

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Canadian Financial Wellness Group v. Resolve Business Outsourcing  
2013 NSSC 394

Date: December 4, 2013

Docket: Hfx No. 354790

Registry: Halifax

Between:

Canadian Financial Wellness Group

Plaintiff

v.

Resolve Business Outsourcing

Defendants

Judge: The Honourable Justice N. M. Scaravelli

Heard: November 7, 2013, in Halifax, Nova Scotia

Written Decision: December 4, 2013

Counsel: Peter Coulthard, for the plaintiff

Christopher Maddill, for the defendant

**By the Court:**

[1] The defendants (Resolve) bring a motion for an order for confidentiality (sealing order) regarding certain documents and information to be produced by the defendants to the plaintiff (CFW) in an ongoing proceeding. No trial date has been set in these proceedings.

[2] *Civil Procedure Rule 85.04* provides:

85.04 (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;

**BACKGROUND**

[3] CFW alleges to have developed a program of confidential and proprietary material (CFWIP) designed to address problems relating to the relationships between student loan borrowers, and the service providers in those transactions, to reduce the rate of default on those loans through improved service providers/borrower communication.

[4] Resolve manages and administers portfolios in student loans across Canada including loans provided by the Government of Canada Student Loan Program (CSLP). Servicing for the CSLP loans is pursuant to a contract with the Government of Canada.

[5] CFW commenced an action alleging that Resolve is liable to the plaintiff in *quantum meruit* for the value of the CFWIP provided to Resolve during contract negotiations that never materialized. CFW alleges that Resolve subsequently used the CFWIP to its advantage. Resolve denies it was provided with the FWIP or that it used same to its advantage in its operations.

## **ISSUE**

[6] Should a confidentially order be granted in respect of Resolve's confidential information?

## **LEGAL TEST**

[7] The parties agree this motion involves the application of the “Sierra Test” as set out in *Sierra Club Canada vs. Canada (Minister of Finance)* 2002 SCC 41 in which the court stated the confidentiality order will be granted when an applicant satisfies the court that:

[53] (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.

[8] There are three elements to the “necessary” part of the test:

(1) The risk in question must be real and substantial, in that the risk is well grounded in the evidence and pose a serious threat to the commercial interest in question.

(2) The “important commercial 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 public interest and confidentiality.

(3) “Reasonable Alternative Measures” requires the court 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. (*Sierra Club*)

[9] Both *Civil Procedure Rule* 85.04 and the common law compete against confidentiality orders in that they require The Court to exercise its discretion in accordance with the open court principle. As stated in *Sierra Club*:

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the Charter: *New Brunswick*, supra, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice", guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, at para. 22.

[10] The defendants submit the sealing order is necessary as the evidence establishes a real and substantial risk to Resolve’s commercial interest. Affidavit evidence provides that Resolve’s current contract with the Government of Canada is set to expire and the government has initiated a competitive bidding process for the new CSLP service

contract. Resolve estimates revenue from its current contract with the government is in excess of three hundred million dollars. The issuance of the RFP for the new contract is scheduled for late 2013. The valuation of the bids will take place in the spring of 2014. Several multinational information technology corporations have been involved in the consultative process with the government and Resolve believes that all or some of these companies will submit bids for the new CSLP contract. Bids will be submitted on a confidential basis. No bidder will be privy to any commercially sensitive information submitted by another bidder.

[11] Resolve says the confidential information possessed by it provides a competitive advantage over other bidders. If this confidential information were to become a matter of public record, it would become available to other bidders and would seriously undermine the competitive position of Resolve, and create a serious harm to its commercial interests. Resolve also submits the public interest at stake is the right to a fair trial. They argue that denial of a sealing order forces the defendants to choose between risking “irreparable harm” to their commercial interests through disclosure, or compromising their defence by not relying on this information at trial. In this regard the defendants submit they are also prohibited from making pretrial motions.

[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 "necessity" branch, or the "proportionality" branch of the "Sierra Test".

## **ANALYSIS**

[13] Resolve has identified its risk in terms of competitive advantage and fair trial. According to *Sierra Club* the "important commercial interest" must go beyond the specific interest of the party seeking a confidential order.

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".

[14] In *Sierra Club*, the confidentiality order was granted as to refuse to do so, would result in the applicant breaking its contractual obligations to a third party. It was in this context that the commercial interest was expressed in terms of public interest in confidentiality.

[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 RIP will be issued in late 2013 with the valuation of the confidential bids set for the spring of 2014.



[16] In terms of a right to a fair trial Resolve submits they are forced with choosing between risking exposing the information to the public or compromising its defence by not relying on the information at trial. Again, the right to a fair trial would be a matter of public interest. The confidential information in question is relevant to the very issues raised in the action and Resolve acknowledges that it will have to produce the information in order to successfully defend the action. However, a sealing order is not required to permit Resolve to provide this evidence. The risk it 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.

[17] As a result, I am not satisfied that Resolve has discharged the onus of demonstrating on a balance of probabilities that granting of a confidentiality order is necessary in order to prevent a serious risk to an important commercial interest. The motion is dismissed.

[18] Costs of \$750 are awarded to the plaintiff in any event of the cause payable forthwith.