries an implied undertaking of confidentiality, acknowledged by Rule 14.03(1). As the private disclosure process does not involve the court, it does not engage the open courts principle: *Juman v. Doucette*, [2008] 1 S.C.R. 157, para 22, per Binnie, J.

for the Court; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743, paras 59-72; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, para 83.

[22] D+H/Resolve do not seek to limit the disclosure of documents to CFW. Their concern is that CFW may attach the documents to an affidavit for a chambers motion. In that event, the documents would be publicly accessible. D+H/Resolve indicate that a summary judgment motion may be in the offing. Hence, their request for a sealing order.

[23] Rules 85.05(1) and (2) require that the applicant for a confidentiality order give "reasonable notice to representatives of media". This may be done through posting on the Courts of Nova Scotia website. D+H/Resolve gave such notice before the motion in the Supreme Court. The Courts of Nova Scotia website displays a Protocol, approved by the judges of the Court of Appeal, for notice to the media respecting proceedings in the Court of Appeal. Before the appeal hearing, D+H/Resolve gave that notice to the media under the Protocol. In neither court did any representative of the media appear or contest the confidentiality order. CFW is the only party to object.

[24] The judge's discretion under Rule 85.04(1) is to be exercised in accordance with the open courts principle that was discussed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, [2001] 3 S.C.R. 442 and was summarized in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522. See also *Coltsfoot*, paras 22-24, 27.

[25] In *Sierra Club*, Justice Iacobucci for the Court formulated the *Dagenais*/*Mentuck* test in the context of *Federal Court Rule* 151, that stated:

> **151.** (1) On motion, the Court may order that material to be filed shall be treated as confidential.
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

Federal Court Rule 151 does not differ materially from Nova Scotia's Rule 85.04(1). In *Sierra Club*, Justice Iacobucci said:

> (3) Adapting the *Dagenais* Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under Rule 151 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.

54 As in *Mentuck*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" [Justice Iacobucci's underlining].

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are

> available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

[26] To summarize the test's two branches, the judge determines whether (1) the confidentiality order is necessary to prevent a serious risk to an important public interest, because reasonable alternative measures would not alleviate the risk, and (2) the salutary effects of the confidentiality order, that may include the promotion of a fair trial, outweigh its deleterious effects, that include a limitation on constitutionally protected freedom of expression and public access to the courts. For the first branch, the important interest must (a) be real, substantial and well-grounded in the evidence, and (b) involve a general principle of public significance, rather than be merely personal to the parties, while (c) the judge's consideration of reasonable alternative measures must restrict the confidentiality order as much as possible while preserving the important public interest that requires confidentiality.

[27] In this case, the motions judge's decision framed the issue:

> [12] The plaintiff does not dispute the information sought to be protected is confidential and proprietary. Moreover, both parties agree there is no reasonable alternative to the request for a sealing order including redaction. The plaintiff submits Resolve's motion does not meet either [the] "necessity" branch or the "proportionality" branch of the "Sierra Test".

[28] With that background, I will turn to the motions judge's reasons. The judge determined that there was no public interest in confidentiality under the first branch of *Sierra Club*'s test. He said:

> [15] The evidentiary basis set out in the present case by way of affidavit evidence relates specifically to Resolve's upcoming participation in a RFP with other competitors it believes will participate in the process. They submit public disclosure of the confidential material would undermine Resolve's competitive advantage. Although there would be a public interest in fair competition, the interest in this case is clearly specific to Resolve in that it seeks to protect its own commercial interests. However, as stated in *Sierra Club* there must be a broader public interest at stake in order to defeat the fundamental principle of the open court process. Moreover, Resolve has the burden of establishing the risk to its commercial interest is real and grounded in evidence. However, the RFP for the contract has yet to be issued and the competitive bidding process has yet to occur. No trial dates have been set for these proceedings. There is no evidence of any pending or intended motions requiring disclosure of the confidential information. It is anticipated that the RFP will be issued in late 2013 with the valuation of the confidential bids set for the spring of 2014.

The judge concluded:

> [16] … The risk it [D+H/Resolve] identified is specific to its interests only and there is no serious risk to any broader public interest. Otherwise, all litigants possessing confidential information specific to its own commercial interest would demand confidential orders in legal proceedings based on a right to fair trial public interest which would be an affront to the proper administration of justice and the open court principle.

[29] In my respectful view, the judge's reasoning erroneously restricted the meaning of "public interest in confidentiality" under *Sierra Club*.

[30] That D+H and Resolve have a specific private interest does not exclude the existence of a concurrent public interest. The two are not mutually exclusive. In *Sierra Club*, Justice Iacobucci said (para 55) "the interest in question cannot *merely* be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality" [emphasis added]. The question is whether D+H/Resolve's clear private interest also can be expressed in terms of a public interest in confidentiality.

[31] The motions judge accepted that "there would be a public interest in fair competition". I agree, for the following reasons.

[32] This is a tender call, issued by the Government of Canada, for a publicly funded, several hundred million dollar contract for a government-sponsored program governing loans to thousands of students across the country. The Government's Rules of Engagement state that "the utmost of fairness and equity between all parties" is an "overriding principle", and that the Government "will not disclose proprietary or commercially-sensitive information concerning a Participant to other Participants or third parties, except and only to the extent required by law". Clearly the integrity of the tendering process for a new CSLP Contract is a matter of public interest.

[33] In *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, para 88, Justices Iacobucci and Major, for the Court, said that the implication of a term of fair and equal treatment in a tender process "has a certain degree of obviousness to it" and "is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved". See also *Double N Earthmovers Ltd. v. Edmonton (City of)*, 2005 ABCA 104, paras 23, 52, affirmed *Double N Earthmovers Ltd. v. Edmonton (City)*, [2007] 1 S.C.R. 116, para 32.

[34] The motions judge said that public interest did not apply here because the RFP "has yet to be issued" (by the decision date of December 4, 2013), and "will be issued in late 2013 with the valuation of the confidential bids set for the spring of 2014".

[35] With respect, I don't follow the judge's reasoning. The motions judge acknowledged that an RFP was expected within weeks, and an evaluation of tenders within several months. If D+H/Resolve's confidential material were made available to its competitors, the competitors could tailor their imminent tenders to that material, while D+H/Resolve would not have those competitors' equivalent confidential information. This would contravene the Government's Rules of Engagement and the judicially endorsed principles of fairness and equality that should govern the tender process. That the RFP had not yet issued, but was anticipated in the immediate future, has no bearing on the public's interest in the integrity of the upcoming tender process. The risk may well peak immediately before the expected RFP, when prospective tenderers gather information to prepare their bids. The motions judge's qualification to the legal characteristics that define the public interest, in my view, errs in principle.

[36] The first branch of *Sierra Club*'s test is satisfied. There is a real and substantial risk to an important commercial interest that can be expressed in terms of a public interest in confidentiality, and there is no reasonable alternative, short of a confidentiality order, that would preserve the interest in question.

[37] *Sierra Club*'s second branch asks whether the salutary effects of the confidentiality order outweigh its deleterious effects, including the right to freedom of expression and the public interest in open and accessible court proceedings.

[38] Despite notice, no representative of the media appeared in either the Supreme Court or this Court to object. There is little discernable public appetite for access to D+H/Resolve's operational manuals and scripts.

[39] At the chambers hearing in the Supreme Court, counsel for D+H/Resolve said "the confidential information, which we're seeking to protect here, would be available to the parties and to the Court, and the order wouldn't do anything which would impair public access to any hearings related to this matter". Similarly, D+H/Resolve's factum to the Court of Appeal said "the Appellants did not ask that the public be restricted from any hearings, nor that the media be restricted from any reporting". In *Sierra Club*, para 79, Justice Iacobucci noted that such a restricted confidentiality order "represents a fairly minimal intrusion into the open

court rule, and thus would not have significant deleterious effects on this principle".

[40] In my view, *Sierra Club*'s second branch is satisfied.

Conclusion

[41] I would grant leave to appeal and allow the appeal. I would order that, if the confidential information from D+H or Resolve's training and systems manuals and scripts is to be included in an affidavit for a chambers motion, then that confidential information be sealed from the public, but be available for the unrestricted use of counsel and the court in a hearing to which the public would have the normal access.

[42] I would order that any costs paid further to the motions judge's decision be repaid. I would order costs of $750 for the motion in the Supreme Court and appeal costs of $2,000 plus disbursements be paid by CFW to the Appellants.

Fichaud, J.A.

Concurred: Saunders, J.A.

Bryson, J.A.