Federal Court  Cour fédérale

Date: 20160712

Docket: DES-3-16

Citation: 2016 FC 795

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 12, 2016

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

DANIEL TURP

Respondent

ORDER AND REASONS

I. Background to proceedings

[1] On March 21, 2016, Daniel Turp, the respondent in this application under subsection 38.04(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (section 38) [CEA], filed a notice of judicial review (Court file No. T-462-16), initially seeking an order from the Court

prohibiting the issue of permits to allow the export of light armoured vehicles [LAVs] to Saudi Arabia.

[2] On March 24, 2016, the Minister of Foreign Affairs filed a notice of appearance in the underlying proceeding (Court file No. T-462-16).

[3] On March 31, 2016, my colleague Mr. Justice Noël was assigned to act as a case management judge in the underlying proceeding (Court file No. T-462-16).

[4] On April 11, 2016, in response to the request for disclosure filed by the respondent, the Minister of Foreign Affairs filed a certificate from Wendy Gilmour, Director General, Trade Controls Bureau, along with the file sought in the application for judicial review pursuant to section 317 of the *Federal Courts Rules*, SOR/98-106 [Rules], which included precisely a copy of the decision made by the Minister on April 8, 2016, approving the permits allowing the export of LAVs and associated weaponry subject to a contract entered into between the Canadian Commercial Corporation [CCC] and the Kingdom of Saudi Arabia in a nine-page memorandum entitled "Memorandum for Action," dated March 21, 2016.

[5] On April 11, 2016, the respondent specified that he sought disclosure of the information in only one paragraph of the said memorandum, specifically the second and third lines of paragraph 6.

[6] The Minister was unwilling to disclose the other documents requested, particularly the contract for the sale of vehicles between CCC and Saudi Arabia, given its confidential nature.

[7] On April 21, 2016, the respondent filed an amended notice of application for judicial review in the underlying proceeding in light of the April 8, 2016 decision, now asking the Court to rescind the permits.

[8] On May 16, 2016, Michèle Lavergne, Senior Counsel for Justice Canada, told the Attorney General of Canada that she was required to disclose sensitive or potentially injurious information from the nine-page memorandum (Memorandum for Action, dated March 21, 2016) to comply with the request for disclosure as per Rule 317 of the Rules.

[9] On June 7, 2016, the Attorney General of Canada decided, pursuant to subsection 38.03(1) of the CEA, to authorize the disclosure of the redacted version of the document and to uphold non-disclosure of the redacted information in lines two and three of paragraph 6 of the said document, being of the view that this redacted information was subject to statutory privilege under section 38 of the CEA and that its disclosure would be injurious to international relations.

[10] On June 21, 2016, the Attorney General of Canada filed an amended application that is the subject of this proceeding under subsection 38.04(1) of the CEA, seeking an order from this Court confirming prohibition of disclosure of the information identified in the notice given by Ms. Lavergne (as amended on May 30, 2016) under subsection 38.01(1) of the CEA.

[11] Therefore, it is important to note that, for the purposes of this proceeding, only the redacted information in lines two and three of paragraph 6 of the aforementioned document is subject to section 38.

II. Issue

[12] The only issue, common to all proceedings under the CEA, is whether the Court should, pursuant to subsection 38.06(3), confirm the prohibition of disclosure of the information identified by the Attorney General, as provided in paragraph 38.02(1)(a) of the CEA, or authorize the disclosure, subject to conditions, of all of the information, a part or summary of the information, or a written admission of facts relating to the information, under subsection 38.06(1) or (2) of the CEA.

III. Analysis

[13] The parties did not dispute the three-step test that was so clearly set out in *Canada (Attorney General) v. Ribic*, 2003 FCA 246 [*Ribic*] and that has since been fully adopted in a number of cases, including *Canada (Attorney General) v. Telbani*, 2014 FC 1050; *Canada (Attorney General) v. Almalki*, 2010 FC 1106; *Canada (Attorney General) v. Khawaja*, 2007 FC 490; *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766; and *Khadr v. Canada (Attorney General)*, 2008 FC 549.

[14] Thus, the judge designated by the Chief Justice of the Federal Court to make an order under the CEA must first determine whether or not the information sought to be disclosed is relevant to the underlying proceeding in which the respondent intends to use it. The applicant for disclosure bears that burden. If the judge is satisfied that the information is relevant, the judge must then determine whether disclosure of that information would be injurious to international

relations, national defence or national security. At this stage, the Attorney General must prove the potential injury if disclosure of the information were to be ordered. Finally, if satisfied that the disclosure of the information would be injurious to international relations or national defence or national security, but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may, by order, after considering the public interest in disclosure, authorize the disclosure of all or part of the information, subject to those conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security.

[15] As stated in *Ribic*, cited above, and as has since been repeated many times in the jurisprudence, the threshold for determining whether the information for which an order confirming prohibition is sought by the Attorney General is relevant to the underlying judicial review is a low one.

[16] At the outset, it is important to note that the respondent's application is very specific; he seeks disclosure of the information in only lines two and three of paragraph 6 of the March 21, 2016 "Memorandum for Action," at the very heart of the document constituting the decision under review. For this reason, I have no difficulty finding that the information is relevant and that the respondent has met his burden with regard to this first task.

[17] Next, the Court must determine whether the disclosure of this information would be injurious to international relations or national defence or national security. Here, the Attorney General bears the burden of proving the potential injury if disclosure of the information were to be ordered.

[18] The Attorney General rebuts the respondent's assertion that the information sought to be disclosed is already in the public domain, saying that it is clearly based on speculation, as the respondent has not seen the information in question.

[19] The respondent submits that the context of the sentence containing the redacted words makes it clear that they pertain to the weaponry aboard the LAVs, and that this information is of prime importance in assessing the destructive capabilities of the LAVs, including the possibility that they will be used against civilians. Moreover, in support of his assertion, he says that the redacted information was made public in response to an access to information request made by a *Globe and Mail* reporter. The respondent adds that even if the information that the Attorney General seeks to protect were different than that made public, this proves that the disclosure of such information is not injurious to international relations.

IV. Conclusion

[20] After reading the parties' written representations and the public and confidential affidavits filed by the Attorney General in support of her position, the Court is of the opinion that the disclosure of the information about which notice was given would be injurious to international relations or national defence or national security. Moreover, after reviewing the information for which an order for non-disclosure is sought, I find that the Attorney General has met her burden of establishing that the full disclosure of the redacted information would be injurious to international relations or national defence or national security and that, subject to the outcome of the judicial review, the public interest in non-disclosure outweighs in importance the public interest in disclosure.

[21] I am also satisfied that the argument the respondent intends to make can very well be made by counsel in the absence of information confirming or refuting his contention; if the reviewing judge can read the information in question, then the Court will be able to make a decision based on full evidence. The application for judicial review will therefore be heard by the undersigned.

ORDER

THE COURT, BY ORDER, confirms the prohibition of disclosure of the information in lines two and three of paragraph 6 of the March 21, 2016 document entitled "Memorandum for Action," pursuant to subsection 38.06(3) of the *Canada Evidence Act*.

"Danièle Tremblay-Lamer"

Judge designated by the Chief Justice
under the *Canada Evidence Act* for
the purposes of that Act

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-3-16
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v DANIEL TURP

NOTICE OF APPLICATION DEALT WITH IN WRITING AND DECIDED WITHOUT APPEARANCE OF THE PARTIES

ORDER AND REASONS:	TREMBLAY-LAMER J.
DATED:	JULY 12, 2016

WRITTEN REPRESENTATIONS BY:

Jacques-Michel Cyr Maria Barrett-Morris	FOR THE APPLICANT
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