Federal Court Cour fédérale

Date: 20170628

Docket: T-195-92

Citation: 2017 FC 631

Ottawa, Ontario, June 28, 2017

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ALDERVILLE INDIAN BAND NOW KNOWN AS MISSISSAUGAS OF ALDERVILLE FIRST NATION, AND GIMAA JIM BOB MARSDEN, SUING ON HIS OWN BEHALFAND ON BEHALF OF THE MEMBERS OF THE MISSISSAUGAS OF ALDERVILLE FIRST NATION

BEAUSOLEIL INDIAN BAND NOW KNOWNAS BEAUSOLEIL FIRST NATION, AND GIMAA RODNEY MONAGUE, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE BEAUSOLEIL FIRST NATION

CHIPPEWAS OF GEORGINA ISLAND INDIAN BAND NOW KNOWN AS CHIPPEWAS OF GEORGINA ISLAND FIRST NATION, AND GIMAANINIIKWE DONNA BIG CANOE, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE CHIPPEWAS OF GEORGINA ISLAND FIRST NATION

CHIPPEWAS OF RAMA INDIAN BAND NOW KNOWN AS MNJIKANING FIRST NATION, AND GIMAANINIIKWE SHARON STINSON HENRY, SUING ON HER OWN BEHALFAND ON BEHALF OF THE MEMBERS OF THE MNJIKANING FIRST NATION

CURVE LAKE INDIAN BAND NOW KNOWN AS CURVE LAKE FIRST NATION, AND GIMAA KEITH KNOTT, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE CURVE LAKE FIRST NATION

HIAWATHA INDIAN BAND NOW KNOWN AS HIAWATHA FIRST NATION, AND GIMAANINIIKWE LAURIE CARR, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE HIAWATHA FIRST NATION

MISSISSAUGAS OF SCUGOG INDIAN BAND NOW KNOWN AS MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION, AND GIMAANINIIKWE TRACY GAUTHIER, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Third Party

ORDER AND REASONS

[1] The Plaintiff First Nations have applied for an order granting leave to have certain information treated as confidential in accordance with Rule 151 of the *Federal Courts Rules,*

SOR/98-106 [Rules] which requires a party to obtain leave of the Court in order to have certain exhibits treated as confidential and not accessible by the public.

[2] In particular, the First Nations seek to have certain information entered into the record by the Defendant Canada treated as confidential, the first being the Coldwater-Narrows Settlement Agreement [the Settlement Agreement], and the second being the names of persons recorded in the First Nations' trust account records for the time period 1957-2017.

[3] The names of persons contained in the First Nations' trust account records are names associated with specific financial transactions. The individuals themselves are not parties in this action except somewhat indirectly where those individuals are members of the First Nations in question.

[4] For reasons that follow, I will grant leave to the First Nations to have the designated information treated as confidential. More specifically, the Settlement Agreement is to be sealed in its entirety and the names of persons in the identified documents are to be redacted.

I. Background

[5] The First Nations commenced this action in 1992 against the Defendant claiming Canada breached its fiduciary obligations to the First Nations and failed to uphold the honour of the Crown in the making of the two 1923 Williams Treaties Canada defended. In addition to leading evidence on liability, both the First Nations and Canada led evidence on the question of damages should the First Nations' claim succeed.

[6] Canada filed a copy of the Settlement Agreement, identified as Exhibit 302 during its cross-examination on August 28, 2015 of Dan Shilling, a Rama First Nations community witness.

[7] Canada and three of the First Nations, the Chippewas of Georgina Island First Nation, the Beausoleil First Nation, and the Chippewas of Rama First Nation were parties to the Settlement Agreement, a settlement not related to the present action. The Chippewas of Nawash was also a party to this Settlement Agreement but is not a party in this action.

[8] Canada maintains and controls the trust accounts for the individual First Nations pursuant to its statutory authority under the *Indian Act*, RSC, 1985, c. I-5 [*Indian Act*]. Canada filed exhibits that include personal financial information derived from the First Nations' trust accounts and Indian band pay lists through its joint expert witnesses Professors Eric Kirzner and Laurence Booth and also through its lay witness Mr. Mathew LaCompte.

[9] Professors Kirzner and Booth authored an expert report on equitable damages that was filed as Exhibit 79. One document, appended as part of Exhibit 79 and identified as Tab 17, included financial information which included the names of individuals derived from the trust accounts and band pay lists of Chippewas of Georgina Island First Nation.

[10] Canada's witness Mathew LaCompte compiled information from each of the First Nations' trust accounts which included personal financial information. The names of the persons associated with that financial information is contained in Exhibit 410, Appendix 2, Tab 2, Appendix 4 Tab 2 and Appendix 6, Tab 2. The same type of personal financial information is contained in Exhibits 421, 423, 425, 426, 431, 432, and 434.

[11] For purposes of specifying the Settlement Agreement and names of persons the First Nations wish redacted, the First Nations also listed that same information in Exhibit A to the supporting Affidavit of Ms. Kelly Larocca.

II. **Parties' Submissions**

A. *First Nations' Position*

[12] The First Nations state the Settlement Agreement was the result of confidential negotiations between Canada and three of the First Nations – the Chippewas of Georgina Island First Nation, the Beausoleil First Nation and the Chippewas of Rama First Nation – to settle a claim. The terms of the Agreement had never been made publicly available.

[13] The First Nations submit that oral or written communications made during settlement discussions for purposes of settlement are not admissible as a matter of public policy, and this extends to final agreements when the agreement terms are treated as confidential by the parties. The First Nations seek an order that the Settlement Agreement be sealed and so marked on the Court Exhibit List.

[14] The First Nations also identified specific personal financial information derived from individual First Nations' trust accounts and pay lists which they submit is confidential personal information and should be redacted from identified documents. The relevant documents are:

i. Exhibit 79, Tab 17;
ii. Exhibit 410, Appendix 2, Tab 2, and Appendix 6, Tab 2; and
iii. Exhibits 421, 423, 425, 426, 431, 432, and 434.

[15] The First Nations say they have always maintained the confidentially of their individual trust accounts and individual Indian band pay lists from both the general public and from each other because of the private financial information contained therein.

[16] The First Nations submit treating the personal information as confidential is necessary. They submit there is serious and well-grounded risk to the First Nations and named individuals by having this information become public. The First Nations submit there is a strong public interest in being able to rely on the government to maintain personal financial information as private and not to make it accessible to the public. They rely on statements and findings regarding the importance of privacy interests in Canadian law made by Supreme Court justices in *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326.

[17] The First Nations seek only to have the names of identifiable persons redacted and not the financial transactions *per se*. They further limit their request to documents within the time period 1957-2017.

[18] The First Nations submit that a judge hearing a motion to seal documents and mark them as confidential has the discretion to direct that the media be informed of the motion seeking a confidentiality order, but the decision on whether to give notice to the media is a discretionary one and there is no absolute rule on giving notice. On this point, they rely on Ontario Superior Court jurisprudence, specifically *M.(A.) v Toronto Police Service*, 127 OR (3d) 382 at para 5 [*M.(A.)*]. The First Nations believe no such order was required in the present case, given the limited scope of the requested order.

B. *Canada's Position*

[19] Canada submits the First Nations' request to seal the Settlement Agreement meets the test for a sealing order since the First Nations have articulated and provided evidence as to the confidential nature of the document, the public interest in protecting the confidentiality and the potential harm or injury that could occur upon its release.

[20] Canada does not agree with the First Nations about the redaction of names in the financial documents. It submits the First Nations' concerns only relate to maintaining privacy, which is not an interest of sufficient importance to meet the test for a confidentiality order.

[21] Canada says the identified documents contain over 600 pages of material that relate to financial records of the First Nations. This evidence was adduced in the context of expert opinion evidence on the assessment of any compensation that may be owed. Canada points out that the list of identified exhibits is not exhaustive because it does not include unidentified transcripts or underlying documents which are the sources of information for the listed exhibits, and which also contain personal financial information.

[22] Canada says the type of financial information relating to the trust accounts of the First Nations is outlined in case law as being the type of evidence a Court is to use in assessment of equitable compensation, relying on *Whitefish Lake Band of Indians v Canada (Attorney General)*, 2007 ONCA 744 at paras 116-118 [*Whitefish Lake*]. Canada further states the First Nations acknowledge the trust account information "forms a central part of this case."

[23] Canada submits that the interest the First Nations articulated for redacting names from the trust account information is related to maintaining privacy, but the evidence presented does not posit any specific harm. It only affirms the First Nations' desire to maintain privacy.

[24] Canada cites case law that recognizes the privacy of litigants is "somewhat surrendered to the judicial process that is taking place to the claims that they filed… It is trite law that public process to and reporting of those proceedings is a price that the respondents must pay in the interests of ensuring the accountability of those engaged in the administration of justice" (*Canada (Attorney General) v Almalki*, 2010 FC 733 at para 29).

[25] Canada thus argues that the privacy of litigants is not a sufficient ground for satisfying the test for a confidentiality order.

[26] Canada made no submissions regarding notice to the media.

C. *Ontario's Position*

[27] Ontario made a brief oral submission, explaining no written submissions had been made because Ontario believed the law and issues were sufficiently canvassed by the submissions of the other parties. Ontario took no position regarding notice to the media.

III. **Legal Framework**

[28] The *Federal Court Rules*, SOR/98-106 [Rules] provide:

151 (1) On motion, the Court may order that material to be filed shall be treated as confidential. **Demonstrated need for confidentiality** (2) Before making an order	151 (1) La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels. **Circonstances justifiant la**

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.

confidentialité

(2) Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

[29] The *Privacy Act,* RSC 1985, c. P-21 provides (emphasis added):

3 In this Act,

…

personal information means information about an identifiable individual … including, without restricting the generality of the foregoing

…

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

…

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

...

Use of personal information

7 Personal information under

3 Les définitions qui suivent s'appliquent à la présente loi.

…

renseignements personnels Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment :

…

b) les renseignements relatifs à son éducation, à son dossier médical, à son casier judiciaire, à ses antécédents professionnels ou à des opérations financières auxquelles il a participé;

…

i) son nom lorsque celui-ci est mentionné avec d'autres renseignements personnels le concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet;

…

Protection des renseignements personnels

the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except

(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or

(b) for a purpose for which the information may be disclosed to the institution under subsection 8(2).

Disclosure of personal information

8 (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.

Where personal information may be disclosed

(2) Subject to any other *Act of Parliament*, personal information under the control of a government institution may be disclosed

…

(d) to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada;

7 À défaut du consentement de l'individu concerné, les renseignements personnels relevant d'une institution fédérale ne peuvent servir à celle-ci :

a) qu'aux fins auxquelles ils ont été recueillis ou préparés par l'institution de même que pour les usages qui sont compatibles avec ces fins;

b) qu'aux fins auxquelles ils peuvent lui être communiqués en vertu du paragraphe 8(2).

Communication des renseignements personnels

8 (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.

Cas d'autorisation

(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :

…

d) communication au procureur général du Canada pour usage dans des poursuites judiciaires intéressant la Couronne du chef du Canada ou le gouvernement fédéral;

[30] Confidentiality orders are granted only in exceptional circumstances (*Kirikos v Fowlie*, 2016 FCA 80 at para 19). They constitute exceptions to the principle of open court proceedings, which has been described as a "hallmark of a democratic society" (*Vancouver Sun (Re)*, 2004 SCC 43 at para 23 [*Vancouver Sun*], reproduced in *A.B. v Bragg Communications Inc*., 2012 SCC 46 at para 11 [*Bragg*]). The principle "is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings" (*Canadian Broadcasting Corp. v New Brunswick (Attorney General)*, [1996] 3 SCR 480 at para 23 [*CBC*], reproduced with approval in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 36 [*Sierra Club*]). In other words, the open court principle is intended to promote transparency of the judicial decision-making process: it allows the public to access the same information a Court has used to come to a decision, thereby allowing for well-informed critique and commentary.

[31] In *Sierra Club*, the Supreme Court of Canada set out the analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under Rule 151. After reviewing the general framework laid out in earlier decisions, notably *Dagenais v Canadian Broadcasting Corp*., [1994] 3 SCR 835, [*CBC*], and *R v Mentuck*, 2001 SCC 76, the Supreme Court, at paragraph 53, reformulated the *Dagenais/Mentuck* test used in the criminal law context to state:

> 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.

[32] The Supreme Court also reiterated that three elements must be considered in the first part of the test, also known as the necessity stage: (1) the risk must be real and substantial, in that the risk is well grounded in the evidence and poses a serious threat to the interest in question; (2) the Court must be cautious in determining what constitutes an important interest, being "alive to the fundamental importance of the open court rule"; and (3) the Court must determine whether reasonable alternatives are available and must restrict the order as much as possible (*Sierra Club* at paras 54-57).

[33] The affected interests in *Sierra Club* were a commercial interest and the right to a fair trial. The Supreme Court clarified that, to be deemed an important interest, the interest in question cannot merely be specific to the party requesting the order; it must be one which can be expressed in terms of the public interest in confidentiality. On this point, the Supreme Court referenced Justice Binnie's explanation in *F.N. (Re),* 2000 SCC 35 at para 10, that the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" (*Sierra Club* at para 55).

[34] There is a heavy onus on an applicant to satisfy the Court that a derogation from the open court principle is justified, and it is not a sufficient ground, as a matter of law, that a litigant desires to keep its affairs private *(McCabe v Canada (Attorney General*), 2000 CanLII 15987 (FC)).

[35] Rule 151 speaks prospectively stating that the Court may order that material to be filed shall be treated as confidential. However, in *Bah v Canada (Minister of Citizenship and Immigration)*, 2014 FC 693 at para 13 [*Bah v Canada*], Justice Bédard stated (emphasis added):

> I find that section 44 of the *Federal Courts Act,* RSC 1985, c F-7 as well as rules 4 and 26(2) of the Rules give the Court the power to deal with a motion for a confidentiality order even where the documents in question have already been placed in the Court file and to apply, by analogy, the principles set out in rules 151 and 152 (*Sellathurai v Canada (Minister of Public safety and Emergency Preparedness),* 2011 FCA 223 at para 20, 30, 32-38, 42-46; *Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness),* 2012 FCA 299 at para 16). I also find for reasons that follow and despite the fact that the CBSA's investigation report and references to its content in other documents are already in the public domain, that the investigation report should be declared confidential and that it is appropriate to issue a confidentiality order to protect the confidentiality of the report to the extent possible.

In this case, the motion for a confidentiality order is for documents that were placed on the Court file in order to keep trial proceedings moving forward without adding unnecessary delay to what is a very long trial.

[36] Lastly, in *Vancouver Sun* at para 26, the Supreme Court found that "the open court principle is inextricably linked to the freedom of expression protected by s. 2(b) of the Charter and advances the core values therein". In *M.(A.)*, Justice Nordheimer opined there is a presumption the media will be given notice of any motion where relief is sought that would have the effect of restricting the public's, and thus the media's, right of access to court proceedings. It is to be noted that the person in *M.(A.)* seeking confidentiality, namely to only be identified by initials, was a party to the proceeding.

IV. Issues

[37] There are three main issues in this motion:

a. What principles govern the issuance of a confidentiality order in the circumstances of this motion?

b. Has the test for issuance of a confidentiality order been met regarding sealing of the Coldwater-Narrows Settlement Agreement?

c. Has the test for issuance of a confidentiality order been met regarding limited redaction of individual names from financial documents?

There is a further question of whether the media should have been provided notice of the motion.

V. Analysis

A. *Principles Governing the Issuance of a Confidentiality Order*

[38] The parties agree, correctly, that the issuance of a confidentiality order is governed by application of the *Dagenais/Mentuck* test as reformulated in *Sierra Club* [the *Dagenais/Mentuck Sierra Club* test]. This test must be applied in a contextual manner.

B. *Coldwater-Narrows Settlement Agreement*

[39] Settlement negotiation privilege is a long accepted class privilege principle that accords with the important public policy interest of encouraging settlements. It complies with the parameters set by the Supreme Court of Canada for recognition of a class privilege because protection of settlement negotiations is essential to operation of the legal system; without settlements, the administration of justice would be overburdened (David Paciocco and Lee Struesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law Inc., 2015) at 268-270).

[40] The Settlement Agreement was the result of settlement negotiations. The First Nations provided affidavit evidence from each of the Chiefs of the Williams Treaties First Nations which were party to the Settlement Agreement establishing that:

A. the Settlement Agreement was entered into to resolve a longstanding claim;

B. it was the understanding of the First Nations that the materials and discussions stemming from the negotiations and the Settlement Agreement itself would be kept confidential between the parties;

C. the Settlement Agreement was shared with the members of the respective First Nations so they could make an informed ratification vote but the Settlement Agreement was not made available to the general public;

D. while Canada made public some general information on the history of the claim and its settlement, the Settlement Agreement was never made available to the general public; and

E. the settlement amounts for the First Nations would be kept confidential so as to not adversely affect the First Nations in their economic development dealings with neighbouring communities.

[41] This evidence establishes that Exhibit 302 was the result of settlement negotiations and all parties treated the Settlement Agreement as confidential. Moreover, the evidence discloses a serious risk to an important interest if the Settlement Agreement and the settlement amounts are not kept confidential. The salutary effect of maintaining the confidentiality of the Settlement Agreement clearly outweighs the deleterious effect of a slight infringement on the open court principle that an order to seal the document would have.

[42] Although Exhibit 302 is already filed, the Rules provide for flexibility in the making a of subsequent confidentiality order (*Bah v Canada*).

C. *Redaction of Individuals' Names*

[43] The main point of contention between the First Nations and Canada is whether privacy interests can constitute an "important interest" for the purposes of the *Dagenais/Mentuck/Sierra Club* test – and if they can, whether the importance of protecting privacy interests can justify infringing the open court principle.

i. Contextual Factors

[44] There are several contextual considerations, not fully canvassed by any party, that must be taken into account in assessing the interest at stake in the requested motion.

[45] First, the First Nations' trust account information is information held by Canada because of its statutory control over Indian monies pursuant to the *Indian Act* and the attendant regulations. Section 2 of the *Indian Act* defines "Indian moneys" as "all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands". In other words, these are monies held in trust by the Crown for the First Nations. Sections 61-69 of the *Indian Act* relate to management of these moneys, which fall into two categories, capital moneys and revenue moneys (s. 63). The *de facto* set-up under the *Indian Act* is that the government collects, holds, and manages all Indian moneys, with the Minister making/authorizing expenditures, sometimes requiring consent of the First Nation council and sometimes not (ss. 64-68).

[46] In *Montana Band of Indians v Canada (Minister of Indian and Northern Affairs)*, [1989] 1 FCR 143 at para 26, Jerome A.C.J. stated "By a complex series of historical and constitutional

developments, it happens that funds are held in trust for the bands by the federal government. In the context of that fiduciary relationship, financial information passes between the parties."

[47] Second, while the *Privacy Act* permits sharing of personal information held by government institutions with the Attorney General for use in legal proceedings involving the Crown in right of Canada, it does not follow that this information automatically loses all protection. Sections 7 and 8 of the *Privacy Act* reflect Parliament's attempt to balance competing interests: the privacy interest of individuals with respect to personal information on the one hand, and a variety of interests including competing personal interests of the respective individuals, as well as interests largely of a public nature, on the other. This balancing is similar, though clearly not identical, to that found at s. 241 of the *Income Tax Act* [ITA] (see *Slattery (Trustee of) v Slattery*, [1993] 3 SCR 430 at p 443-44 [*Slattery*]). Sub-section 241(3) of the ITA sets out exceptions to the ITA's confidentiality provisions, and includes an exception permitting disclosure of taxpayer information "in respect of…any legal proceedings relating to the administration or enforcement of" various Acts of Parliament. The Supreme Court has interpreted this exception as permitting disclosure of taxpayer information "to the extent necessary for the effective administration and enforcement" of the relevant statues (*Slattery* at 443-444, per Iacobucci J). In *Barreiro v Minister of National Revenue*, 2008 FC 850 at para 17, Justice Phelan, in considering a requested confidentiality order regarding taxpayer information in the hands of the Minister and the implication of s. 241(3), stated, "Litigation, particularly at this stage, does not justify the Minister in disclosing taxpayer information simply because there is litigation (nor is a taxpayer to be treated as if in a cocoon)."

[48] In my view, a similar reading of s. 8(d) of the *Privacy Act* is appropriate: while personal information may be shared with the Attorney General for use in legal proceedings, it does not follow that the Attorney General may disclose personal information simply because there is litigation. While the Attorney General is entitled to access and use of personal information where it is necessary to advance its position in legal proceedings, this does not close the door to a contextual analysis as to whether a confidentiality order should be granted where the Attorney General makes use of personal financial information in litigation. I find it relevant to consider whether the information targeted by the confidentiality order is needed by the Attorney General to make full argument relating to a question the Court will have to answer. As explained further below in these reasons, the information targeted by the confidentiality order is not so needed.

[49] Third, and related to the above considerations, Canada authorized the witnesses' access to and collection of information from the seven First Nations trust accounts. It is Canada that filed the documents in question through its witnesses Eric Kirzner, Laurence Booth and Matthew LaCompte. The targeted Exhibits are, in the main, trust accounts:

> Exhibit 79, Tab 17: Georgina Island Interest Account, 1983-2009, as appears with Report of Eric Kirzner and Laurence Booth
>
> Exhibit 410, Appendix 2, Tab 2: Accounts Transcriptions – Beausoleil/Christian Island: Updated Interest Trust Account Table from 1922-23 to 2012-13
>
> Exhibit 410, Appendix 6, Tab 2: Accounts Transcriptions – Rama: Updated Interest Trust Account Table from 1922-23 to 2012-13
>
> Exhibit No. 421: Beausoleil Trust Accounts 1983-2013
>
> Exhibit No. 423: Georgina Island Trust Accounts 1983-2013
>
> Exhibit No. 425: Rama Trust Accounts 1983-2013
>
> Exhibit No. 426: Scugog Island Trust Accounts 1983-2013
>
> Exhibit No. 431: Georgina Island typed ledger 1957-58

> Exhibit No. 432: Curve Lake typed ledger 1966-67
>
> Exhibit No. 434: Printout from INAC Trust Fund Management system – Georgina Island 1994-95, Pages 1, 177-203

In addition, parts of Exhibit 410, Appendix 4, Tab 2 are almost identical to parts of Exhibit 79, Tab 17 and I choose to also include this document in the collection under review.

[50] Before calling Matthew LaCompte, Counsel for Canada explained that all counsel for the parties canvassed the issue that there were a number of line items, both in transcriptions and in trust account statements, which identify persons by name. All parties had agreed that there had to be a way to treat this information in a manner that protected the privacy of those individuals. They agreed that, in the course of direct and cross-examination, they would identify the line items by date and amount without using names, and would later seek the Court's assistance to ensure the privacy of those individuals could be protected.

[51] Clearly, the personal financial information in the enumerated exhibits is derived from First Nations trust accounts. I should think that Canada, having assumed statutory control over Indian monies and in maintaining First Nations trust accounts, is in a position of a fiduciary and has responsibility to keep personal financial information confidential except as it is obligated to be publicly accountable or if disclosure is required to advance a position in litigation.

[52] Fourth, the names of persons in the trust account records are names of individuals who are either First Nations members or persons who engaged in financial transactions with the First Nations. Neither are parties to this lawsuit.

[53] Each First Nation Plaintiff is described in the style of cause as "[the First Nation] and [the Chief of the First Nation] on his or her own behalf and on behalf of the members of [the First Nation]". This reflects the collective nature of a First Nation claim.

[54] In Olthius, Kleer, Townshend LLP's *Aboriginal Law Handbook, 4th Edition* (Toronto, ON: Carswell, Thomson Reuters, 2012) at p. 32, the nature of Aboriginal and treaty rights is explained in the following manner: "Aboriginal and treaty rights are collective rights belonging to a community or people as a whole. This means that Aboriginal individuals may enjoy the benefits of these rights, such as hunting or fishing, but that the rights belong to the community." The authors cite *Pasco v Canadian National Railway* (1989), (sub nom. *Oregon Jack Creek Indian Band v Canadian National Railway Co.*) [1990] 2 CNLR More recently, in *Canadian National Railway v Brant*, 96 O.R. (3d) 734, [2009] 4 CNLR 47 at para 50, Justice Strathy of the Ontario Superior Court stated that Aboriginal and treaty rights "are held by Aboriginal people in common and they cannot be asserted by individual members of the community" (emphasis added).

[55] Moreover, not all named individuals are First Nations members. The trial evidence allows me to infer there are other named individuals who are third parties who engaged in financial transactions, mostly lot lease payments, with the First Nations. The latter are clearly not litigants.

[56] There is one further contextual consideration, which is that this motion is being heard in the context of a s. 35 claim. In *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1, Justice Binnie wrote the following:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and

> ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.

[57] The First Nations affidavit evidence is that the First Nations have always maintained the confidentiality of trust accounts and of individual band pay lists. The affidavit of Chief Larocca asserts specific harm that would occur through making such information public, including the fact that dignity of individual members of the First Nations could be harmed if personal information on financial assistance received by them is made public.

ii. Necessity

[58] Taking into consideration the above contextual factors, I find that the interests at stake in the requested confidentiality order meet the necessity requirement of the *Dagenais/Mentuck/Sierra Club* test. The interests at stake are more than merely personal privacy interests. There is a public interest in the public's ability to rely on Canada to maintain the confidentiality and privacy of personal information kept in government documents, especially where that information is in the government's control through mandatory statutory requirements to provide such information.

[59] Additionally, there is a public interest in ensuring that confidentiality of information shared in the context of a fiduciary relationship is not lightly interfered with. There is a further public interest in the public's confidence that the government's relationship with First Nations peoples is in accord with the notions of reconciliation reflected in s. 35 of the *Constitution Act*, 1982 and not with a continuation of the past colonial attitude of overbearing government control

and indifference to First Nations' concerns. To borrow the words of McLachlin J (as she then was), reconciliation is "a goal of fundamental importance" (*R. v Van der Peet,* [1996] 2 SCR 507 at para 310, who wrote a dissenting opinion, but whose statement here was in accordance with the opinion of the majority).

[60] The affidavit evidence and application of "reason and logic" (*Bragg* at para 16; see also para 15) establish serious risk of harm, to individual First Nations members as well as the First Nations collectives, and to the above-described public interests, should the personal information contained in the First Nations trust account records be treated as public.

iii. Proportionality

[61] As the requested order passes stage one of the *Dagenais/Mentuck/Sierra Club* test, it must now be considered whether the salutary effects of the order outweigh its deleterious effects. This involves undertaking a contextual analysis of the impact of the requested order on the open court principle and freedom of expression: "Although as a general principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the particular deleterious effects on freedom of expression that the confidentiality order would have" (*Sierra Club* at para 74, emphasis in original).

[62] This motion for a confidentiality order was made in the context of a multi-year trial in which over 600 exhibits (not pages) have been filed, with many of the exhibits in turn containing hundreds to thousands of supporting documents. The requested redactions pertain to individual names contained within only a handful of documents filed for the limited purpose of addressing calculation of equitable damages.

[63] In *Whitefish Lake*, Laskin J.A. wrote the following, at para 117, about the type of evidence needed to assess equitable compensation for breach of fiduciary duty in an "improvident" sale by the Crown on behalf of Whitefish Lake:

> What is needed is evidence either from the Whitefish trust account records or elsewhere showing Whitefish's annual spending patterns over the period. For example, annually, how much of the interest in the interest account did it spend and on what? Annually, how much interest remained in the interest account and was it reinvested? Annually, was interest paid on the interest account, and if not, why not? Annually, how much money did Whitefish spend out of the capital account and on what? It seems to me that the answers to these, and no doubt other related questions, will assist in fixing an appropriate award of equitable compensation.

There has been no suggestion made by any party that the trust account records are not an appropriate piece of evidence, or that they should be kept confidential in their entirety. What is sought by the First Nations is that names of individuals be removed from the public record. The above quote from *Whitefish* makes it clear that the details about *to whom specifically* money has been disbursed is not of relevance to the issue this Court must pronounce on, i.e. calculation of equitable compensation, except to the extent that this information informs categorization of a given disbursement.

[64] In this instance, the names of individuals associated with personal financial information in the First Nations trust accounts may be necessary *in the underlying documents* to allow parties to verify proposed categorizations of the financial information. The categorization is in turn relevant to proposed equitable damages calculations. The underlying documents, however, are not the subject of the requested confidentiality motion.

[65] The important public interests in protection of privacy which would be furthered by the granting of a confidentiality order in the context of this motion outweigh any deleterious effect

of the order. The order requested by the First Nations is carefully tailored to target the minimum amount of information necessary to achieve the goal of protection of privacy and prevention of harm by limiting the redaction to the individual names from records dating from 1957 to present day. The rationale behind the specified time period is to protect only the privacy interests of members likely to be alive today and who would therefore be most directly affected by publication of their personal financial information. The requested order does not seek redaction of the financial information necessary to conduct an analysis of equitable remedies, and thus does not cloud the transparency of the judicial decision-making process.

[66] Furthermore, the Supreme Court has described as “minimal” the infringement on the open court principle in instances where the names of sexual assault complainants are kept confidential (*Bragg* at para 28, quoting from *Canadian Newspapers Co. v Canada (Attorney General)*, [1988] 2 SCR 122 at 133). The infringement caused by keeping confidential the names of individuals in trust account records, where this information is not required by the Court to answer a question before it, is likewise minimal. The Supreme Court has referred to “the relative insignificance of knowing a party’s identity” (*Bragg* at para 28); surely knowing the identity of someone who is not a party is of even less significance.

D. *Notice to the Media*

[67] I am satisfied the Settlement Agreement always was a confidential settlement agreement and its terms are covered by settlement privilege. As such it never had been agreed to be in the public domain.

[68] I also am satisfied the names of individuals derived from the First Nations trust account records are names of persons who are not parties *per se* to this action. The names of such persons are not information directly relevant to the issue of equitable compensation damages.

[69] Due to the limited and minimal infringement on the open court principle, I did not consider it necessary to order that the media be given notice of the motion.

VI. **Conclusion**

[70] I conclude that Exhibit 302, the Coldwater-Narrows Settlement Agreement, satisfies the test for a confidentiality order for sealing. In addition, I conclude the specific settlement terms awarded under the Settlement Agreement disclosed in the transcript evidence of the Rama First Nation witness, Dan Shilling, on August 28, 2015 should also be redacted from the transcript record.

[71] I agree with the First Nations that there is both a "reasonable expectation and a significant public interest for individuals to be able to rely on their governments to keep their personal financial information, maintained in trust accounts, government databases or other documentation, confidential and not share that information with the public".

[72] Furthermore, the privacy interest at play is not that of a single person who is a private litigant in this case, but rather many individuals whose information is recorded in these First Nations trust accounts where those individuals are not personal litigants in this action.

[73] Not only is there an important public interest at stake in how government treats personal information in its possession, there is also a general public interest at stake in the treatment of

confidential personal information shared in the context of a fiduciary relationship. There is also an over-arching public interest in promoting reconciliation.

[74] The affidavits, reason, and logic establish serious risk of harm to these interests should the targeted private personal information be treated as public. An order to have this information redacted would thus meet the necessity criterion. As the impact on the open court principle is minimal, the order would also meet the proportionality criterion.

[75] I conclude there should be a sealing order for the Coldwater-Narrows Settlement Agreement and redaction of the settlement terms in the transcript of the community witness' testimony given during cross-examination of August 15, 2015.

[76] I conclude the names of individual persons in the enumerated Exhibits, identified at paragraph 49 of these Reasons, for the period 1957-2017 should be redacted. I also conclude, since the First Nations have made no request for redactions in the underlying documents, that no redaction of those documents is necessary.

[77] I do not consider the First Nations' motion for confidentiality sufficiently engages the public interest so as to require notice to the media. However, not having the benefit of full argument on the question of notice, I will leave it open to any interested party to seek review of this Order within 14 days of its issuance.

VII. **Costs**

[78] Since Canada will have to assume the task of providing a redacted copy of the Exhibits, I make no order for costs other than to direct costs will be in the cause. The First Nations will similarly provide a redacted copy of its Motion Record Exhibits.

ORDER IN T-195-92

THIS COURT ORDERS that:

1. The sealing of the Coldwater-Narrows Settlement Agreement and redaction of specific terms in the transcripts will be done by the Court Registry.

2. The redaction of the names in the enumerated Exhibits on the record will be done by Canada which will provide the Court with a redacted copy of the Exhibits, to replace the existing Exhibits. The First Nations will provide a redacted copy of the enumerated Exhibits for the Motion Record. The respective original trial and motion record will be sealed by the Court Registry and retained on the Court file.

3. Any sufficiently interested third party may apply for leave to revisit this Order within 14 days of its issuance. The Order will take interim effect on issuance and, should no leave be sought and granted, will take permanent effect after 14 days.

4. Costs will be in the cause.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	ALDERVILLE INDIAN BAND ET AL v HER MAJESTY THE QUEEN AND HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
PLACE OF HEARING:	ONTARIO, ONTARIO
DATE OF HEARING:	MAY 16, 2017
ORDER AND REASONS:	MANDAMIN J.
DATED:	JUNE 28, 2017

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